

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Washington, DC
June 6-7, 2016**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 6-7, 2016**

AGENDA

I. Opening Business

- A. Welcome and opening remarks by Judge Jeffrey S. Sutton
- B. Report on March 2016 Judicial Conference Session
- C. Report on proposed amendments transmitted to Congress by the Supreme Court on April 28, 2016:
 - 1. Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, new Form 7, and new Appendix
 - 2. Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, and new Rule 1012
 - 3. Civil Rules 4, 6, and 82
 - 4. Criminal Rules 4, 41, and 45
- D. **ACTION**—The Committee will be asked to approve the minutes of the January 7, 2016 Committee meeting

II. Report of the Advisory Committee on Evidence Rules – Judge William K. Sessions III

- A. **ACTION** – The Committee will be asked to recommend the following to the Judicial Conference for approval:
 - 1. Rule 803(16) [*Hearsay Exception for Statements in Ancient Documents*]
 - 2. Rule 902 [*Evidence that is Self-Authenticating*]
- B. **ACTION** – The Committee will be asked to consider the future use and dissemination of:

Best Practices Manual for Authenticating Electronic Evidence
- C. Information items:
 - 1. Ongoing projects:
 - a) Possible amendments to the notice provisions in the Evidence Rules
 - b) Possible amendments to Rule 807 [*Residual Exception*]
 - c) Possible amendments to Rule 801(d)(1)(A) [*A Declarant-Witness's Prior [Inconsistent] Statement*]

2. Update on items considered and removed from the docket
3. Proposed symposium in conjunction with fall meeting

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

A. **ACTION** – The Committee will be asked to approve that the following be published for public comment:

1. Proposed amendments to Rules 8 [*Stay or Injunction Pending Appeal*], 11(g) [*Forwarding the Record – Record for a Preliminary Motion in the Court of Appeals*], and 39(e)(3) [*Costs – Costs on Appeal Taxable in the District Court*] that would conform with the proposed amendments to Civil Rule 62
2. Proposed amendments to Rule 29(a) [*Brief of an Amicus Curiae – When Permitted*] that would allow local rules to afford an appellate court the option to refuse an amicus brief, despite party consent, if the brief would cause disqualification
3. Proposed amendment to Appellate Form 4 [*Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis*] that would delete the portion of question 12 requiring the movant to provide the last four digits of the movant’s social security number
4. Proposed amendments to Appellate Rule 25 [*Filing and Service*] would address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

B. Information item:

Proposed amendments to Rules 26.1 [*Corporate Disclosure Statement*] and 29(c) [*Brief of an Amicus Curiae – Contents and Form*]

IV. Report of the Advisory Committee on Civil Rules – Judge John D. Bates

A. **ACTION** – The Committee will be asked to recommend the following to the Judicial Conference for approval:

1. Mandatory Initial Discovery Pilot Project
2. Expedited Procedures Pilot Project

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

1. Proposed amendments to Rule 5 [*Serving and Filing Pleadings and Other Papers*]
2. Proposed amendments to Rule 23 [*Class Actions*]
3. Proposed amendments to Rule 62 [*Stay of Proceedings to Enforce a Judgment*]

- C. Information items:
 - 1. Education efforts regarding the Civil Rules Package that became effective December 1, 2015
 - 2. Ongoing projects:
 - a) Rule 5.2: Motion to redact
 - b) Rule 30(b)(6): Deposing an entity
 - c) Rule 81(c)(3): Jury demand on removal
 - 3. Update on items considered and removed from the docket

V. Inter-Committee Work

- A. Electronic Filing, Service, and Notice

Following the lead of the Civil Rules Advisory Committee, each Advisory Committee now plans to publish proposed amendments to the Federal Rules to require e-filing and service, subject to appropriate exceptions. The Civil Rules Advisory Committee proposes amendments to Civil Rule 5 that would require represented parties to file electronically (subject to “good cause” and local rule exceptions for paper filings). Each Advisory Committee proposes amendments to their respective filing rules (Appellate Rule 25, Bankruptcy Rule 5005, and Criminal Rule 49) that parallel, to the extent possible, the proposed changes to Civil Rule 5.

- B. Coordination of Inter-Committee Rule Proposals

VI. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy

- A. **ACTION** – The Committee will be asked to approve that the following be published for public comment:
 - 1. Proposed amendments to Rule 49 [*Serving and Filing Papers*] and conforming amendment to Rule 45(c) [*Additional Time After Certain Kinds of Service*] that would create a stand-alone filing and service rule paralleling Civil Rule 5
 - 2. Proposed amendments to Rule 12.4 [*Disclosure Statement*] in light of changes to the Code of Judicial Conduct
- B. Information items:
 - 1. Subcommittees formed to consider suggested amendments to Criminal Rule 16 and Rule 5 of the Rules Governing Section 2255 Proceedings
 - 2. Cooperator Subcommittee activity (issue referred to the Standing Committee by the Committee on Court Administration and Case Management)

VII. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta

A. **ACTION** – The Committee will be asked to recommend the following to the Judicial Conference for approval:

1. Rule 1001 (Scope of Rules and Forms; Short Title)
2. Rule 1006 (Filing Fee)
3. Technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424

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

1. Proposed Rule 3015 and Rule 3015.1 provisions regarding national plan form and opt out provisions for truncated publication (July to October 2016)
2. Rule 5005 (electronic filing)
3. Proposed amendments to Bankruptcy Appellate Rules and Forms to conform to pending amendments to the Federal Rules of Appellate Procedure
 - a) Rules 8002(c), 8011(a)(2)(C), and Official Form 417A (inmate filing provisions)
 - b) Rule 8002(b) (timeliness of tolling motions)
 - c) Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits)
 - d) Rule 8017 (amicus filings)
4. Additional amendments to the Bankruptcy Appellate Rules
 - a) Rule 8002(a) (separate document requirement)
 - b) Rule 8006 (court statement on merits of certification)
 - c) New Rule 8018.1 (district court review of judgment that the bankruptcy court lacked constitutional authority to enter)
 - d) Rule 8023(cross reference added)
5. Official Form 309F (notice of chapter 11 bankruptcy – corporations and partnerships)
6. Official Forms 25A, 25B, 25C, and 26 (forms for small business debtors under bankruptcy code, and periodic report regarding entity in which debtor has a substantial interest – to be renumbered as 425A, 425B, 425C, and 426)

C. Information items:

1. Status of proposed amendment to Rule 9037 to address redaction of previously filed documents
2. Decision to take no action on suggestion 15-BK-E to amend Rule 4003(c) concerning burden of proof for objections to claimed exemptions

VIII. Report of the Administrative Office

- A. Discussion of strategic initiatives of the Rules Committees related to advancement of priority initiatives identified by the Executive Committee from the *Strategic Plan for the Federal Judiciary*
- B. Legislative report

IX. Next meeting: January 3-4, 2017 in Phoenix, AZ

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

| Members | Position | District/Circuit | Start Date | End Date |
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| Jeffrey S. Sutton Chair | C | Sixth Circuit | 2012 | 2016 |
| Brent E. Dickson | CJUST | Indiana | 2014 | 2017 |
| Roy T. Englert, Jr. | ESQ | Washington, DC | 2010 | 2016 |
| Gregory G. Garre | ESQ | Washington, DC | 2011 | 2017 |
| Daniel C. Girad | ESQ | California | 2015 | 2018 |
| Neil M. Gorsuch | C | Tenth Circuit | 2010 | 2016 |
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| Liaison for the Advisory Committee on Civil Rules | Judge Arthur I. Harris <i>(Bankruptcy)</i> |
| Liaison for the Advisory Committee on Civil Rules | Judge Neil M. Gorsuch <i>(Standing)</i> |
| Liaison for the Advisory Committee on Criminal Rules | Judge Amy J. St. Eve <i>(Standing)</i> |
| Liaison for the Advisory Committee on Evidence Rules | Judge James C. Dever III <i>(Criminal)</i> |
| Liaison for the Advisory Committee on Evidence Rules | Judge Solomon Oliver, Jr. <i>(Civil)</i> |
| Liaison for the Advisory Committee on Evidence Rules | Judge Richard C. Wesley <i>(Standing)</i> |

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FEDERAL JUDICIAL CENTER

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TAB 1

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

| | |
|------------------------------------|-----------------------------|
| Judge Jeffrey S. Sutton, Chair | Judge Susan P. Graber |
| Associate Justice Brent E. Dickson | Professor William K. Kelley |
| Roy T. Englert, Esq. | Judge Patrick J. Schiltz |
| Gregory G. Garre, Esq. | Judge Amy St. Eve |
| Daniel C. Girard, Esq. | Judge Richard C. Wesley |
| Judge Neil M. Gorsuch | Judge Jack Zouhary |

The following attended on behalf of the advisory committees:

| | |
|---|--|
| Advisory Committee on Appellate Rules – Judge Steven M. Colloton, Chair Professor Gregory E. Maggs, Reporter | Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter Professor Nancy J. King, Reporter |
| Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter (by teleconference) Professor Michelle M. Harner, Reporter | Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter |
| Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Reporter | |

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee (“CACM”); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

| | |
|--|--------------------------------|
| Professor Daniel R. Coquillet | Reporter, Standing Committee |
| Rebecca A. Womeldorf (by teleconference) | Secretary, Standing Committee |
| Julie Wilson (by teleconference) | Attorney Advisor, RCSO |
| Scott Myers | Attorney Advisor, RCSO |
| Bridget M. Healy (by teleconference) | Attorney Advisor, RCSO |
| Shelly Cox | Administrative Specialist |
| Tim Reagan | Senior Research Associate, FJC |
| Derek A. Webb | Law Clerk, Standing Committee |
| Amelia G. Yowell (by teleconference) | Supreme Court Fellow, AO |

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O’Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the “*Stern Amendments*”).

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the “privacy rules” adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made “in the manner provided for a civil action.” The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as “parties” all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill “gaps” in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate “by order” and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting “only” in front of “by order” but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can “in extraordinary circumstances” stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: “Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” The proposed amendment adds to that sentence “except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge.”

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten “the disqualification of a judge” to “a judge’s disqualification.” Judge Sutton recommended omitting the phrase “by local rule,” which received support from the members. Others raised stylistic concerns with the “except that” phrase as a whole, preferring to start a new sentence beginning with “But” or “A court of appeals may,” or breaking up the sentence with a semicolon and beginning the second clause with “provided however that.” Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase “prohibit the filing,” asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to “remand” the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee’s brief. This amendment comes in anticipation of the elimination of the “three day rule,” which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase “the committee concluded that” will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a “trap for an incompetent lawyer” and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only “criticism” made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word “spouses” for “husband and wife” in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word “send” for “mail” in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not “include...any amounts previously...ruled on by the bankruptcy court.” The Advisory Committee proposed deleting the form’s inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court’s decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court’s decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee’s appreciation of the Standing Committee’s quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee’s plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this “opt-out” proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee’s ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor’s claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court’s decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM’s recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee’s spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. “Frontloading” in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be “by United States mail, electronic means or other appropriate means.”
5. Addressing issues raised by “bad faith” class action objectors. Finding a way to deter objectors from holding settlements “hostage” while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the “fair, reasonable, and adequate” standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the “bad faith” objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. “Pick-off” offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2016

I. Introduction

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

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

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

The Committee also seeks approval of a Manual on best practices for authenticating electronic evidence, to be published by the Federal Judicial Center.

II. Action Items

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

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

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

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically—that greatly expands

the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

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

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

The Committee unanimously recommends that the Standing Committee approve the following amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference:

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

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

* * *

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

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

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

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

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

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

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

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

The formatted amendment and Committee Note, together with the GAP report and the summary of public comment, is set forth in an appendix to this report.

B. Proposed Amendment to Evidence Rule 902

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an

authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

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

Applications of Rules 902(13) and (14)

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

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

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

Without Rule 902(13): Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall’s computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

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

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

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

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

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

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

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

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

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

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

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

Example of how Rule 902(14) can be used

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

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

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

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

the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

In this regard, the Note approved by the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

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

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment

provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

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

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

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

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

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

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

* * *

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.

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

Committee Note

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

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

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

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

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

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

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

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

The formatted amendment and Committee Notes, together with the GAP reports and the summaries of public comments, are all set forth in an appendix to this report.

C. Best Practices Manual on Authentication of Electronic Evidence

There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee has considered whether to draft new rules to govern authentication of electronic evidence. The Committee has decided that it will not do so at this time. The Committee concluded that amendments regulating authenticity of electronic evidence would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee unanimously concluded, however, that publication of a best practices manual on authenticating electronic evidence would be of great use to the bench and bar. A best practices manual can be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It can include copious citations, which a rule or Committee Note could not.

The Reporter to the Committee has worked with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center. The Committee has reviewed and approves of the final draft of the manual. The Committee believes that the manual will provide substantial assistance and guidance to courts and litigants in solving many of the problems of authenticating electronic evidence.

The Best Practices Manual, as reviewed by the Committee, is set forth in an appendix to this report. The Committee seeks guidance from the Standing Committee on how the Committee's input should be described for purposes of the publication. Currently, the Committee is listed as a co-author. Other possibilities include a statement that the pamphlet was prepared with the assistance and approval of the Committee, or under the Committee's auspices; or there might be no mention of the Committee at all. The pamphlet will be submitted to the FJC as soon as the Standing Committee determines the question of proper attribution.

III. Information Items

A. Proposal to Amend Certain Notice Provisions in the Federal Rules of Evidence

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee has agreed upon the following points:

1) The Rule 807 notice provision is problematic because it contains no language to excuse lack of timely notice upon good cause. This omission has led to a dispute in the courts about whether a good cause exception exists under the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice. Thus the Committee has agreed in principle to propose amending Rule 807 to add good cause language to the notice provision.

2) The request requirement in Rule 404(b)—that the criminal defendant must request notice before the government is obligated to give it—is an unnecessary limitation that serves as a trap for the unwary. Thus the Committee has agreed in principle to propose amending the Rule 404(b) notice provision to eliminate the request requirement.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all

congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Committee has considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide “reasonable written notice of an intent to offer evidence under” the specific rule, and to “make the substance of the evidence available to the party—so that the party has a fair opportunity to meet it.” For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules. The rules operate differently, they cover different information, and uniformity for uniformity’s sake would end up making substantive changes that might be controversial.

After discarding the template, the Committee has moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members have agreed that a requirement that the notice be in writing should be added to Rule 807—as the writing requirement limits disputes on whether notice was actually provided. The Committee has also agreed that the Rule 807 requirement that the notice provide “particulars, including the declarant’s name and address,” should be modified. The requirement of disclosing an address is nonsensical when the declarant is unavailable, and superfluous when the address can be easily obtained by the opponent. Moreover the term “particulars” has given rise to petty disputes about the details of the required notice.

As discussed below, the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee has agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. That is, it would be appropriate to propose all amendments to Rule 807 at one time. The Committee has further agreed that the proposed amendment to Rule 404(b)—to delete the requirement that the defendant request notice—should be held back until other amendments are ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee—that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) Notice. The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its~~ particulars, including the declarant’s name and address, including its substance and the

declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

B. Proposal to Expand the Residual Exception

The Committee is considering whether Rule 807—the residual exception to the hearsay rule—should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility in the use of hearsay exceptions, and it might also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee recognizes the challenge involved in expanding the residual exception: the goal would be to allow the exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system controlled by court discretion, with unpredictable outcomes.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted, as it is difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.
- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. They add nothing to what is already in the rules. These provisions were added to the residual exception to emphasize that it was to be used only rarely and in truly exceptional situations. The Committee believes that deleting these provisions might constitute a change of tone—to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest—there is no attempt to allow the residual exception to swallow the categorical exceptions, or to make use of the residual exception a commonplace event.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

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

~~(1) the statement has equivalent circumstantial guarantees of trustworthiness~~
the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; ~~and~~

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

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

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

(b) Notice. The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the

statement and its particulars, including the declarant's name and address, including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

* * *

Finally, the Committee has decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

C. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses—the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions are now focused on whether Rule 801(d)(1)(A) should be amended to provide for greater substantive admissibility of prior inconsistent statements. Currently the rule is very narrow—prior inconsistent statements are admissible substantively only if they were made under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof—other than a witness's statement—that the prior statement was ever made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee has concluded that it will not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee is concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there is a substantial dispute that it was ever made. It might well be costly and distracting to take evidence and to determine whether a prior inconsistent statement was made, if there is no reliable record of it.

The Committee will be debating whether to allow for substantive admissibility if the prior inconsistent statement has been video recorded. If the statement is video recorded, any denial that it was made becomes implausible, and the proof of its making is a fact easily determined. Any dispute about the circumstances under which it is made—for example, whether police officers induced the statement—probably can be straightforwardly evaluated by the

factfinder. Moreover, allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in the expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.

The Committee will continue the debate over expanding substantive admissibility of prior inconsistent statements at its next meeting.

D. Proposals to Amend Rule 803(2)

The Committee has received four separate proposals for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner’s suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word “continuous” to the rule—requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already require the statement to be made while under the continuous influence of the startling event. The single case cited as problematic by the professor who suggested the change is one in which the declarant is severely assaulted, and then months after the event saw the defendant’s picture in the newspaper; she got upset and identified him as the perpetrator. The court held that seeing the defendant in the newspaper was a startling event, and that the identification related to both startling events (the assault and the newspaper viewing). The Committee has concluded that adding the word “continuous” would not change the result in that case—because the declarant *was* under a continuous state of excitement in the time between she viewed the newspaper and her statement. Moreover, the result in the case is sound—reliability is guaranteed by the condition of startlement. And even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the oft-stated allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language—derived from the 2014 amendment to Rule 803(6)—that would allow the court to exclude an excited utterance if the opponent could show that it was in fact untrustworthy. Another proposal was to add language—derived from Rule 804(b)(3)—that would require the proponent to show corroborating circumstances clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee has decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2)—consideration would have to be given to whether there should be similar treatment for other exceptions that have been found

controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2)—specifically whether there is empirical support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data to support the premises that: 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2)—or Rule 803(1), for that matter—due to any reliability concerns.

E. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the Sentencing Guidelines—i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. At its Spring meeting, the Committee considered the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Committee has determined that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible).

The Committee also rejected an alternative designed to provide significantly more flexibility and discretion within the current Federal Rules structure. That alternative would 1) add a safety valve applicable to all the exceptions, allowing a judge to exclude otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. The Committee determined that this provision for two-way judicial departures from the categorical exceptions would inject too much discretion and unpredictability into the system. At the Hearsay Symposium, the Committee heard from the lawyers that rules were needed to provide guidance, stability and consistency. The Committee concluded that allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency—making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a “home team advantage” in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee has opted to consider modest changes to the residual exception, discussed above—with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. The Committee recognizes the challenge of adding a little flexibility, but not too much—which is one of the reasons why a miniconference on the possible change to Rule 807 will be so useful.

F. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a *nolo contendere* plea; and 2) misdemeanor convictions. Judge Graber asked the Evidence Rules Committee to consider whether these two limitations on the exception were justified. The Committee has determined that both these carve-outs are justified.

The Committee found that the *nolo contendere* carve-out is necessary to preserve the protection provided in Rule 410 for *nolo pleas*. Rule 410's exclusion of a *nolo contendere* plea—and the underlying policy of encouraging compromise—would be undermined if the conviction itself were admissible to prove the essential facts.

The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. The Committee noted that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail; also, if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel. These factors counsel against admitting misdemeanor convictions to prove the underlying facts. Committee members recognized of course that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) was found not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

For these reasons the Committee voted unanimously not to proceed with an amendment to Rule 803(22).

G. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Committee has received a law review article that advocates elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Committee

determined that it would not proceed with any effort to eliminate Rule 704(b). Rule 704(b) was part of the Insanity Defense Reform Act—a broad statutory overhaul of the insanity defense. Because Rule 704(b) was part of an integrated approach by Congress, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence. While amendments to *improve* the Rule are not necessarily ruled out, deference to the Congressional scheme cautioned strongly against an amendment that would eliminate the Rule.

H. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee has, however, continued to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

The review on recent federal case law involving eHearsay indicates that there are few if any instances of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. Moreover, the study conducted by the Committee’s FJC representative on social science research counsels caution in adopting an eHearsay exception. The social science studies indicate that lies are more likely to be made when outside another person’s presence—for example, by a tweet or Facebook post.

The Committee will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

I. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Spring 2016 Meeting

The draft of the minutes of the Committee's Spring 2016 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Appendix

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

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

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

* * * * *

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

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

Changes Made After Publication and Comment

The amendment as issued for public comment would have eliminated the ancient documents exception to the hearsay rule. In response to the public comment, the amendment was changed to limit the coverage of the ancient documents exception to those documents prepared before January 1, 1998.

Summary of Public Comment

David Hird (EV-20015-0003-0003), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it “could have a substantial negative effect in environmental cases by excluding significant evidence that is only available from older documents.”

Erin Campbell (EV-2015-0003-0004), is opposed to the elimination of Rule 803(16). She states that the deletion of the hearsay exception will “suggest to trial court judges that ancient documents should never be admitted under the residual exception” and suggests that “if you still intend to delete Rule 803(16), you advise that ancient documents remain admissible if Rule 807 is satisfied.”

Nathan Schachtman (EV-2015-0003-005), states that “[t]he proposed abrogation of this exception to the rule against hearsay is welcomed and overdue.” He states that “[t]he fact that a document is old may perhaps add to its authenticity, but in many technical, scientific, and medical contexts, the ‘ancient’ provenance actually makes the content unlikely to be true. As such, the rule as now in effect is capable of much mischief and undermines accurate fact finding.” He notes that “the statements in authenticated ancient documents remain relevant to the declarant's state of mind, and nothing in the proposed amendment would affect this use of the document” because such statements would not be hearsay.

Thomas Flaskamp (EV-2015-0003-007), states that eliminating the ancient documents hearsay exception “would restrict the use of valuable evidence and benefit corporations over people.”

Kim Johannessen (EV-2015-0003-008), is opposed to the elimination of Rule 803(16). She states that the elimination will “undermine efforts to prove the existence of historical

insurance coverage, particularly in cases involving environmental claims, toxic tort claims, and real property disputes.” She contends that “[t]he result will be to make it impossible for individuals and small businesses to fund Superfund cleanups or respond to environmental claims, the end result of which will be to hinder cleanups of contaminated sites and place an ever increasing risk that the burden to do so will fall on the general public.”

Paul Bovarnick (EV-2015-0003-009), declares that much of the evidence that can be used against corporations is old paper documents and that the elimination of Rule 803(16) “would create obstacles, some impossible to overcome, to the admission of this ancient evidence.”

Florence Murray (EV-2015-0003-0010), is opposed to the elimination of Rule 803(16). She states that “there has never been a complaint or inequity in this rule” and suggests that a more equitable alternative is “to grandfather all documents before a current date.” She is concerned that the deletion of the hearsay exception will “suggest to trial court judges that ancient documents should never be admitted under the residual exception.”

Conard Metcalf (EV-2015-0003-0011), argues that the elimination of Rule 803(16) will have a negative impact on plaintiffs’ claims in toxic torts cases where injuries have long latency periods.

William Kohlburn (EV-2015-0003-0012), states that eliminating the ancient documents exception will “impede, not further, the search for the truth” in toxic tort cases “where long past events are in issue.” He argues that ancient documents are reliable because they are old and thus probably not made in anticipation of the litigation in which they are offered.

Richard N. Shapiro (EV-2015-0003-0013), argues that if any change to the ancient documents exception is required due to a concern about the advent of electronic information, it should be “a modification or addition to the rule that will only apply to documents that were capable of being electronically stored, created on or after January 1, 2000.”

David McCormick (EV-2015-0003-0013), is opposed to the elimination of the ancient documents exception to the hearsay rule.

Cynthia Brooks (EV-2015-0003-0015), opposes the elimination of Rule 803(16). She argues that it will have a negative impact on actions involving cleanup of contaminated facilities. In such cases, historic documents are necessary “to identify liable persons responsible for cleanup.”

Peter Nicolas (EV-2015-0003-0016), suggests several ways in which Rule 803(16) can be amended to prevent the admission of old and unreliable ESI, short of eliminating the rule: 1) Increase the necessary age for ancient documents from 20 years to 30 years; 2) Amend Rule 803(16) to provide that the only form of authentication is through the authentication rule for ancient documents (Rule 901(b)(8)); 3) Amend the rule to provide that hearsay embedded in an ancient document is not admissible; or 4) Require that the ancient document be prepared before the controversy arose and that the document was subsequently acted upon by those with an interest in the matter set forth.

Michael Gatto (EV-2015-0003-0017), believes that “the proposed rule change unfairly inures to the benefit of the defense” and that “it is the rare case when the defense wants to avail itself of this rule.”

William Harty (EV-2015-0003-0018), is opposed to the elimination of the ancient documents exception to the hearsay rule. He states that there is no evidence of a problem that is occurring with unreliable electronic information being offered under the exception. He argues that “[b]y singling out only the ancient document exception for abrogation . . . the committee's action may convey to courts and litigants a blanket, unwarranted disapproval of ancient documents themselves” making it unlikely that even reliable ancient documents will be admissible under the residual exception.

Steve Rineberg (EV-2015-0003-0019), opposes the elimination of the ancient documents hearsay exception, on the ground that it will unfairly affect plaintiffs in toxic tort cases involving latent diseases. He states that “[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important for purposes of litigation in cases such as this, and such documents are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or are deceased, given the amount of time that has passed.”

Amy Heins (EV-2015-0003-0020), contends that “[e]liminating the ancient document exception will unilaterally eliminate the best evidence both sides have in cases of latent disease such as mesothelioma.”

Michael Mudd (EV-2015-0003-0021), is opposed to the elimination of the ancient documents exception. His comment is identical to the comment submitted by Steve Rineberg, (EV-2015-0003-0019).

Robert Paul (EV-2015-0003-0022), opposes the proposed change, on the ground that ancient documents are necessary in asbestos litigation. He concludes that the elimination of the “would certainly increase cost and multiply motion practice before judges on . . . ancient documents and prevent relevant and important evidence from reaching juries.”

Frederick Jekel (EV-2015-0003-0023), opposes the elimination of the hearsay exception for ancient documents. He states that in “asbestos, lead paint and tobacco litigation . . . most of the knowledge based liability document are more than 20 years old.”

Henry Bullard (EV-2015-0003-0024), states that the proposal to eliminate Rule 803(16) “is a solution in search of a problem, and there is no problem.”

Devin Robinson (EV-2015-0003-0025), is opposed to the elimination of Rule 803(16), on the ground that the change “is not needed and will radically effect many injured peoples' ability to seek compensation from at fault parties” especially in cases of latent injury, where often “no one exists to authenticate the documents.”

Robert Beatty-Walters (EV-2015-0003-0026), states that “[e]liminating this rule simply makes the burden on the plaintiff unnecessarily higher when conduct by nefarious manufacturers is documented in older records.”

Benno Ashrafi (EV-2015-0003-0027), is opposed to the elimination of the hearsay exception for ancient documents.

Darron Berquist (EV-2015-0003-0028), states that elimination of the ancient documents exception has a potential to impede access to justice in cases involving latent diseases. He contends that “plaintiffs in asbestos litigation often must rely upon ancient documents to prove their cases (e.g., asbestos content of products, a company’s knowledge of the hazards of asbestos, a company’s recommendation of the use of asbestos replacement parts, etc.).”

Thomas Melville (EV-2015-0003-0029), asserts that “[h]istoric documents are impossible to authenticate, unlike a modern document, because the author is likely long since retired from institutional employment or dead.” He concludes that the proposed elimination of Rule 803(16) “will favor large corporations and tortious wrongdoers at the expense of future victims.”

J.D. McMullen (EV-2015-0003-0030), states that eliminating Rule 803(16) “would allow companies to shield decades of knowledge as it relates to the hazards associated with the products they manufacture and sell to workers and consumers.”

Patrick O’Hara (EV-2015-0003-0031), contends that “[i]t would be a mistake to delete . . . Rule of Evidence 803(16)” because “[m]any of these documents which are important to cases dealing with issues that happened decades ago will not be admissible without this rule.”

Avery Waterman (EV-2015-0003-0032), opposes the elimination of Rule 803(16), because “sheer passage of time should not shield potentially dispositive evidence.”

Gary Berne (EV-2015-0003-0033), states that the ancient documents hearsay exception “can be helpful in leading to a fair result in those rare instances where it is needed. In fact, it very well may be that the best reason to keep the rule is that it could be crucial in a rare instance.”

Jared Placitella (EV-2015-0003-0034), states that the elimination of the ancient documents exception “will have a significant impact on toxic tort plaintiffs, leaving many people who have been harmed by corporate negligence uncompensated for their losses.” He contends that a change is not yet necessary to prevent admission of old, unreliable ESI, because “we are at most only 10-15 years into the digital ESI age [and] many relevant documents and other evidence material to toxic tort and other litigation are largely still in paper-form.”

Chris Placitella (EV-2015-0003-0035), opposes the elimination of Rule 803(16), because the exception “is particularly important in latent disease cases where the injury does not manifest for many years after exposure. The need for this exception is further accentuated by the fact that defendants who have destroyed original documents often object to the introduction of fraud based evidence arguing that because there is no one to testify how documents were created the documents are not admissible.”

James Bedortha (EV-2015-0003-0036), opposes eliminating the ancient documents exception to the hearsay rule, on the ground that “numerous parties would be deprived of their ability to offer relevant, compelling and in most cases dispositive evidence of activities, knowledge or awareness of other parties reflected in documents subject to this rule.”

James Pettit (EV-2015-0003-0037), states that eliminating the ancient documents exception “means that the search for truth in the courtroom will be reduced to allowing current corporate personnel testifying about their memories of speaking with now-deceased persons, or testifying about their belief about corporate practices decades ago.”

Scott Frost (EV-2015-0003-0038), opposes elimination of the ancient documents exception to the hearsay rule, concluding that the rationale of the rule is sound and there have been “no real changes in practice or procedure” that would require elimination of the rule.

Scott Marshall (EV-2015-0003-0039), declares that “[t]he elimination of F.R.E. 803(16) will not advance justice; instead it will impede it by allowing corporate defendants the ability to deny juries the opportunity to see important evidence that is rightfully admissible.”

David Aubrey (EV-2015-0003-0040), argues that the elimination of Rule 803(16) will prevent plaintiffs with mesothelioma and lung cancer from the evidence necessary to prove that defendants had knowledge of the dangerousness of asbestos.

Jason Steinmeyer (EV-2015-0003-0041), filed a comment identical to that of David Aubrey (EV-2015-0003-0040).

Robert Jacobs (EV-2015-0003-0042), states that the ancient documents hearsay exception “is invaluable” in litigation seeking to prove the existence or value of an old insurance policy. He argues that “the continued use of paper regardless of computer storage warrants this rule to remain.”

Shawn Acton (EV-2015-0003-0043), concludes that “[t]he abrogation of FRE 803(16) would have a devastating effect on Plaintiffs and Defendants who have to prove or defend their claims using documents that are decades old” because with old documents “there is often not a witness that can qualify an authentic document under a hearsay exception other than FRE 803(16).”

Susannah Chester (EV-2015-0003-0044), opposes the elimination of Rule 803(16). She states that the exception is needed for property records and that it is unlikely such records will be admissible under other exceptions such as for business records or the residual exception.

Perry Browder (EV-2015-0003-0045), opposes the elimination of Rule 803(16) on the ground that it will be “harmful to any litigation that involves older cases.”

Tina Bradley (EV-2015-0003-0046), states that Rule 803(16) is “used frequently as too often, no other proof is available because parties are defunct and no longer in existence.” She also states that “even if the opportunity exists to authenticate ancient documents, it is often a very expensive process.” Accordingly she opposes the elimination of Rule 803(16).

Lillian Talbot (EV-2015-0003-0047), states that in litigation involving latent diseases, “[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important [and] are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or deceased, given the amount of time that has passed.” Accordingly, she opposes the elimination of Rule 803(16).

Margaret Samadi (EV-2015-0003-0048), argues that “[e]liminating Rule 803(16) would result in grave injustice for latent disease sufferers.”

Andrew Balcer (EV-2015-0003-0049), opposes the elimination of Rule 803(16) because it would have a negative effect on plaintiffs who are “victims of latent disease, which only now manifest, despite their exposures to dangerous products occurring many decades ago.” He states that the residual exception is not an adequate substitute because it is designed to be only rarely invoked, and that the business records exception is not an adequate substitute because it is often not possible to find a custodian for old documents.

John Kerley (EV-2015-0003-0050), opposes the elimination of the ancient documents exception to the hearsay rule because “[i]n many cases, the exception is the only way to prove or disprove material facts in dispute. The exception helps both sides of litigation and needs to be left in place.”

Steven Perbix (EV-2015-0003-0051), urges retention of the ancient documents exception to the hearsay rule, because it is still necessary for documents that are not electronically stored, “especially as to documents stored at sites in rural areas that have not availed themselves of technology for documents that date back into the 1970s, 1980s, and even early 1990s.”

Christopher Madeksho (EV-2015-0003-0052), states that “[a]brogating the historical document hearsay exception would take away the chance for cancer-stricken Americans like my clients to seek justice for having been wrongfully exposed to carcinogens that take decades to cause their cancer.”

Mark Bratt (EV-2015-0003-0053), is opposed to the elimination of Rule 803(16), arguing that the result would be “a huge windfall for large corporations and insurance companies as they will be able to use the passing of time as a sword in defending themselves in lawsuits.”

Michael Patronella (EV-2015-0003-0054), argues that “[a]uthentication of ancient documents is very costly and expensive” and that the proposed change “benefits large multi-million and billion dollar defendants.” He concludes that “[p]laintiffs already have an uphill battle when it comes to finding and authenticating evidence, and this amendment will make many colorable claims even more difficult to prove.”

Brent Zadorozny (EV-2015-0003-0055), opposes the amendment on the ground that it would have a negative impact on plaintiffs’ claims in asbestos litigation, “in which the latency period for the asbestos diseases range from up to 40 to even 80 years.”

Leonard Sandoval (EV-2015-0003-0056), opposes the elimination of Rule 803(16) on the ground that the result would be to “deprive victims of latent injuries (e.g. lung cancer, mesothelioma, etc.) of a significant source of evidence in cases related to asbestos exposure.”

Marc Willick (EV-2015-0003-0057), states that “[e]liminating the ancient records exception will destroy proof necessary for prosecution and defense in thousands of cases across the country that turn on long held evidence.” He therefore opposes the proposed amendment.

Jon Neumann (EV-2015-0003-0058), states: “Without the ancient document exception to the hearsay rule, evidence that may presently be admissible to support a victim’s case will no longer be available for consideration by the trier of fact.”

Ari Friedman (EV-2015-0003-0059), argues that the proposed elimination of Rule 803(16) “is advanced under theoretical and hypothetical concerns that may (or may not) arise in the future.” He concludes that Rule 803(16) should not be abrogated because “more often than not the only thing to have survived the passage of time are the documents subject to this exception, as the people who can speak to the issues in the documents tend to move away, have faded memories, or worst of all, pass away.”

Thomas Plouff (EV-2015-0003-0060), opposes the elimination of Rule 803(16) on the ground that “[t]here are some cases, particularly involving minors or others under a disability, where ancient documents may be necessary proof.”

Matthew McLeod (EV-2015-0003-0061), states that the ancient documents exception to the hearsay rule “is a well-reasoned and important exception that provides a measure of fairness for victims of negligence to make their cases that would not otherwise be possible simply due to the passage of time.”

Brian Wendler (EV-2015-0003-0062), opposes the elimination of the ancient documents hearsay exception because it “would be a travesty to scores of attorneys who have relied on its existence to forego depositions to save client costs.”

Barrett Naman (EV-2015-0003-0063), states that “[t]his unnecessary rule change would detrimentally affect thousands of cases that rely upon these documents to prove events that occurred decades ago.”

Nicholas Cronauer (EV-2015-0003-0064), opposes elimination of the hearsay exception for ancient documents. He argues that the exception “preserves evidence and permits evidence to be admitted at trial that otherwise would be barred due to incompetence of a party or the passage of time.”

Thomas Bevan (EV-2015-0003-0065), opposes the proposed elimination of Rule 803(16) on the ground that asbestos victims’ claims “are often admitted at trial pursuant to the ancient document rule. The elimination of the rule will further victimize these people and provide cover for the corporations who injured them.”

Scott Britton-Mehlich (EV-2015-0003-0066), states that eliminating the hearsay exception for ancient documents “will disproportionately impact plaintiffs who will have to expend substantial amounts of resources in order to authenticate and prove up these valuable documents in order to use them at trial.”

Jonathan Forbes (EV-2015-0003-0067), opposes the elimination of the ancient documents exception, in a comment identical to that provided by Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Barry Castleman (EV-2015-0003-0068), opposes the elimination of the ancient documents hearsay exception. He states that “[j]uries have the ability to give appropriate weight to [ancient] documents, once admitted, for their consistency with other evidence, their importance and truthfulness.”

Valerie Farwell (EV-2015-0003-0069), states that the elimination of the ancient documents hearsay exception would have a negative impact on plaintiffs in asbestos litigation. The result would be “more delay and expense in the litigation process when these large corporations seek to prevent the admission of ancient documents without additional authentication.”

Alexandra Caggiano (EV-2015-0003-0070), states that in cases involving latent injuries, the ancient documents hearsay exception “is a tremendous help in bringing in evidence that is obviously authentic but cannot be admitted into evidence via another exception.”

Jeffrey Simon (EV-2015-0003-0071), concludes that “[t]he ancient documents exception to the hearsay rule provides a crucial basis to offer and authenticate documents where no sponsoring witness can be found, yet there is no genuine reason to believe the document has been fabricated.”

Christian Hartley (EV-2015-0003-0072), argues that for cases involving conduct that occurred many years earlier, elimination of the ancient documents hearsay exception “would create a de facto statute of limitations by allowing the passage of time to extinguish the evidence.”

Michael Shepard (EV-2015-0003-0073), opposes the elimination of the ancient documents hearsay exception. He states that the exception “is used more often than realized, and when it is needed, it is often crucial to either proving a plaintiff’s claim, or proving a defendant’s defense.”

Shane Hampton (EV-2015-0003-0074), opposes the elimination of Rule 803(16). He argues that in cases involving latent injuries, “older documents are provided by parties to the case, and it would frustrate the search for truth if they became inadmissible.” He also states that “[t]here are circumstances when older documents may vindicate a defendant, who was not negligent, or who did not cause the alleged injury, and this amendment would hurt those defendants rights to defend themselves.” Thus the elimination of the exception is “not a plaintiff v. defendant issue.”

David Norris (EV-2015-0003-0075), believes that “all of the good reasons for the creation of FRE 803(16) still exist” and that it is “an important tool for both plaintiffs and defendants.” Thus he opposes elimination of the ancient documents hearsay exception.

Jason Beale (EV-2015-0003-0076), states that “abrogating the ancient document exception to the hearsay rule, outright, would directly and severely prejudice” victims of mesothelioma “and unfairly allow a negligent party to have an unnecessary, unfair, and prejudicial advantage.”

Angela Bullock (EV-2015-0003-0077), states that if not for the ancient documents hearsay exception, a defendant corporation in a case involving a latent disease “would unfairly benefit” from a plaintiff being barred from introducing relevant records. She concludes that “[m]any of

the sources of these ancient documents are companies of bad actors—most of which are defunct and therefore, cannot be deposed and otherwise examined on the documents.” She therefore opposes elimination of the hearsay exception for ancient documents.

Samuel Elswick (EV-2015-0003-0078), opposes the elimination of Rule 803(16). He states that the ancient documents exception is necessary in asbestos cases to qualify documents showing knowledge of the dangers of asbestos, as well as documents indicating the defendants' choice to utilize asbestos rather than some other material.

Jonathan Ruckdeschel (EV-2015-0003-0079), opposes the proposed elimination of Rule 803(16) on the ground that it would prevent recovery for victims of mesothelioma. In the alternative, he urges “that any alteration act only prospectively. That is, that it only apply to documents created after the amendment of the rule. To do otherwise will result in the denial of compensation to terminally ill Americans.”

Bruce Carter (EV-2015-0003-0080), opposes the elimination of the ancient documents exception to the hearsay rule. He states that “[t]he rule has substantial safeguards to assure authenticity of the documents” and that “[d]epriving the parties of the ability to use historic documents will deny both parties the ability to be adequately represented.”

Christopher Meisenkothen (EV-2015-0003-0081), states that “[t]he ancient document exception to the hearsay rule should not be eliminated. It is a vital part of many cases involving long-latent injuries where ancient documents are often important pieces of evidence.”

Michelle Whitman (EV-2015-0003-0082), states that “[a]bolishing the ancient document exception to the hearsay rule would no doubt be detrimental to so many on both sides of the bar who rely on these documents in proving their cases.”

Carla Guttilla (EV-2015-0003-0083), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that the change “would preclude parties on both sides of litigation from utilizing ancient documents for which no other form of authentication exists due to the passage of time and death of the authors. These documents are paramount in latent disease cases to show what actually happened and what was known or not known during the relevant periods for these cases, where exposure or injury occurred decades ago.”

Marc Weingarten (EV-2015-0003-0084)—who provided written comment and testimony at the public hearing—is opposed to the elimination of Rule 803(16). He argues that it will impose new costs on the proponent to establish the admissibility of an ancient document, which he maintains runs contrary to recent Rules Committee projects designed to make federal litigation less expensive. He contends that any amendment to Rule 803(16) short of abrogation should be opposed, because an amendment would add more reliability and/or necessity requirements, requiring additional expenditure to meet those requirements. He states that ancient documents are necessary to prosecute claims against asbestos manufacturers, and that many of these documents have been found “in garages, musty warehouses, in other out of the way, and decidedly non-corporate places, and often in old file cabinets, folders and boxes” and they “cannot be authenticated in a traditional manner because there is no one from the company who is capable of doing so.”

Mark Wintering (EV-2015-0003-0085), opposes the elimination of Rule 803(16), on the ground that “[t]he ancient document exception to the hearsay rule has been crucial to the full and fair presentation of evidence in asbestos and other toxic tort cases, where key documents were not electronically preserved.”

Charles Soechting, Jr. (EV-2015-0003-0086), opposes the elimination of the ancient documents hearsay exception. He asserts that “more often than not given their age there are no longer individuals able to provide the necessary testimony to authenticate [such] documents, despite their importance to the underlying litigation.”

Mike Bilbrey (EV-2015-0003-0087), states that abrogation of the ancient documents exception would have an unfair impact on plaintiffs’ claims of latent disease, where “[a]ncient documents are routinely used to provide evidence of the Defendant’s knowledge of the dangers from these poisons, toxins and harmful substances.”

Rachel Moussa (EV-2015-0003-0088), opposes the elimination of the ancient documents hearsay exception. She concludes that without the exception “[v]ictims who have suffered injuries from latent defects will be unable to prove their claims.”

William Minkin (EV-2015-0003-0089), states that the ancient document exception “has been instrumental in holding wrongdoers accountable in civil litigation, particularly in cases of latent diseases, such as asbestos, lead and tobacco” because Rule 803(16) “is very often the only way” to admit the critical documents.

Michael Burnworth (EV-2015-0003-0090), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Lamont McClure (EV-2015-0003-0091), opposes the elimination of the ancient documents hearsay exception on the ground that the authentication requirements for ancient documents “already provide[] sufficient safeguards to the possibility of the use of fraudulent documents.”

Beth Gori (EV-2015-0003-0092), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Kenneth Wilson (EV-2015-0003-0093), states that the ancient documents exception should be retained, because “[a]s time passes, witnesses become unavailable or pass away, memories fade, companies get sold or go out of business” and “oftentimes the only available evidence is in the form of ancient documents.”

Mike Riley (EV-2015-0003-0094), states that in toxic tort cases, “[l]egitimate and relevant documents are often admitted at trial pursuant to the ancient document rule, and the elimination of the rule would not serve the interests of justice.”

David Layton (EV-2015-0003-0095), states that the ancient documents hearsay exception “is particularly important for cases with injuries that have long latency periods.” He concludes that the exception “is neutral and is often relied upon by both parties” and that without the exception, “the finder of fact will be deprived of key information.”

Taylor Kerns (EV-2015-0003-0096), opposes the elimination of the ancient documents hearsay exception, on the ground that it “has been, and will continue to be, necessary to protect the rights of plaintiffs and defendants alike in areas of litigation in which information is located only in hardcopy.” He states that “[t]o the extent the Committee believes ESI must be addressed, there are mechanisms by which this can be accomplished without the radical remedy of total abrogation, such as limiting the exception for hardcopy documents.”

Dimitri Nichols (EV-2015-0003-0097), opposes the elimination of the hearsay exception for ancient documents, on the ground that it will “injure the rights” of plaintiffs in asbestos litigation, “whom already face a deck stacked against them when they seek justice.”

Chris Romanelli (EV-2015-0003-0098), argues that “[o]lder documents are noteworthy for their truth and reliability” and that eliminating the hearsay exception for ancient documents “frustrates the search for the truth.”

Christopher Hickey (EV-2015-0003-0099), argues that the elimination of the ancient documents exception “will adversely affect Americans suffering from latent disease, including our military veterans.”

John Kane (EV-2015-0003-0100), objects to the elimination of the hearsay exception for ancient documents. He argues that Rule 803(16) “is a practical rule that understands that after several decades the original author of an ancient document may not be available to testify but the contents of the document are still relevant and typically critical to the case.”

Holly Peterson (EV-2015-0003-0101), opposes the elimination of the ancient documents exception, emphasizing its impact on plaintiffs in latent disease cases. “Abrogation of this rule will mean I must argue [the hearsay] issue to judges in every single case—a colossal waste of attorney time and judicial resources.”

Justin Shrader (EV-2015-0003-0102), contends that the ancient documents exception to the hearsay rule “has an important place in modern practice, despite the growing prevalence of ESI.” He argues that the exception is especially important in cases involving toxic torts and latent injuries: “Every asbestos trial our firm has been involved in has relied on FRE 803(16) to enter into evidence key historical documents to impute knowledge to a defendant that may otherwise be inadmissible.” He therefore opposes any amendment that would limit the ancient documents hearsay exception.

Keith Patton (EV-2015-0003-0103), states that “[t]he ancient documents exception is necessary in cases that require the use of documents that pre-date modern technology, such as latent injury cases.” He declares that “by eliminating the exception, the proposal will prevent trial judges from exercising their discretion in determining the admissibility of these documents—a role judges are well-equipped to handle.”

Bradley Evetts (EV-2015-0003-0104), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Erin Jewell (EV-2015-0003-0105), states that “[a]ncient documents often form a quintessential part of the proof in latent disease cases, where the plaintiff is forced to prove that the defendant companies knew, had reason to know or should have known about the dangers of asbestos in the 1940s, 1950s, 1960s and 1970s, long before documents were stored electronically.” She concludes that “[e]liminating the ancient document exception will only benefit corporations, at the expense of innocent victims.”

Todd Neilson (EV-2015-0003-0106), asserts that Rule 803(16) “is in fact invoked frequently” and that eliminating the hearsay exception “will ultimately increase the time and expense of litigation.”

John Kopesky (EV-2015-0003-0107), contends that without the ancient documents hearsay exception “individuals who suffer injuries from latent defects will be unable to prove their claims” because “[i]f the company that originated the [ancient] document no longer exists, there may be no way to authenticate the document.”

Amy Gabriel (EV-2015-0003-0108), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Bradley Evetts, (EV-2015-0003-0104), Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Laurel Halbany (EV-2015-0003-0109), opposes the elimination of the ancient documents hearsay exception, arguing as follows: “The existence of electronically stored information for newer documents does not change the value of existing ancient documents, nor render them hearsay.”

Lance Pomerantz (EV-2015-0003-0110)—in a written comment and in testimony at the public hearing—contends that the ancient documents exception has continuing vitality in land title litigation, and notes that the exception originated in land title cases under the common law. Thus any proposal to limit the ancient documents hearsay exception should leave some way for old documents to be admitted in land title litigation. One possibility might be to “grandfather” old documents and allow the abrogation to apply only to those documents generated after a certain date.

Nathaniel Mudd (EV-2015-0003-0111), is “deeply concerned about the proposed rule to abrogate FRE 803(16) regarding the admissibility of ancient documents.” He states that without the ancient documents hearsay exception, many asbestos claims could not be brought.

Stacey Kurich (EV-2015-0003-0112), argues that without the ancient documents hearsay exception, many asbestos claims could not be brought because the authors of the relevant documents are long deceased.

Kelly Battley (EV-2015-0003-0113), states that “[t]here are many kinds of litigation in which the only available and admissible evidence may be the ancient documents exception to hearsay. The rule continues to work in those situations.”

Peter Janci (EV-2015-0003-0114), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative effect on plaintiffs’ claims of sexual abuse when that abuse occurred many years before the action is brought. He states that the ancient documents exception is essential because it allows “a corporation’s own internal documents to be admitted as evidence of what it knew about a danger and how it responded.”

Clayton Thompson (EV-2015-0003-0115), opposes the proposal to eliminate the ancient documents hearsay exception, emphasizing its negative effect on the claims of victims of mesothelioma. He states the plaintiff must put on evidence “of what the defendant knew about the hazards of asbestos, when it used asbestos, and in which products or at which jobsites.” He contends that these facts ordinarily must be proved through ancient documents.

John Harp (EV-2015-0003-0116), contends that eliminating the hearsay exception for ancient documents “would harm a substantial number of workers in fields such as the railroad industry.”

Anthony Petru (EV-2015-0003-0117), opposes the elimination of the ancient documents hearsay exception, based on his experience in representing clients “who have illnesses and injuries as a result of various forms of cumulative trauma and exposure.” He states that “[f]requently the only way to prove that the entities are responsible for the exposure and injury is through the use of ancient documents.” The documents “often either are explicit admissions, or evidence of available information which would make a reasonable person take notice and act to protect the users.”

Kristoffer Mayfield (EV-2015-0003-0118), argues that the consequence of eliminating the ancient documents exception to the hearsay rule will be that “many types of cases, where people have been very badly injured, killed, or made very sick, will not be adequately prepared and presented on the merits.” He states that “[t]he issue is that corporate knowledge is extremely important to prove notice and culpability and to deter bad conduct by the world’s most powerful corporations.”

Victor Russo (EV-2015-0003-0119), argues that the ancient documents exception to the hearsay rule must be retained, because defendants destroy their relevant documents; “in response to this, attorneys and some expert witnesses have developed and maintain libraries of documents obtained through diligent work. As time passes those documents become ‘ancient’, as we use that term of art.” He concludes that Rule 803(16) is necessary to qualify design guides, internal memoranda, safety suggestions, risk management assessments, and “all manner of documents that existed some years ago [and] cannot be found now, in a current litigation, because a defendant has decided to destroy them.”

Christina Stephenson (EV-2015-0003-0120), opposes the elimination of the hearsay exception for ancient documents, stating: “I don’t believe that developments in technology are sufficient at this time to justify the change.”

The Association of the Bar of the City of New York (EV-2016-0121), through its Committee on Federal Courts, opposes the elimination of the ancient documents exception to the hearsay rule. The Committee “appreciates the Advisory Committee’s desire to be proactive to preempt any possible problem that might arise in the future with electronically stored information that survives for more than twenty years.” But it states that no such problem has arisen to date. It also contends that there is a guarantee of reliability in the fact that ancient documents “must be authenticated pursuant to Rule 901(b)(8).” The Committee further opines that “Rule 403 could be used to exclude ancient documents in cases when a problem actually arises.” Finally, the Committee concludes that the abrogation could lead to “unintended consequences” because other hearsay exceptions (such as Rules 803(6) and 807) may not be sufficient to qualify reliable ancient documents.

Gilion Dumas (EV-2015-0003-0122), opposes the elimination of the ancient documents hearsay exception, arguing that it is necessary for the prosecution of claims of sexual abuse that occurred many years ago. Old documents “show what the defendants knew about child molesters in their ranks, when they knew it, and what these defendants did with that knowledge.” Mr. Dumas recognizes that many of the documents offered under the ancient documents exception “are arguably admissible as non-hearsay ‘notice’ evidence, excluded from the hearsay rule as admissions of a party opponent, or are admissible under other exceptions to the hearsay rule such as the business records exception or the (always risky) catch-all exception.” But he states that “the effort and inefficiency of arguing the admissibility of every page - and every secondary or tertiary hearsay statement within each page - would make the battle almost impossible for most plaintiffs.” He concludes that “[o]nly the ancient documents rule can cut through all these irrelevant, time-wasting, side arguments to allow in relevant, authentic evidence to prove these claims.”

James Campbell (EV-2015-0003-0123), opposes the elimination of the ancient documents rule on the ground that it will have a negative effect on the prosecution of cases involving latent diseases. He states that “[t]he elimination of the ancient document exception to the hearsay rule would effectively bar such suits from being brought in federal court, foreclosing a significant avenue of relief for cancer patients and victims of other diseases that were wrongfully caused by exposure to toxic substances.”

Gregg Meyers (EV-2015-0003-0124), urges retention of the ancient documents exception to the hearsay rule, claiming that it is “[v]ital in work involving sexual abuse cases . . . where records were kept but are hidden.”

James Stang (EV-2015-0003-0125), contends that the ancient documents exception to the hearsay rule is necessary in cases involving “institutional cover-up of sexual abuse and the efforts to put assets beyond the reach of abuse survivors.” He concludes that “[e]limination of the exception will perpetuate the historical wrong these children suffered.”

Will Nefzger (EV-2015-0003-0126), opposes the elimination of the ancient documents hearsay exception. He states that “[p]erhaps in another generation, it might make sense, but not now.”

Raeann Warner (EV-2015-0003-0127), argues that the ancient documents exception to the hearsay rule should be retained because of its importance in cases involving asbestos contamination, as well as cases alleging sexual abuse allegedly condoned by institutions. She states that “[i]t is in the instances of the greatest cover-ups or latent diseases that don’t develop for many years that these documents are the most critical to victims of corporate negligence.”

Michele Betti (EV-2015-0003-0128), opposes the elimination of the ancient documents exception to the hearsay rule. She argues that the exception is essential for the admission of evidence indicating that institutions were aware of sexual abuse perpetrated by agents and employees many years before the litigation is brought.

Edward Cook (EV-2015-0003-0129), argues that the ancient documents exception should be retained because of its importance in proving liability for injuries suffered by rail workers.

Lori Watson (EV-2015-0003-0130), argues that the ancient documents hearsay exception should be retained due to its importance in proving cases involving past sexual abuse. She states that “[m]any of these cases include significant claims of fraudulent concealment and conspiracy against large institutional defendants that permitted or ratified the abuse. These defendants often have records dating back decades that are the evidence to establish these claims, and make these cases viable. Often the authors of the documents and/or witnesses referred to in the documents are deceased, therefore making the document unusable if the ancient document rule is eliminated.”

Peter Kraus (EV-2015-0003-0131), states that “[f]or attorneys representing the victims of toxic injuries, Rule 803(16) is a key tool to prove liability in these already very difficult cases.” He notes that “[a]lthough other exceptions to the hearsay rules may be available in some instances, the best and clearest path to the admissibility of relevant evidence from industry trade groups and other companies similarly situated to the defendant is Rule 803(16), the ancient documents exception.”

Jonathan Redgrave (EV-2015-0003-0132)—in written comment and in testimony at the public hearing—supports the proposal to eliminate the ancient documents exception to the hearsay rule. He observes that “a document does not become more reliable from one day to the next by having a birthday.” He states that if the rule is not abrogated, “litigants may seek to admit ESI that contains unreliable hearsay into evidence simply because the ESI is old enough to come within the ancient documents exception to the hearsay rule. The initial trickle will turn into a flood as the universe of ESI that reaches the magical 20 year milestone grows at an exponential rate.” He concludes that “[u]nreliable evidence should not be admitted, whether it is in hardcopy or ESI regardless of age” and that “the only practical effects of abrogating Rule 803(16) will be to require litigants to establish the reliability of ESI before offering it for the truth of its contents, and to prevent abuses of the ancient documents exception to the hearsay rule. Both results are desirable.” Finally, he finds the concerns expressed in other comments about the inapplicability of the business records exception to ancient documents “overstated

because there are ways to meet the requisites of Rule 803(6) without a contemporaneous witness who had personal knowledge of the records being created.”

Tahira Merritt (EV-2015-0003-0133), states that the ancient documents hearsay exception is “a vital tool to hold institutions accountable in cases involving alleged sexual abuses that were caused or suppressed by institutions” because “the institution’s pattern and practice is often found in the institution's ancient documents.” Therefore she opposes the elimination of the ancient documents hearsay exception.

Ashley Vaughn (EV-2015-0003-0134), states that the ancient documents hearsay exception “is invaluable in cases with extended statutes of limitation, such as child sexual abuse cases, and advances in technology do not dispense with the need for the rule.” She argues that “[t]he evidence necessary to prove claims for child sexual abuse that occurred many years ago is often found in ‘ancient documents’ such as magazines, newspaper articles, and documents published by the organization at fault” and “the articles may be otherwise difficult to authenticate except through FRE 803(16).”

Mark Gallagher (EV-2015-0003-0135), states that “Federal Rule of Evidence 803(16) is absolutely necessary to parties seeking to hold accountable individuals and institutions for offenses which occurred years ago” including acts of sexual abuse. He therefore opposes elimination of the ancient documents hearsay exception.

Richard S. Walinski (EV-2015-0003-0136), supports the proposed amendment to eliminate the ancient documents exception to the hearsay rule. He reasons that “Rule 803(16) simply sets an unprincipled, 20-year expiration date for all hearsay considerations based on the bland happenstance that a statement was reduced to writing long ago, regardless of whether the author’s purpose was to record fact, fiction, malice, poetic insight, or pure fancy.” He states that Rule 803(16) “transfers the burden of producing the percipient witness to the opposing party without any showing or reason to presume that the opposing party is in any better position to produce the percipient-but-absent witness than is the party who would ordinary bear that burden.” He concludes that “[a]brogation of Rule 803(16) will merely reinstate the same criteria for the admissibility of ancient statements that have been applied to other kinds of out-of-court declarations.”

David Romine (EV-2015-0003-0137)—in a written submission and in testimony at the public hearing—opposes elimination of the ancient documents exception to the hearsay rule. He argues that the exception is critical in proving cases brought under CERCLA and in denaturalization cases. He concludes that the business records exception is not a substitute because no custodian will be found for ancient documents; and the residual exception is not a substitute because it is disfavored by the courts. Finally, he expresses concern that abrogation of Rule 803(16) “will lead to increased tangential litigation as the question of admissibility of ancient documents is pushed from the ancient documents exception to the residual exception, resulting in increased expense for litigants and increased burdens for judges.”

Randy Reagan (EV-2015-0003-0138), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would have “an extremely negative impact” on the ability of plaintiffs in toxic tort cases to prove critical facts. He argues that “[t]here is

already an uneven playing field between the injured parties that we represent and the corporations that are responsible for their injuries” and that the abrogation of Rule 803(16) would accentuate that imbalance.

Ross Stomel (EV-2015-0003-0139), opposes the elimination of the ancient documents hearsay exception, on the ground that it will have a negative impact on plaintiffs’ claims in asbestos litigation. He states that “[d]iscovery in litigation over the past 40 years has resulted in the production of millions of pages of corporate and trade organization documents from these past decades that demonstrate widespread knowledge of the dangers of asbestos” and he fears that these documents, “admissible for their truth prior to the amendment (and not seriously challenged), would become inadmissible overnight and unavailable as proof, allowing the companies to deny the undeniable.”

Christopher Paulos (EV-2015-0003-0140), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that the exception should not be altered in response to electronically stored information because “in an age when everything can be created or deleted with just one click, if something can survive long enough to be considered ‘ancient’ then it is more reliable than not, and the truth of its contents, likely created when the case at bar had not yet been set in motion, should be presumed.”

Michael Blanchard (EV-2015-0003-0141), states that “[d]oing away with the ancient document exception to the hearsay rule would be a great injustice to many claimants who must rely on ancient documents that are clearly acceptable but cannot get into evidence any other way.”

Richard Cook (EV-2015-0003-0142), states that the ancient document exception to the hearsay rule “is essential in a number of cases” and eliminating the exception “will increase the cost and difficulty of establishing the truth and satisfying one's burden of proof.”

Professor Roger Park (EV-2015-0003-0143), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that “[t]he strongest ground for excluding hearsay is the danger of adversarial abuse. Were there no rule excluding it, adversaries might create hearsay as a substitute for live testimony, hoping that dubious witnesses will make themselves scarce so that the hearsay can take their place. The notion that this machination might occur 20 years before the evidence is needed is so fanciful as not to be worth considering.” He argues that the fact that the business records exception and the residual exception would be available for admission of reliable ancient documents, “is a reason for fear, not comfort. It’s an invitation to partisan judges to screen out reliable evidence on grounds of untrustworthiness. It’s a destroyer of predictability because the outcome of that screening cannot be known beforehand.”

Allyson Romani (EV-2015-0003-0144), objects to “the proposed amendment to FRE 901(8) [sic].” She notes the difficulty of authenticating documents in mesothelioma cases due to the passage of time.

Sidney Cominsky (EV-2015-0003-0145), is opposed to the elimination of the ancient documents hearsay exception on the ground that it would “hurt ordinary citizens.”

Nathan Finch (EV-2015-0003-0146), states that “the ancient document rule is often the only way to get an important and reliable old piece of information before a jury, because frequently the company that made and kept the record no longer has any living employees who can testify to its creation.” He suggests that “[i]f any editing is done to the rule, at most it should be clear that documents created prior to 1990—when electronic data storage first became widely available—are still subject to the rule in its current form.”

Joseph Rice, together with the members of Motley Rice LLP (EV-2015-0003-0147), is opposed to the elimination of the ancient documents exception to the hearsay rule. He notes that the firm has “recently used the ancient documents rule to have evidence admitted in Court for situations where there is no longer a living witness to call upon who could lay a foundation to meet the business records exception to the hearsay rule. Therefore, ancient documents are vital even in litigation today.” He concludes that “if a document has been preserved for more than 30 years in hard copy, and in some cases 50, 60, 70 or 80 years, it is likely there is a reason for that preservation and highly probable that the document is significant, relevant and reliable.”

Ben DuBose (EV-2015-0003-0148), states that elimination of the ancient documents hearsay exception, “would create an undue burden on the parties and increase the costs of litigation”—especially in cases involving latent diseases.

Jackalyn Olinger (EV-2015-0003-0149), states that elimination of the ancient documents hearsay exception “would prolong the discovery process, and would often make it impossible to track down the information needed for victims of latent diseases like mesothelioma. It would also increase the cost of litigation, as companies, businesses, and municipalities would be required to put their ancient documents in electronic form. That cost would then likely be transferred to the victims.”

Jeffrey Kaiser (2015-EV-0003-0150), opposes eliminating the ancient documents hearsay exception on the ground that it “would have a negative impact on victims of asbestos diseases—a process the typically takes decades and often 50 or more years to manifest.” He argues that “[h]istorical documents are often the only evidence in these cases as those who have authored them are deceased.”

Dan Brown (2015-EV-0003-0151), states that the ancient documents is necessary to allow admission of documents that “may serve as a critical basis for establishing liability and provide an important historical context for the jury in many asbestos cases.”

Bart French (2015-0003-0152), states that “[m]any of the documents showing knowledge of the dangers of asbestos date back several decades. These ‘ancient documents’ are well known and accepted by all parties.” To eliminate the ancient documents hearsay exception “would be to promote inefficiency and increase costs for all parties, both plaintiffs and defendants.”

Sarah Gilson (2015-0003-0153), opposes the elimination of the ancient documents hearsay exception, stating as follows: “Ancient documents are regularly critical in establishing liability, finding proof for the material content of defective products, and showing corporate knowledge and failure to act on hazards to the public. These documents are essential to the basic needs of the practice of an asbestos litigator.”

Trusha Goffe (2015-EV-0003-0154), opposes the elimination of the ancient documents exception, stating that the exception “is vital in litigation of child sexual abuse cases involving conduct decades ago” because “documents from the 1960s, 1970s and 1980s are key to both plaintiff and defense lawyers in prosecuting and defending claims.” She concludes that “[t]he exception continues to be relevant even with the development of ESI and will continue to be very valuable for this type of litigation.”

Brett Powers (2015-EV-0003-0155), objects to the elimination of the ancient documents hearsay exception, arguing that “the burden required for a sick and injured worker, or his widow and orphans to prove their case is difficult enough under the current civil justice system.” He concludes that “[t]his amendment will simply lead to prolonged and increased litigation if not increase corporate immunity for bad acts.”

Brian Kelley (2015-EV-0003-0156), asserts that the ancient document exception to the hearsay rule “is an essential rule that is necessary for several claims to be heard fairly” and that eliminating the rule “would exclude relevant evidence and provide no additional benefits to any cases.”

Greg Lisemby (2015-EV-0003-0157), opposes the elimination of the ancient documents exception on the ground that it would result in the exclusion of important documentary evidence in asbestos cases. He states that “[i]t is typical in such cases to acquire documents from third-party repositories that identify a defendant's asbestos-containing products and/or a defendant's knowledge regarding the dangers of asbestos. Documents of this nature are typically not in electronic format, and defendants typically will not agree to the authenticity or admissibility of such documents.”

Lin Thunder (2015-EV-0003-0158), opposes the elimination of the ancient documents hearsay exception on the ground that it would negatively impact plaintiffs in asbestos litigation. She concludes that “[t]he ancient document exception to the hearsay rule helps those whose cases involve actions that stretch back decades and has no negative impact.”

Mary Nold Lattimore (2015-EV-0003-0159)—in written comment and in testimony at the public hearing— supports the elimination of the ancient documents exception to the hearsay rule. She states that “[t]he proposition that a document should be considered reliable, probative, admissible evidence based solely on the age and authenticity of the document is unsupportable.” She asserts that “[i]t is frightening to think that personal assertions by non-parties in the form of personal emails, blogs, Tweets, Facebook posts, text messages, chat room dialog, voicemails, will become admissible ‘evidence’ once they are twenty years old.” She concludes that “[t]he Committee’s proposal is sound and well-reasoned. I very much appreciate that the Committee is acting in a proactive manner to ensure the integrity of the evidence presented at trials.”

William A. Rossbach (2015-EV-0003-0160)—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical evidence in many cases, not only those involving asbestos, and that any concern about old unreliable ESI being admitted under the exception should not result in abrogation of the exception; he states that the concern should be “addressed with targeted and specific standards, appropriate to that unique type of evidence.” Finally, he

argues that there are many hearsay exceptions that are questionable in allowing potentially unreliable evidence to be admitted, so there is no call for singling out the ancient documents exception.

Robert J. Gordon (2015-EV-0003-0161)—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical in asbestos litigation. He is also concerned that elimination of the exception will result in more motion practice and costs for the litigants, who will have to establish that the ancient document is reliable under another exception, and that there will be inconsistent application of admissibility standards to these documents under the other exceptions.

Annesley DeGaris (2015-EV-0003-0162)—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents hearsay exception, on the ground that “[i]t places those injured by products with long latency periods at a disadvantage.” He suggests consideration of amending the rule rather than eliminating it, and adopts the suggestions for amendment made by Peter Nicolas (2015-EV-0003-0016).

Marc P. Weingarten (2015-EV-0003-0163)—in written comment and in testimony at the public hearing—opposes the elimination of the ancient documents hearsay exception. He argues that ancient documents are critical in many cases, such as asbestos cases, and that without the ancient documents exception “[w]hat will happen is an entirely new series of motions, briefing, oral arguments and court decisions concerning documents which were once routinely deemed admissible.” He is also concerned that “if the rule is abrogated, documents which were once routinely admitted into evidence would then become the subject of rulings by different judges in different jurisdictions, coming to different results.” For these reasons, he also opposes any amendment to Rule 803(16) that would add any further admissibility requirement to the rule.

Tracy Saxe (2015-EV-0003-0164)—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents exception to the hearsay rule. He states that the exception “is incredibly important for insurance policyholders seeking coverage” because “occurrence-based liability insurance policies offer coverage that frequently lasts indefinitely, and activate when a claim is made based on something that occurred during that long ago policy term” and so in many instances very old policies are implicated in coverage disputes between insurers and policyholders. He concludes that “in a case involving a missing policy from multiple decades ago, the only reliable way to establish the contents of a policy is through use of the Ancient Documents hearsay exception” because “[o]nly rarely will a person with knowledge of the policy still be around to testify and fulfill the requirements of the business records exception.” He asserts that the residual hearsay exception is not a good substitute because courts hold that it is to be rarely applied.

James Begley (2015-EV-0003-0165), contends that the elimination of the ancient documents hearsay exception “would essentially be the end of toxic torts.” He explains that elimination of the exception would “increase the costs and expense to all parties in attempting to authenticate” the necessary documents “and, even with the added cost and expenses, authentication would likely be unsuccessful, as the author and recipient(s) of those documents will not be found or have passed away.”

Gregory Lynam (EV-2015-0003-0166), opposes the elimination of the ancient documents exception to the hearsay rule. He states that “the abrogation of Rule 803(16) is unnecessary and will do significant harm to those who are attempting to receive redress for acts that occurred decades prior, but the injury did not become evident until later.”

The Federal Magistrate Judges Association (EV-2015-0003-0167), endorses the proposed elimination of the ancient documents hearsay exception “for the reasons stated in the Advisory Committee Report.”

Joseph Whyte (EV-2015-0003-0168), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would lead to “unjust results” for plaintiffs in asbestos litigation.

John Camillus (EV-2015-0003-0169), states that Rule 803(16) “is an important rule that is critical to permitting the admissibility of relevant evidence that otherwise would not be admissible.” He suggests that “[a]nother possibility, which I would oppose but which would make a lot more sense than removing the rule altogether, would be to change the definition of ancient records as, for instance, records created prior to the year 2000.”

Jose Becerra (EV-2015-0003-0170), opposes the elimination of the hearsay exception for ancient documents, in a written statement that is identical to that of Gregory Lynam (EV-2015-0003-0166).

Mike Finnegan (EV-2015-0003-0171), states that without the ancient documents exception “child sex offenders and the institutions that protect them might escape justice.” He explains that “[t]hese survivors have to rely on paper documents. Often the writers of the documents are dead and without the ancient document exception juries and judges would never be able to consider this evidence.”

Molly Burke (EV-2015-0003-0172), opposes the elimination of the ancient documents hearsay exception, on the ground that it will prejudice plaintiffs suing for childhood sexual abuse. She states that without the exception, critical documents “although relevant and highly probative to show what an institution knew about problem actors and the risk of sexual abuse of children, would be inadmissible.”

Tim Hale (EV-2015-0003-0173), states that the ancient documents exception to the hearsay rule is essential for plaintiffs who are survivors of childhood sexual abuse. He asserts that eliminating the exception “will decrease abuse survivors’ opportunities for justice, and decrease the likelihood of success of litigation that forces institutional transparency and makes today’s children safer.”

Marc Pearlman (EV-2015-0003-0174), states that the ancient document exception to the hearsay rule “is of paramount importance to survivors of childhood sexual abuse” in which the documents regarding institutional knowledge are often “the key to proving the survivors case.” He contends that “[n]one of the other hearsay exceptions or the residual rule are sufficient to ensure these documents’ admission.”

Anonymous (EV-2015-0003-0175), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that in cases brought by adult survivors of childhood sexual abuse, cases often turn on ancient documents, because “[o]rganizations and individuals in these cases keep ancient documents which become critical to the case” and “Rule 803(16) is one of the most important ways that these documents get into evidence.”

Erica Brady (EV-2015-0003-0176), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Lance Pomerantz (EV-2015-0003-0177), posted a comment that is a follow-up to a question that was raised during his testimony at the public hearing—whether instead of eliminating the ancient document exception completely, the amendment would provide a “grandfathering” provision. He states: “I believe a grandfathering approach would be preferable to abrogation, but that the better approach (short of status quo) would be to leave the bright-line hearsay exception in place while limiting the rule’s applicability to evidence involving proof of title.”

Michael Dunlavy (EV-2015-0003-0178), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Erica Brady (EV-2015-0003-0176), Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Michael Reck (EV-2015-0003-0179), opposes eliminating the ancient documents hearsay exception on the ground that it will have a negative effect on cases brought by adult survivors of sexual abuse. He explains that “[i]n cases against large institutions, plaintiffs’ lawyers rely heavily on the exception to be able to shed light on decades of knowledge possessed by” those institutions.

Daniel Monahan (EV-2015-0003-0180), states that “[v]ictims of childhood sexual abuse often don’t understand the harm caused by sexual abuse until years later. Documentary evidence is often the only evidence available to prove up cases due to the passage of time. The ancient document exception continues to be necessary in the litigation of these types of cases.” Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Jeff Anderson (EV-2015-0003-0181), states that Rule 803(16) “is one of the most important evidentiary rules for survivors of childhood sexual abuse.” He explains that “documents indicating the facts of abuse as well as institutional knowledge about it go back decades, often times with all of the individuals involved deceased except for the survivor. In some cases, these documents may be the only way that the survivor can prove their case, making Rule 803 (16) critical.” Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Troy Chandler (EV-2015-0003-0182), would retain the ancient documents exception to the hearsay rule, arguing that it is critical for plaintiffs in toxic tort cases involving latent injuries. He states that in such cases the ancient documents exception is necessary to qualify documents that establish the state of mind of defendants.

Ben Snipes (EV-2015-0003-0183), argues that “[t]he use of historical documents could not be more imperative to the fair litigation of asbestos claims.” He concludes that “[i]n the context of a disease with latency periods consisting of several decades, such as asbestos related disease, abolishing the ancient documents exception would substantially impair justice.”

Joshua Grunda (EV-2015-0003-0184), states that in cases brought by plaintiffs for injuries from toxic substances, “the proposed change to FRE 803(16) would have a dramatic negative impact on my clients' ability to present critical evidence in court.” Therefore he opposes the elimination of the hearsay exception for ancient documents.

Mickey Landry (EV-2015-0003-0185), states that the proposal to eliminate Rule 803(16) “purports to fix a problem that does not exist and will or could exclude extremely important documents.” Therefore he opposes the proposed amendment.

Gary Brayton (EV-2015-0003-0186), believes that “the concerns intended to be addressed by the proposed amendment to Rule 803 can be successfully addressed with outright abrogation of Rule 803(16).” He states, however, that Rule 807 is unlikely to be an easy means of admitting ancient documents, because abrogation of the ancient documents exception “could reasonably be interpreted by trial judges as a repudiation of its underlying policy considerations, or, at a minimum, as a demotion of their importance.” He concludes that “any judge already viewing Rule 807 with a jaundiced eye would almost certainly regard proffered ancient document evidence as bearing additional stigma on account of being stripped of a previously existing specific exception.”

Glenn Draper (EV-2015-0003-0187), would retain the ancient documents hearsay exception. He emphasizes that in mesothelioma cases, Rule 803(16) “allows juries a window into what the corporations knew and when they knew it.” He recognizes that “[i]n some instances, these documents may be admissible under another rule” but states that “often showing another hearsay exception applies is impossible or cumbersome.”

Mark Berry (EV-2015-0003-0188), opposes the elimination of the ancient documents exception to the hearsay rule, noting its importance in asbestos cases. He states that “[w]ithout this rule, it is literally impossible to find a witness to prove up a document that was written 40 years ago. Obviously, the document is of great importance because it shows the state of mind of the defendant at the time of the alleged wrongdoing.”

Shelby Reed (EV-2015-0003-0189), is opposed to the elimination of the ancient documents exception to the hearsay rule, concluding that “[a]brogation of this long-standing rule of evidence without justification would constitute radical activism.”

Anthony Carr (EV-2015-0003-0190), states that in cases involving asbestos-related diseases, elimination of the ancient documents exception to the hearsay rule “would significantly increase the time and costs associated with our litigation of these cases, reducing the amount that should rightfully go to Plaintiffs.”

Alyssa Segawa (EV-2015-0003-0191), states that in toxic tort cases, “the ancient document rule is essential in demonstrating individuals were exposed to certain products” and that

“[e]limination of this rule would prevent countless individuals who have been harmed by toxic substances from obtaining any compensation for their injuries.”

United Policyholders (EV-2015-0003-0192), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative impact in cases involving insurance coverage. It states that “[p]erhaps there is a manner in which the concerns about electronic documents can be addressed without abrogating the rule in its entirety by limiting FRE 803(16) to hard copies.”

Senators Edward Markey, Sheldon Whitehouse, Jeff Merkley, Barbara Boxer, Richard Durbin, Patrick Leahy, and Al Franken (EV-2015-0003-0193), oppose the elimination of the ancient documents exception to the hearsay rule. They state that the proposal “is especially troublesome because, in latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct, abrogating Rule 803(16) could make it more difficult for plaintiffs—including the Federal Government—to prove their claims.” The Senators assert that it is “premature” to eliminate Rule 803(16) out of concern that it will be used as a vehicle to introduce unreliable ESI. They conclude that eliminating the ancient documents exception “would place a significant hurdle in the way of litigants seeking to pursue . . . congressionally created federal claims in cases in which the misconduct occurred long ago, and would thereby undermine Congress’s desire for injured parties to be able to seek a remedy.”

The Thornton Law Firm, LLP (EV-2015-0003-0194), states that “[t]he abrogation of FRE 803(16), or the ancient documents exception to the hearsay rule, would deeply impact and diminish the likelihood of plaintiff success in toxic torts cases, particularly those filed against defunct, bankrupt or otherwise wholly acquired entities” because Rule 803(16) is necessary “for authenticating ‘smoking gun’ ancient documents and records that are vital in the successful litigation.” The firm asserts that the other hearsay exceptions are not an alternative because “a representative of a bankrupt, defunct, or otherwise wholly acquired corporation rarely exists for authentication purposes.”

Certain Members of the American Bar Association Criminal Procedure Committee (EV-2015-0003-0195), oppose the elimination of the ancient documents exception to the hearsay rule. The members “agree with the Advisory Committee that the exception has not been used much, and that many statements that fit within the exception would fit within other hearsay exceptions as well.” They “also recognize that just because a document is old does not necessarily mean that it is reliable. Nevertheless, we believe that the exception has value and that eliminating it at this time would be a mistake.” The members state that “Rule 803(16) is crisp and categorical in nature; it is easily applied, and its application is easy for lawyers to predict” whereas “the residual exception is necessarily open-ended.” The members conclude that “the most prudent course for now is to adopt a policy of watchful waiting, perhaps with a commitment to re-examine the matter in five years” and that if “change now is necessary, it would be better to amend the Rule rather than abrogate it.”

Kathy Byrne (EV-2015-0003-0196), opposes the elimination of the ancient documents exception, on the ground that it will have a negative impact in cases involving latent diseases. She states that ancient documents in such cases “provide essential evidence of what was known of toxic hazards before and at the times of exposure.”

Clarisse Kobashigawa (EV-2015-0003-0198), states that “the current Ancient Documents exception makes practical sense legally and most importantly, it prevents corporations from conveniently hiding from documents that shine a magnifying glass on their knowledge and intent in continuing to use harmful products to the detriment of their unknowing victims so many years ago.”

David Barrett (EV-2015-0003-0199), states that in cases involving latent diseases, eliminating the ancient documents exception to the hearsay rule “will divest the prosecuting attorney of a critical evidentiary tool, and will deprive the trier of fact of an important piece of evidence in the pursuit of truth and justice.”

The American Association for Justice (EV-2015-0003-0200), opposes the elimination of the ancient documents exception to the hearsay rule. It states that “[t]he use of this straightforward, century-old exception to the hearsay rule is well-established. It has served as a means to provide fairness and protect the public interest in a variety of cases. By limiting significant, relevant and necessary evidence on the speculative premise that it could be admitted through another avenue is an insufficient protection that will lead to uncertainty, unnecessary utilization of court resources and an unfair impediment to victims’ legal rights.”

The Academy of Rail Labor Attorneys (EV-2015-0003-0201), opposes the elimination of the ancient documents exception to the hearsay rule. The Academy states that ancient documents are critical in cases involving latent injuries, and that “the proposed amendment would increase the cost of litigation because of the necessity to have the documents authenticated.”

Iana Waxman (EV-2015-0003-0202), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would deprive plaintiffs of evidence in environmental and toxic-tort litigation. She states that “[w]hile some amendment of the rule might be appropriate to address the Committee’s concerns regarding ESI, a complete abrogation would only serve to make it even more difficult for litigants to address old wrongs.”

Samantha Flores (EV-2015-0003-0203), objects to the elimination of the ancient documents exception to the hearsay rule, “as this would adversely affect the type of clients . . . who were exposed to toxic substances 40, 50, 60 or 70 years ago and developed diseases that have taken their lives.”

J. Kirkland Sammons (EV-2015-0003-0204), states that “abrogating the ancient documents exception would serve to further encourage ‘corporate amnesia.’” He asserts that without the ancient documents exception, evidence about what corporations knew about the dangers of asbestos and other substances would be inadmissible. Therefore he opposes its elimination.

Sherilyn Pastor (EV-2015-0003-0205), urges the Committee “to reconsider its proposal abrogating the ancient documents exception set forth in Federal Rule of Evidence 803(16) given the adverse, and likely unintended, impact it will have on policyholders and insureds pursuing coverage under insurance policies issued twenty or more years ago, but nonetheless covering bodily injury and property damage claims asserted by claimants against them today.” She

concludes that the ancient documents exception “is an important rule for policyholders seeking to prove their right to insurance coverage” and that “[w]ithout it, insureds face increased difficulty and expense proving the existence and terms of their incomplete or missing insurance policies.”

Professor Jeffrey Stempel (EV-2015-0003-0206), opposes the elimination of the ancient documents hearsay exception. He contends that the problem of old unreliable ESI being admitted under the exception will not be serious because “separating the wheat from the chaff has always been the task of adjudication.” He concedes that “the Rule 807 residual exception is perhaps available to fill some of the void that would be created by abrogation of Rule 803(16)” but argues that Rule 807 “contains additional requirements that place a substantially higher burden on the party seeking to introduce evidence than does Rule 803(16), including a requirement of advance notice of intended use.”

David Donadio (EV-2015-0003-0207), opposes the elimination of the ancient documents exception to the hearsay rule, stating it is commonplace in asbestos litigation “to encounter reliable ancient documents that cannot qualify under any other exception” because “the foundational witnesses necessary to establish the requisite elements for a business record exception even if living are impossible to identify or locate.”

Amanda Kessler (EV-2015-0003-0208), opposes the elimination of the ancient documents hearsay exception, stating as follows: “Frequently in toxic tort litigation, the corporate officers, directors and employees with knowledge of a product that was manufactured over 40 years ago are deceased or incapacitated and unable to testify. Plaintiffs are forced to rely on company documents from many years ago, and must invoke the ancient document rule to do so.”

Joseph Cirilano (EV-2015-0003-0209), objects to the elimination of the ancient documents exception, stating that the rule is needed to allow asbestos victims to prove their exposure.

Robert Buck (EV-2015-0003-0210), is opposed to the elimination of the ancient documents exception to the hearsay rule, noting that in product liability cases, “important facts relevant to both the claims and defenses being asserted in a case can only be established through introduction into evidence, as a hearsay exception, various engineering drawings, product specifications, internal corporate communications, product catalogs and brochures, as well as other forms of ancient documents because there are no living witnesses or other mechanisms to prove the facts contained in the ancient documents.”

David Rancilio (EV-2015-0003-0211), opposes the elimination of the ancient documents hearsay exception. He states that in asbestos cases, “[d]efendants have consistently avoided placing documents in paper form and microfiche into an electronic format to frustrate and burden the plaintiffs bar. Now, defendants seek to be awarded for their intransigence by continuing to avoid the incorporation of these ancient documents into their electronic files, and simply wipe the relevance of these ancient documents from the record.”

David Butler (EV-2015-0003-0212), opposes the elimination of the ancient documents exception, stating that in cases involving latent diseases, “[t]he abrogation of FRE 803(16) will do serious harm to the ability of innocent victims to hold those responsible accountable for their actions.”

The Evangelical Lutheran Church of America (EV-2015-0003-0213), opposes the elimination of the ancient documents exception to the hearsay rule, expressing concern that it “is likely to prejudice churches and similar organizations in identifying and proving historical insurance coverage.” It elaborates as follows: “By recommending the abrogation of Fed. R. Evid. 803(16), the Committee gives insurers a powerful weapon to deny coverage under policies purchased and paid for years ago. Even when a local congregation finds documents referencing a policy of insurance, the insurers can simply interpose a hearsay objection that will be almost impossible for a local congregation to overcome in a coverage action. Who will be able to testify as to the reliability of the contents of a letter from 1972? Given that most local congregations lack the wherewithal to litigate an insurance coverage action, the proposed abrogation will tilt the playing field in favor of insurance carriers and against the insureds. In addition, by facilitating the denial of coverage, the proposed abrogation will deny plaintiffs and other claimants the most likely and substantial source of possible compensation.”

Kay Gundersen Reeves (EV-2015-0003-0214), states that “[t]he abrogation of FRE 803(16) will significantly diminish the ability of the victims of toxic exposure to prove their cases, people suffering from cancer that develops after a latency period that is measured in decades.” She states that “[o]ne alternative might be to limit the exception to documents prepared before a particular date, say, January 1, 1996.”

John Cooney (EV-2015-0003-0215), opposes the elimination of the ancient documents hearsay exception, noting that it is especially needed “in cases which involve conduct from decades ago that was accurately memorialized for non-litigation purposes at the time and the authors have since passed away.”

N. Dean Nasser (EV-2015-0003-0216), opposes the elimination of the ancient documents hearsay exception, stating that “there is simply no good reason to require ancient evidence of the reliability of an ancient document when the dispute (99% of the time) did not even exist and was not even envisioned when the ancient (but authenticated) document was created.”

Richard Grant (EV-2015-0003-0217), opposes the elimination of the ancient documents hearsay exception, arguing that in cases involving latent diseases, “crucial evidence such as packing slips, purchase orders, inter-office memos and reports, shipping invoices, and bills of lading, amongst many other documents that cannot be properly authenticated under other hearsay exceptions play a significant part in litigation.” He suggests that any concerns about ESI being admitted under Rule 803(16) “can be addressed by prospective amendments specifically limited to those concerns.”

Bart Baumstark (EV-2015-0003-0218), states that “[t]he ancient document rule is crucial in cases where toxic exposures cause cancer and other diseases decades after the exposures occurred” and that “[i]n many cases, old corporate knowledge documents would not otherwise be admissible if not for this well accepted, well grounded rule of evidence.”

Gerson Smoger (EV-2015-0003-0219 and 0220), opposes the elimination of the ancient documents exception, arguing that the exception guarantees that evidence admitted under it is reliable, and that in his experience, parties never object to admissibility of documents offered under Rule 803(16).

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

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

5 * * * * *

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

7 **Process or System.** A record generated by an

8 electronic process or system that produces an

9 accurate result, as shown by a certification of a

10 qualified person that complies with the

11 certification requirements of Rule 902(11) or

12 (12). The proponent must also meet the notice

13 requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an

authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

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

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

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

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases

the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

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

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

Changes Made After Publication and Comment

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and to emphasize the importance of reasonable notice.

Summary of Public Comment

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121), supports the proposed addition of Rule 902(13), stating that the rule “should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity.”

Jonathan Redgrave (2015-EV-0003-0132), supports the proposed addition of Rule 902(13). He states that “[s]hifting the burden of questioning the authenticity of such records to the opponent of the evidence (who will have a fair opportunity to challenge both the certification and the records themselves) will streamline the process by which these items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or on summary judgment.” He concludes that the proposed amendment “will lead to increased efficiency without sacrificing the integrity of the Rules of Evidence.”

The Federal Magistrate Judges Association (2015-EV-0003-0167), supports the proposed addition of Rule 902(13). The Association notes that the notice provided by the rule “should not come so shortly before the trial or hearing that the adverse party cannot realistically do the investigation required for a challenge.” It suggests that “judges specify a date for serving the notification in the initial scheduling order.” It further states that some electronic information might be authenticated under either Rule 902(13) or (14), but that “[a]s a practical matter, the distinction may not make a difference because both types are handled in the same way.”

Certain Members of the American Bar Association Criminal Procedure and Evidence Committee (2015-EV-0003-0197), oppose the proposed addition of Rule 902(13) insofar as it would allow a certification to authenticate electronic information that was prepared in anticipation of a criminal prosecution. The members state that in criminal cases the Confrontation Clause does not permit authentication by a certificate where that certificate is “used to leverage into evidence documents that have been created for the purpose of the litigation.”

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

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

5 * * * * *

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

Committee Note

The amendment sets forth a procedure by which
parties can authenticate data copied from an electronic
device, storage medium, or an electronic file, other than
through the testimony of a foundation witness. As with the
provisions on business records in Rules 902(11) and (12),
the Committee has found that the expense and

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

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

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

A proponent establishing authenticity under this Rule must present a certification containing information that

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

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

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

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

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

Changes Made After Publication and Comment

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and the definition of hash values, and to emphasize the importance of reasonable notice, and to address the relationship between Rules 902(13) and (14).

Summary of Public Comment

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

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Best Practices for Authenticating Digital Evidence

Hon. Paul W. Grimm

Gregory P. Joseph, Esq.

The Judicial Conference Advisory Committee on Evidence Rules

I. Introduction

Digital evidence is now offered commonly at trial. Examples include emails, spreadsheets, evidence from websites, digitally-enhanced photographs, PowerPoint presentations, texts, tweets, Facebook posts, and computerized versions of disputed events. Does the fact that an item is electronic raise any special challenges in authenticating that item?

In Federal Courts, authenticity is governed by Rule 901(a), which requires that to establish that an item is authentic, a proponent must produce admissible evidence “sufficient to support a finding that the item is what the proponent claims it is.”¹ Rule 901(b) provides many examples of evidence that satisfies the standard of proof for establishing authenticity, including testimony of a witness with knowledge,² circumstantial evidence,³ and evidence describing a process or system that shows that it produces an accurate result.⁴ The standards and examples provided by Rule 901(a) and (b) are flexible enough to adapt to all forms of electronic evidence.

That does not mean that authenticating digital evidence is automatic. There are a large number cases dealing with authentication of digital evidence over the last 15 years; and such evidence can present challenges in establishing that it has not been altered and that it comes from a certain source. The Judicial Conference Advisory Committee on Evidence Rules, surveying this case law, considered whether to propose an amendment to Rule 901(b) that would provide for a list of relevant factors for establishing the authenticity of the new types of digital evidence encountered by the courts --- such as email, text, chats, internet postings, and social media communications. The Advisory Committee decided not to proceed with a proposal, for a number of reasons: 1) there would be a problematic interface between any new rule and the existing, flexible rules that are currently being used to govern authentication of electronic evidence; 2) listing factors relevant to authentication would run the risk of misleading courts and litigators

¹ Evidence proffered to support authenticity of a challenged item must itself be admissible. See, e.g., *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception).

² Fed. R. Evid. 901(b)(1).

³ Fed. R. Evid. 901(b)(4).

⁴ Fed. R. Evid. 901(b)(9).

into thinking that all of the listed factors can or should be weighed equally; 3) no existing evidence rule is structured as a list of relevant factors; and 4) given the deliberate nature of the rulemaking process—with a minimum of three years between formal consideration of an amendment and its adoption—it would be possible that authentication rules on electronic evidence would be outmoded by the time they became law.

The Advisory Committee decided that a better alternative for providing guidance to courts and litigants on authentication of digital evidence would be to prepare and publish a “Best Practices Manual” for each of the major new forms of digital evidence that are being offered in the courts. The Advisory Committee has collaborated with Hon. Paul Grimm and Gregory P. Joseph, Esq. to prepare this Best Practices Manual, to be distributed by the Federal Judicial Center.

This Manual begins with an analysis by Judge Grimm of the basic rules on authenticating evidence, with a focus on digital evidence and the interplay between Evidence Rules 104(a) (providing that the judge is to decide admissibility factors by a preponderance of the evidence) and Rule 104(b) (providing that for questions of conditional relevance --- such as authenticity --- the standard of proof for admissibility is enough evidence sufficient to support a finding).

Following Judge Grimm’s introduction, this Manual sets forth some guidelines on authentication of the kinds of electronic evidence that are most frequently offered in litigation today: 1) emails; 2) texts; 3) chatroom conversations; 4) web postings; and 5) social media postings.⁵ Finally, the Manual considers whether and when the proponent might argue that the court can take judicial notice of the authenticity of certain digital evidence.

At the outset it is important to emphasize that the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence. None of the checklists set forth below are going to be required to be met in toto before digital evidence is found authentic. They are just relevant factors, and usually satisfying one or two of any of the listed factors will be enough to convince the court that a juror could find the digital evidence to be authentic. But the factors will need to be applied case-by-case.

⁵ This Best Practices Manual covers the relatively new forms of electronic communications. Parties have been authenticating more traditional forms of electronic evidence for many years --- examples include telephone conversations, audiotapes, and video recordings. See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976). (video evidence from a bank security camera was properly authenticated where testimony revealed the camera was present on the day in question and was facing the events of an armed robbery, and was functioning properly). This pamphlet does not cover such traditional forms of electronic communication. For more on authentication of such information, see Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual* §901 (11th ed. 2015), which provides relevant case law and commentary.

II. An Introduction to the Principles of Authentication for Electronic Evidence: The Relationship Between Rule 104(a) and 104(b).

This Manual is designed to provide answers to the fundamental evidentiary questions of how to authenticate digital evidence. But before turning to the authentication rules themselves, there are two preliminary rules that must be discussed and understood, because without them, authentication decisions are apt to be erroneous. These rules are Fed. R. Evid. 104(a) (which states the general rule governing preliminary questions about the admissibility of evidence) and Fed. R. Evid. 104(b) (the so-called “conditional relevance” rule⁶). Understanding these two rules is essential to making correct decisions about the authentication of digital evidence.

We start with Rule 104(a). Its text is deceptively straightforward: “[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, *or evidence is admissible*. In so deciding, the court is not bound by evidence rules, except those on privilege.” (emphasis added). Most decisions about admissibility of evidence, whether digital or otherwise, are made by the judge alone. They include decisions about whether evidence is relevant, constitutes hearsay (or fits within one of the many hearsay exceptions), or is excessively prejudicial when compared to its probative value, whether experts are qualified and the extent of opinion testimony that will be allowed, and most questions regarding application of the original writing rule. When the judge makes a ruling under Rule 104(a) he or she is the sole decision maker as to whether the evidence may be heard by the jury. If admitted, of course, the jury is free to give the evidence whatever weight (if any) they think it deserves. This is familiar turf to trial judges, but with digital evidence, there is a greater likelihood that the judge alone may not be the final decision maker regarding admissibility. The jury also may have a part to play in the admissibility decision, and this is where Rule 104(b) comes in.

Rule 104(b) qualifies Rule 104(a). It provides “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.” Read in isolation, Rule 104(b) seems too abstract to be helpful. But, in the case of disputes over the authenticity of digital evidence, it can be an important qualifier to the general rule of 104(a) that the trial judge decides questions about the admissibility of evidence. An illustration will help bring things into focus. Imagine the following variations of a common theme. In an employment discrimination case the plaintiff, a woman, alleges that her supervisor, a man, intentionally discriminated against her in deciding to promote a lesser qualified man to a position that the plaintiff sought. As evidence of intentional discrimination, the plaintiff wants to introduce an email that she asserts her supervisor sent to her that says: “Jane, stop bugging me about the sales supervisor position. Your track record compared to the men in our sales group is terrible, and confirms what I always have suspected. Women just don’t have the stuff it takes to get out there and sell our products. You should be glad you still have your sales job, and quit trying to be something you can never do well. Bob.” The email is from the company email account (Bob@company.com), addressed to the plaintiff (Jane@company.com), apparently signed by the supervisor (Bob), discusses a subject matter about which the supervisor has knowledge, and is dated on a day and time the supervisor was known to be at the office. Plaintiff

⁶ Fed. R. Evid. 104(b) (1972) Advisory Note.

contends that the email is “smoking gun” evidence of intentional gender discrimination.

Imagine further the following scenarios when the plaintiff offers the email into evidence at trial. One: the defense attorney objects to the introduction of the email, the judge asks for the basis of the objection, and the defense attorney says “inadequate foundation”. Two: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, this is an email, there is no evidence that the supervisor was the one who actually wrote it. It was found on a company computer, anyone in the company had access to that computer, including the plaintiff herself, whose office was right next to his, and my client is often away from his desk during the day, and he does not log out of his computer. Plaintiff hasn’t shown that someone else didn’t send that email pretending to be my client, and everyone knows how easy it is to fake an email.” Three: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, my client will testify that on the day and time stated on the email he was at a sales meeting with the other supervisors and the president of the company. Five other people saw him there at that day and time and will testify that they did. During those meetings, no one is allowed to use their smart phone or to send or receive emails, on pain of being fired if the president sees them looking at their phones. The location of the meeting was on a different floor from where my client and the plaintiff work. He will testify that he did not send the email, and that when he leaves his office he does not log out, his computer stays on, and anyone can access it without a password and use his office email account. He also will testify that when he came back from the meeting, the plaintiff looked at him in a strange way, and said “I wouldn’t look so smug if I were you. You might not be that way for very long.”

With these scenarios in mind, what is the interplay between Rule 104(a) and 104(b) in determining whether the email may be admitted at trial and considered by the jury? In the first scenario, no explanation was given by the defense attorney for excluding the email other than the conclusory statement that the plaintiff had not laid a sufficient foundation. Here, the trial judge alone decides, under Rule 104(a), whether an adequate foundation has been established. If the foundation was deficient, the judge will require the plaintiff’s lawyer to make a fuller showing, and allow or exclude the email accordingly. Rule 104(b) is not implicated.

In the second scenario, the defense attorney has made a conclusory legal argument that provides no facts showing that the supervisor did not author the email, but rather speculates that it *could have* been written by someone else. The argument invites the trial judge to require the plaintiff’s lawyer to “prove a negative”—that no one but the supervisor was the author. But this is not the burden that the plaintiff must meet under Rule 104(a) to establish the admissibility of the email. Rather, all that plaintiff must do is to meet the obligation imposed by Rule 901(a), which is to “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Certainty is not required. All that is needed is evidence sufficient to convince a reasonable juror that, more likely than not, the email is what the plaintiff claims it is—an email her supervisor drafted. And, under the hypothetical facts of the second scenario, the defense counsel is wrong in saying the plaintiff has offered no evidence that the email came from the supervisor. She has shown that the email came from the supervisor’s email address, on the company email server, on a day when the supervisor was at the office, discussing a topic about which the supervisor had knowledge, and is signed with his name. Certainly this would be an example of authentication under Rule 901(b)(4), where the “appearance, contents, substance . . .

or other distinctive characteristics of the item, taken together with all the circumstances” tend to show that the supervisor authored the email.

The second scenario also raises only Rule 104(a) issues for the trial judge alone to determine admissibility. The facts, under which admissibility must be judged, are undisputed. If the trial judge concludes (as she should under these facts) that a reasonable juror *could* find from the foundation presented that it is more likely than not that the supervisor wrote the email, it is admissible. Defense counsel’s speculation about what “could” have happened is reserved for argument to the jury about how much weight (if any) to give to the email. Absent from scenario two is evidence that the supervisor in fact did not author the email, to contradict the undisputed facts introduced by the plaintiff regarding the distinctive characteristics of the email that associate it with the supervisor.

Scenario three does introduce facts contradicting the evidence the plaintiff introduced about the distinctive characteristics of the email tying it to the supervisor. The defense attorney has proffered that he will introduce evidence (the supervisor, the five witnesses who corroborate that he was with them at the time the email was sent, the policy prohibiting use of cell phones during meetings with the company president, the meeting’s location on a different floor of the building). Now the trial judge is presented with competing evidence that the supervisor did, and did not, author the email. If the plaintiff’s evidence is accepted over that of the defendant, then it is more likely than not that the supervisor is the author, and the email is relevant to show his discriminatory intent. But, if the defendant’s version of the facts is accepted over those offered by the plaintiff, then the supervisor did not author the email, and it is irrelevant to prove his state of mind. The relevance of the email turns on whether the plaintiff’s version or the defendant’s version is accepted, and this falls squarely within the scope of Rule 104(b). The relevance of the email depends on the existence of a disputed fact—authorship of the email. Who decides between the competing versions? If the case is tried before a jury, it is the jury, not the judge, who must resolve the dispute.⁷ The judge’s role under Rule 104(a) is to evaluate whether a reasonable jury *could* find (more likely than not) either that the supervisor did, or did not, author the email. If either version is plausible, then the judge conditionally admits the email, but at the time it is introduced instructs the jury that if they find that the plaintiff has shown that the supervisor more likely than not authored the email, they may consider it as evidence and give it the weight that they feel it is entitled to. Contrastingly, if they find that the defendant has persuaded them that, more likely than not, he did not author the email, they must disregard it entirely, and give it no weight in their deliberations. The final decision about whether the email has been admitted (and can be considered by the jury) or excluded (and disregarded by the jury) must await the jury’s deliberation on the merits of the case. The judge makes a preliminary assessment of whether the evidence is one-sided or two, and if the latter, submits it to the jury for

⁷ Fed. R. Evid. 104(b) (1972) Advisory Note (“If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.”).

their decision. The issue of conditional relevance generated by disputed facts regarding the authenticity (and hence, relevance) of evidence is especially prevalent with digital evidence.

It is important for judges to distinguish between which of the scenarios listed above is presented to them when ruling on admissibility of digital evidence. For scenario one situations, the judge alone decides whether the proponent has laid a proper foundation to authenticate the digital evidence. Most often, the judge will consider whether one or more of the illustrations of how to authenticate found at Fed. R. Evid. 901(b)⁸ or 902⁹ has been shown.

For scenario two situations, the judge alone makes the decision whether to admit or exclude. In doing so, he must be careful not to let unparticularized and conclusory argument by the party objecting to the introduction of the digital evidence about what “might” or “could have happened” lead him to impose on the proponent of the evidence a burden of proof greater than that ordinarily required by Rule 104(a)—a showing that the evidence more likely than not is what it purports to be. It is a mistake for a judge to require the party introducing digital evidence to prove that no one other than the purported maker could have created the evidence if the introducing party has shown that, more likely than not, it was created by a particular person, unless there is evidence (not argument) that some other person could have done so.¹⁰ Finally, for scenario three situations, where the judge is faced with competing facts plausibly showing that the digital evidence was, and was not, created by the person claimed by the proponent, then she should allow the evidence to be admitted “conditionally” under Rule 104(b), and instruct the jury that if they find that the evidence that the person claimed to have created the evidence did not do so is more believable than the evidence that he did, they must disregard it and give it no weight in their deliberations.

Careful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a

⁸ For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person’s voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result).

⁹ Fed. R. Evid. 902 provides examples of self-authentication, where no extrinsic evidence or testimony is needed to authenticate. The following self-authentication rules may be helpful for digital evidence; 902(5) (A book, pamphlet, or other publication purporting to be issued by a public authority. Most public authorities have web sites and post publications relating to their fields of jurisdiction.); 902(6) (Printed material purporting to be a newspaper or periodical. Most newspapers and periodicals have “on line editions”, and this rule potentially is available to self-authenticate.); 902(11) and (12) (certified copy of domestic and foreign records of regularly conducted activities); proposed Rule 902(13) (certified copy of machine-generated information); and proposed Rule 902(14) (certified copy of computer generated or stored information).

¹⁰ Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) (“A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it ‘might’ have been created.”).

long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge. In the end, technical expertise is not needed. Rather, an awareness of the fundamental evidence rules governing admissibility and authentication of any evidence, whether digital or not, is all that is needed. And this Manual aims to provide illustrations to make the effort even easier.

III. Relevant Factors for Authenticating Digital Evidence

What follows are general guidelines and lists of relevant factors for authenticating the basic forms of digital evidence that have developed over the last 20 years. The lists of relevant factors do not purport to be exclusive. There is no attempt to weigh the factors, or to take a cumulative approach, as the importance of any factor will be case-dependent. And there is no intent to imply that all of the factors listed must be met before the proffered digital evidence can be found authentic.

In evaluating all the factors below, it is important to remember that the threshold for the court's determination of authenticity under Rule 901 is not high: "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so."¹¹ The possibility of alteration "does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents."¹²

Generally speaking, it will be a rare case in which an item of digital evidence *cannot* be authenticated. The question is whether the proponent is willing and able to expend the resources necessary to do so.¹³ The factors set forth below are intended to direct litigants to ways in which resources can be usefully spent on authenticating digital evidence --- and on ways to avoid such costs in certain situations.

¹¹ United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

¹² *Id.* at 40.

¹³ See Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is * * * an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.")

A. Emails

The authentication questions for email most commonly focus on whether the email was sent or received by the person whom the party claims sent or received it. There are a number of factors that will assist the proponent in establishing authenticity for either or both of these purposes. Among them are:

1. A witness with personal knowledge may testify to authenticity.¹⁴ Possibilities include:

- The author of the email in question testifies to its authenticity.¹⁵
- A witness testifies that s/he saw the email in question being authored/received by the person who the proponent claims authored/received it.¹⁶

2. Business Records. The custodian of records of a regularly conducted activity testifies to a foundation, or certifies, in accordance with Fed. R. Evid. 902(11) or (12), that an email satisfies the criteria of Fed. R. Evid. 803(6). It should be noted, however, that emails --- even of a business, do not automatically qualify as business records.¹⁷

¹⁴ See Fed. R.Evid. 901(b)(1).

¹⁵ See, e.g., *Anderson v. United States*, 2014 U.S. Dist. LEXIS 166799, at *13 (N.D. Ga. Dec, 2, 2014) (defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent; this was a sufficient showing of authenticity). See also *Citizens Bank & Trust v. LPS Nat'l Flood, LLC*, 2014 U.S. Dist. LEXIS 134933, at *12 (N.D. Ala. Sept. 25, 2014) (witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility).

¹⁶ *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)).

¹⁷ See, e.g., *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013):

While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n. 163 (S.D.N.Y. 2008).

It is probably fair to state that emails and social media postings will often be prepared too casually and irregularly to be admissible as business records. But this is not inevitably so, and again if the electronic communication does fit the admissibility requirements it is just as admissible as a hardcopy record.

3. Jury comparison with other authenticated emails.¹⁸

The authenticity of an email can be determined by the trier of fact by comparing the email in question with emails already authenticated and in evidence.¹⁹

4. Production in discovery. If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production may be a concession that the document is what the party asked for --- and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).²⁰ Authentication has also been found when an adversary produces in discovery a third party's email received by the producing party in the ordinary course of business, and the email is offered against the adversary.²¹

5. Circumstantial Evidence.²²

Applying Rule 901(b)(4) --- covering authentication on the basis of “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item” --- requires consideration of the “totality of circumstantial evidence.”²³ While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. “This rule is one of the most frequently used to authenticate e-mail and other electronic records.”²⁴

¹⁸ Fed.R.Evid. 901(b)(3).

¹⁹ *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006)(“Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with ‘specimens which have been authenticated’—in this case those emails that have been independently authenticated.”).

²⁰ See, e.g., *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) (“[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email’s authenticity”).

²¹ *Broadspring, Inc. v. Congoo, LLC*, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties’ statements must separately be satisfied).

²² Fed.R.Evid. 901(b)(4).

²³ *United States v. Henry*, 164 F.3d 1304, 1305 (10th Cir. 1999).

²⁴ *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

Set forth below are factors that can, alone or in conjunction (depending on the case), establish authenticity. Different circumstantial factors may be relevant depend on whether the authenticity dispute is over whether a person sent or received the email.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in an email can be sufficient to authenticate the email as having been sent by a particular person:

- the purported author’s known email address;²⁵
- the author’s electronic signature;
- the author’s name;²⁶
- the author’s nickname;²⁷
- the author’s screen name;
- the author’s initials;
- the author’s moniker;²⁸
- the author’s customary use of emoji or emoticons;
- the author’s use of the same email address elsewhere;
- a writing style similar or identical to the purported author’s manner of writing;
- reference to facts only the purported author or a small subset of individuals including

²⁵ See, e.g., *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (an email identified as originating from the defendant’s email address and that automatically included the defendant’s address when the reply function was selected was considered sufficiently authenticated).

²⁶ See, e.g., *United States v. Fluker*, 698 F.3d 988, 999–1000 (7th Cir. 2012) (emails sent from a “More Than Enough, LLC” (MTE) email address were sufficiently authenticated when the purported author was an MTE board member and “[i]t would be reasonable for one to assume that an MTE Board member would possess an email address bearing the MTE acronym.”); *Safavian*, 435 F. Supp. 2d at 40 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

²⁷ *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (use of fake name commonly used by defendant).

²⁸ See *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user “Stavron” identified himself as the defendant and shared his email address was used to authenticate subsequent emails from that email address).

the purported author would know;²⁹

- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of the author or items of importance to the author (e.g., car, pet); the author’s personal information, such as a cell phone number, social security number, etc.³⁰

Factors outside the content of the email itself can establish authenticity of authorship circumstantially. For example:

- a witness testifies that the author told him to expect an email prior to its arrival;³¹
- the purported author acts in accordance with, and in response to, an email exchange with the witness;
- the author orally repeats the contents soon after the email is sent;
- the author discusses the contents of the email with a third party;
- the author leaves a voicemail with substantially the same content.

Forensic information may be used to support a circumstantial showing that the email was sent by the purported author. Forensic sources include:

- an email’s hash values;³²

²⁹ See *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (messages that referred to facts only the defendant was familiar with were ruled admissible).

³⁰ *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 674–675, 941 N.E.2d 1143, 1147 (2011) (“In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same”) (citing Mass. G. Evid. § 901(b)(6)).

³¹ *State v. Ruiz*, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901) (witness testified to knowing the defendant authored an email because the defendant told him to expect an email relating to arson—the contents of the email subsequently received).

³² A hash value is “[a] unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. ‘Hashing’ is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp

- testimony from a forensic witness that an email issued from a particular device at a particular time.³³

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating an email as having been received by a particular person:

- a reply to the email was received by the sender from the email address of the purported recipient;
- the subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email;
- subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email;
- the email was received and accessed on a device in the possession and control of the alleged recipient.

Finally, while it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar questions (of possible hacking) could be raised with traditional documents. Therefore, there is no need for separate rules of authenticity for emails. And importantly, the mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated.³⁴

used in paper document production.” Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center, 2007 at 24. See also *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007) (noting that “[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4).”).

³³ *Lorraine*, 241 F.R.D. 534 at 547–48 (because an electronic message’s metadata (including an email’s metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4)).

³⁴ See, e.g., *Interest of F.P.*, 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a “signature can be forged; a letter can be typed on another’s typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.”).

B. Text Messages

Text messages are not different in kind from email and so the rules and guidelines on authentication are similar. Here are some of the relevant factors for authenticating text messages:³⁵

1. A witness with personal knowledge may testify to authenticity. Possibilities include:

- The author of the text in question testifies to its authenticity.
- A witness testifies that s/he saw the text in question being authored/received by the person who the proponent claims authored/received it.³⁶

2. Jury comparison with other authenticated texts.

3. Production in discovery.

4. Establishing that an electronic system of recordation records accurately. This process of illustration, authorized by Fed.R.Evid. 901(b)(9), can be useful if the objection to authenticity is that the original text has been altered in some way. For example, in *United States v. Kilpatrick*, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012), the government sought to authenticate text messages sent from two SkyTel pages, each belonging to one of the defendants respectively. A SkyTel records-custodian verified that the text messages the government offered had not been and could not be edited in any way because when the messages are sent from the devices belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this showing was sufficient, under Fed. R. Evid. 901(b)(9), to establish authenticity over a claim that the messages had been altered.

It should be noted that the showing as to the process or system in *Kilpatrick* will be able to be made by a certificate of the foundation witness --- substituting for live testimony --- under an amendment to the Evidence Rules that is scheduled to take effect on December 1, 2017.³⁷

³⁵ The case law cited under the various factors discussed in the section on emails should be equally useful as supportive citations for the similar (or identical) factors supporting authentication of texts.

³⁶ *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence").

³⁷ The proposed amendments would add two new subdivisions to Rule 902, which provides for various forms of self-authentication. The proposals read as follows:

5. Circumstantial evidence.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in a text can be sufficient to authenticate the text as having been sent by a particular person:

- the purported author's ownership of the phone or other device from which the text was sent;³⁸
- the author's possession of the phone;
- the author's known phone number;
- the author's name;
- the author's nickname;³⁹
- the author's initials;
- the author's moniker;
- the author's name as stored on the recipient's phone;

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

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

It is the proposed Rule 902(13) that would allow proof by certification in a case like *Kilpatrick*.

³⁸ United States v. Mebrtatu, 543 F. App'x 137, 140–141 (3d Cir. 2013) (phone was in the purported sender's possession; phone contains texts sent to and signed with the purported author's first name, including texts from her boyfriend professing love and other texts whose content links them to her; texts sufficiently authenticated as hers).

³⁹ United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166, at *11 (E.D. Mich. Aug. 7, 2012) (the court outlined a number of distinctive characteristics that established the authenticity of the pager and cellphone text messages at issue; among these factors were the defendants' use of their names (Kilpatrick) and nicknames ("Zeke" or "Zizwe") to sign the messages they sent).

- the author's customary use of emoji or emoticons;
- the author's use of the same phone number on other occasions;
- a writing style similar or identical to the purported author's manner of writing;
- reference to facts only the purported author or a small subset of individuals including the purported author would know;
- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of author or items of importance to author (*e.g.*, car, pet); author's personal information, such as contact information, social security number, etc.; receipt of messages addressed to the author by name or reference.⁴⁰

Factors outside the content of the text itself can establish authenticity of authorship circumstantially. For example:

- a witness testifies that the author told him to expect a text message prior to its arrival;
- the purported author acts in accordance with a text exchange;
- the purported author orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating a text as having been received by a particular person:

⁴⁰ United States v. Benford, 2015 U.S. Dist. LEXIS 17046, at *16–*17 (W.D. Okla. Feb. 12, 2015) (in establishing that text messages from a device were authored by the defendant, the prosecution pointed to evidence that contact information for the defendant's brother and girlfriend were saved on the phone and that incoming messages addressed the defendant by name); United States v. Ellis, 2013 U.S. Dist. LEXIS 73031, at *3–*4 (E.D. Mich. May 23, 2013) (the defendant's possession of a cellphone that received messages addressed to him by name or moniker was, among other circumstantial evidence (such as his possession of the device), sufficient to establish that he was the author of outgoing text messages from the same phone).

- a reply to the text message was received by the sender from the purported recipient's phone number;
- the subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents;
- subsequent communications from the recipient reflect his or her knowledge of the contents of the sent text message;
- the text message was received and accessed on a device in the possession and control of the alleged recipient.

C. Chatroom and Other Social Media Conversations

By definition, chatroom postings and other social media communications are made by third parties, not the owner of the site. Further, chatroom participants usually use screen names (pseudonyms) rather than their real names. Thus the authenticity challenge is to provide enough information for a juror to believe that the chatroom entry or other social media communication is made by a particular person.

Simply to show that a posting appears on a particular user's webpage is insufficient to authenticate the post as one written by the account holder. Third party posts, too, must be authenticated by more than the names of the purported authors reflected on the posts. Evidence sufficient to attribute a social media or chat room posting to a particular individual may include, for example:

- testimony from a witness who identifies the social media account as that of the alleged author, on the basis that the witness on other occasions communicated with the account holder;
- testimony from a participant in the conversation based on firsthand knowledge that the transcript fairly and accurately captures the conversation;⁴¹
- evidence that the purported author used the same screen name on other occasions;
- evidence that the purported author acted in accordance with the posting (*e.g.*, when a meeting with that person was arranged in a chat room conversation, he or she attended);
- evidence that the purported author identified himself or herself as the individual using the screen name;
- an admission that the computer account containing the chat is that of the purported author;⁴²
- use in the conversation of the customary signature, nickname, or emoticon associated with the purported author;

⁴¹ See, e.g., *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012) (internet chat authenticated by credible testimony of one participant); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (“English, as the other participant in the year-long ‘relationship,’ had direct knowledge of the chats. Her testimony could sufficiently authenticate the chat log presented at trial”).

⁴² *United States v. Manley*, 787 F.3d 937, 942 (8th Cir. 2014) (“the government presented testimony of a law enforcement officer who helped to execute the search warrant, and the officer testified that the defendant admitted adopting the username ‘mem659’ for his computer account. The username for his computer account was the same one used in some of the chats.”).

- disclosure in the conversation of particularized information that is either unique to the purported author or known only to a small group including the purported author;
- evidence that the purported author had in his or her possession information given to the person using the screen name;
- evidence from the hard drive of the purported author's computer reflecting that a user of the computer used the screen name in question;
- evidence that the chat appears on the computer or other device of the account owner and purported author;
- evidence that the purported author elsewhere discussed the same subject matter;

D. Internet, Websites, etc.

Websites present authenticity issues because they are dynamic. If the issue is what is on the website at the time the evidence is being proffered, then there are no authenticity issues because the court and the parties can simply access the site and see what the website says.⁴³ But proving up historic information on the website raises the issue of whether the information was actually posted as the proponent says it was.⁴⁴

1. Rule 901 authentication standards as applied to dynamic website information.

In applying Rule 901 authentication standards to website evidence, there are three questions that must be answered:

- What was actually on the website?
- Does the exhibit or testimony accurately reflect it?
- If so, is it attributable to the owner of the site?

A sufficient showing of authenticity of dynamic website information is usually found if a witness testifies—or certifies in compliance with a statute or rule—that:

- the witness typed in the Internet address reflected on the exhibit on the date and at the time stated;
- the witness logged onto the website and reviewed its contents; and
- the exhibit fairly and accurately reflects what the witness perceived.⁴⁵

⁴³ Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U.L.Rev. 1137, 1157 (2014) (“It is hard to imagine many good faith disputes about whether proffered evidence really is a page from Google Maps or WebMD. Malfeasance would be foolish. The opposing party can simply go to the website to verify its authenticity, and if fraud is detected, the consequences for the offering party are dire.”). See also *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 2015 U.S. Dist. LEXIS 115610, at*21-22 (S.D.N.Y. Aug. 31, 2015) (confirming that authenticity of existing website information could be determined by conducting a “basic Internet search.”).

⁴⁴ See, e.g., *Adobe Sys. v. Christenson*, 2011 U.S. Dist. LEXIS 16977, at *29 (D. Nev. Feb. 7, 2011) (“[a]lthough Defendants can probably determine, with little difficulty, whether a current Google search for the search terms ‘software surplus’ provides links on the first page [of a website], this would not prove that such a search would have resulted in such a link at a prior point in time.”).

⁴⁵ See, e.g., *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) (“To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately

The exhibit should bear the Internet address and the date and time the webpage was accessed and the contents downloaded.⁴⁶

When evaluating the proffer, the court may consider the following factors as circumstantial indications that the information was posted by the owner of the site, under Rule 901(b)(4):

- distinctive website design, logos, photos, or other images associated with the website or its owner;⁴⁷
- the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;
- the owner of the website has elsewhere published the same contents, in whole or in part;
- the contents of the webpage have been republished elsewhere and attributed to the website; and
- the length of time the contents were posted on the website.

Other possible means of authenticating website postings are as follows:

- testimony of a witness who created or is in charge of maintaining the website. That witness may testify on the basis of personal knowledge that the printout of a webpage came from the site.⁴⁸

reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity”); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) (“[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time”); *Rivera v. Inc. Village of Farmingdale*, 29 F. Supp. 3d 121 (E.D.N.Y. 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness “personally downloaded all of the postings and confirmed the identities of the key posters ... [suffices to show] a ‘reasonable likelihood’ that they were actually posted on the internet by members of an online community comprised of the Village’s own residents”).

⁴⁶ See, e.g., *Foreword Magazine, Inc. v. OverDrive Inc.*, 2011 U.S. Dist. LEXIS 125373, at *8–*11 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given “other indicia of reliability (such as the Internet domain address and the date of printout)”).

⁴⁷ See, e.g., *Metcalf v. Blue Cross Blue Shield of Mich.*, 2013 U.S. Dist. LEXIS 109641 (D. Or. Aug. 5, 2013). (authenticity of website information of an organization’s purported website was established by logos or headers matching those of the organization).

- a printout obtained from the Internet Archive’s “wayback machine.” The Internet Archive documents and stores all websites and the “wayback machine” can retrieve website information from any particular time.⁴⁹ Some courts require a witness from the Internet archive to testify to establish that the “wayback machine” employs a process that produces accurate results under Rule 901(b)(9).⁵⁰ Other courts, as discussed infra, take judicial notice of the reliability of the “wayback machine.”

The opponent of the evidence is free to challenge authenticity of dynamic website data by adducing facts showing that the exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the ostensible owner of the site. There may be legitimate questions concerning the ownership of the site or attribution of statements contained on the site to the ostensible owner.

2. Self-Authenticating Website Data

Under Fed. R. Evid. 902, three types of webpage exhibits are self-authenticating --- meaning that a presentation of the item itself is sufficient to withstand an authenticity objection from the opponent.

a. Government Websites

⁴⁸ *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 U.S. Dist. LEXIS 28873 (M.D. Fla. May 12, 2006) (web master’s testimony can authenticate a printout).

⁴⁹ Another example of a website that allows users to access archival copies of webpages is www.cachedpages.org, which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

⁵⁰ See, e.g., *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740, at 6* (N.D. Ill. Oct. 15, 2004) (approving the use of the Internet Archive’s “wayback machine” to authenticate websites as they appeared on various dates relevant to the litigation). Compare *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (court was unwilling to accept a screenshot from the wayback machine into evidence without testimony from a representative of the Internet Archive confirming its authenticity).

Under a proposed amendment to the Federal Rules of Evidence, the reliability of the wayback machine process could be established by a certificate of the Internet Archive official, rather than in-court testimony). See Proposed Rule 902(13) (allowing proof of authenticity of electronic information produced by a process leading to an accurate result to be established by the certificate of a knowledgeable witness). That proposed amendment is scheduled to become effective on December 1, 2017.

Under Rule 902(5) data on governmental websites are self-authenticating.⁵¹ As discussed below, courts regularly take judicial notice of these websites.

b. Newspaper & Periodical Websites

Under Rule 902(6) (*Newspapers and Periodicals*), “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating. This includes online newspaper and periodicals, because Rule 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.⁵²

c. Websites Certified as Business Records

Rules 902(11) and (12) render self-authenticating business (organizational) records that are certified as satisfying Rule 803(6) by “the custodian or another qualified person.” Exhibits extracted from websites that are maintained by, for, and in the ordinary course of, a business or other regularly conducted activity can satisfy this rule.⁵³

3. Authenticating the date of information posted on a website.

In some cases, a party may need to show not only that a posting was made on a website, but also the date on which the information was generated --- this can be a distinct question from establishing what the website looked like at a particular time, which can be shown by the methods discussed above. Assume, for example, that a video is posted on YouTube on January 1, 2016. If the proponent wants to prove that it was posted on that day, this can be done by a person with knowledge, circumstantial evidence, etc. It is a different question if the proponent needs to show that the information itself was *generated* on a certain day. That will not be shown by proving it was posted on a certain date. For example, in *Sublime v. Sublime Remembered*, 2013 U.S. Dist. LEXIS 103813 (C.D. Cal. July 22, 2013), the plaintiffs brought suit against the defendant for violating a court order prohibiting defendant from performing songs belonging to the plaintiffs. As evidence, the plaintiffs sought to admit a YouTube video of the defendant

⁵¹ See, e.g., *Williams v. Long*, 585 F. Supp.2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are self-authenticating).

⁵² See, e.g., *White v. City of Birmingham*, 2015 U.S. Dist. LEXIS 39187 (N.D. Ala. Mar. 27, 2015) (noting sua sponte that news articles from Huntsville Times website (AL.com) “could be found self-authenticating at trial”).

⁵³ See, e.g., *United States v. Hassan*, 742 F.3d 104, 132–134 (4th Cir. 2014) (Facebook posts, including YouTube videos were self-authenticating under Rule 902(11) where accompanied by certificates from Facebook and Google custodians “verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities”); *Randazza v. Cox*, 2014 U.S. Dist. LEXIS 49762 (D. Nev. April 10, 2014) (videos posted to YouTube “are self-authenticating as a certified domestic record of a regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception.”).

performing the prohibited music. The court ruled that the video was not properly authenticated without evidence that it was recorded *after* the court order was issued. The mere fact that it was *posted* after the court order was issued was not enough to establish that the video was what the proponent said it was --- performance of the music after the court order was entered.

Establishing that a video (or any other kind of information posted on a website) was *prepared* on --- or before or after --- a certain date thus presents a separate question of authenticity. But it is a question that can be addressed through the same factors discussed above: for example, by a person with personal knowledge, a forensic expert, and/or circumstantial evidence. Illustrative is *United States v. Bloomfield*, 591 Fed.Appx. 847, 848-49 (11th Cir. 2014), in which the defendant was convicted of felon-firearm possession. The government offered a YouTube video which showed the defendant discharging an AR-15 rifle in front of Fowler Firearms. The date that the video was made was obviously critical. If it was made before the defendant was a convicted felon, then it depicted no crime. The government was not required, necessarily, to prove that the video was taken on a specific day, but it was required to establish that the video was taken after the defendant was convicted of a felony. And the date that the video was posted on YouTube was not the relevant date. The court found the date was properly authenticated in the following passage:

- Fowler Firearms's manager testified that Broomfield was a Fowler Firearms member, that on January 21, 2011, Broomfield purchased two boxes of PMC .223 ammunition, and that he had not purchased that ammunition at any other time. Dezendorf stated that the only firearm Fowler Firearms rented to customers at the time that used PMC .223 ammunition was the AR-15 rifle.
- An employee who had worked at Fowler Firearms for ten years testified that he could discern the approximate date the video was taken. He explained that the video showed side deflectors and lights on the gun range, which Fowler Firearms had installed in late 2010 or early 2011. He also testified that Fowler Firearms paints its floors and walls at the beginning of the season, and the freshly-painted floor and walls seen in the video indicated that the footage was filmed close to the start of 2011.
- A witness who operated a maintenance business that provided repair and maintenance to Fowler Firearms testified that he installed the lighted baffles shown in the video, in late September or early October of 2010.

All this was more than enough to indicate that the video was taken around the beginning of 2011 --- post-dating the defendant's felony status --- and so depicted the crime of felon-firearm possession.

E. Social Media Postings

“Social media” is defined as “forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content.”⁵⁴ Parties have increasingly sought to use social media evidence to their advantage at trial. A common example would be a picture or entry posted on a person’s Facebook page, that could be relevant to contradict that person’s testimony at trial. If the entry is challenged for authenticity, the proponent must present a prima facie case that the evidence is what the party says it is—e.g., that it is in fact a posting on the person’s Facebook page. If the goal is to prove that the page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person’s name, or that the person is pictured on the post.⁵⁵ That is because someone can create a Facebook or other social media page in someone else’s name. Moreover, one person may also gain access to another’s account.

What more must be done to establish authenticity of a social media page? Most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.⁵⁶

⁵⁴ Definition of Social Media, Merriam-Webster, <http://www.merriam-webster.com/dictionary/social%20media#> (last visited January 16, 2016).

⁵⁵ See, e.g., *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014), where the court held that a page on the Russian version of Facebook was not sufficiently authenticated simply by the fact that it bore the name and picture of the purported “owner” Zhylytsou:

It is uncontroverted that information about Zhylytsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku’s testimony about him. But there was no evidence that Zhylytsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhylytsou’s Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhylytsou. Otherwise, how could the statements in the flyer be attributed to him?

Essentially the court in *Vayner* held that a Facebook page is not self-authenticating. Compare *United States v. Encarnacion-LaFontaine*, 2016 WL 611925 (2d Cir. Feb. 16, 2016)(threatening Facebook posts were properly authenticated where “the Government introduced evidence that (1) the Facebook accounts used to send the messages were accessed from IP addresses connected to computers near Encarnacion’s apartment; (2) patterns of access to the accounts show that they were controlled by the same person; (3) in addition to the Goris threats, the accounts were used to send messages to other individuals connected to Encarnacion; (4) Encarnacion had a motive to make the threats, and (5) a limited number of people, including Encarnacion, had information that was contained in the messages.”).

⁵⁶ *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (the trial court did not abuse its discretion in admitting Facebook pages purportedly maintained by two of the defendants; the trial court properly determined that the prosecution had satisfied its burden under Rule 901(a) “by tracking the Facebook pages and Facebook accounts to Hassan’s and Yaghi’s email addresses via internet protocol addresses”); *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (Facebook account linked to the defendant’s email).

*Other factors that can be relied upon to support authentication of social media postings include the following:*⁵⁷

- testimony from the purported creator of the social network profile and related postings;
- testimony from persons who saw the purported creator establish or post to the page;
- testimony of a witness that she often communicated with the alleged creator of the page through that account;
- expert testimony concerning the results of a search of the social media account holder's computer hard drive;⁵⁸
- testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the purported author;
- testimony regarding the account holder's exclusive access to the originating computer and social media account;
- information from the social media network that links the page or post to the purported author;
- testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it;
- expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access;
- production pursuant to a document request;
- whether the purported author knows the password to the account, and how many others know it as well;
- that the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc., including:

⁵⁷ See generally Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013); Richard Raysman and Peter Brown, *Authentication of Social Media Evidence*, New York Law Journal, November 11, 2011, p. 3.

⁵⁸ Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 468 (2013) ("A computer forensic expert can frequently authenticate the maker of social media content. Obviously, you will need to retain the proper expert and ensure that he or she has enough time and information to make the identification. Advance planning is essential, and be mindful of the potentially substantial cost.").

- ¾ nonpublic details of the purported author's life;
- ¾ other items known uniquely to the purported author or a small group including him or her;
- ¾ references or links to, or contact information about, loved ones, relatives, co-workers, others close to the purported author;
- ¾ photos and videos likely to be accessed by the purported author;
- ¾ biographical information, nicknames, not generally accessible;
- ¾ the structure or style of comments that are in the style of the purported author;
- ¾ that the purported author acts in accordance with the contents of the page or post.

Finally, a social media post meeting the foundational requirements of a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11). While this may not be enough to authenticate the *identity* of the person posting, it will be enough to establish that the records were not altered in any way after they were posted.⁵⁹

⁵⁹ See, e.g., *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014):

The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers.

III. Judicial Notice of Digital Evidence

This Best Practices Manual has discussed the many ways that new forms of digital evidence might be authenticated. Almost all of these methods require expenditure of resources. Courts and parties have begun to realize that some of this new digital evidence has reached the point of being an undisputed means of proving a fact. In these circumstances, judicial notice may be used to alleviate the expenditure of resources toward authentication.

Under Fed. R. Evid. 201(b) a court may judicially notice a fact if it is not subject to reasonable dispute. An example of a court taking judicial notice of a fact obtained through an electronic process is found in *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013). The defendant in a bank robbery prosecution challenged the admissibility of GPS data that was obtained from a GPS tracker that the teller placed in the envelope of stolen money. The trial court took judicial notice of the accuracy and reliability of GPS technology. The court of appeals found no error:

We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology's accuracy.

Another common example of judicial notice of digital information is that courts take judicial notice of distances, locations, and the physical contours of an area by reference to Google Maps.⁶⁰

What follows are some examples of judicial notice of digital information.

1. Government Websites. Judicial notice may be taken of postings on government websites,⁶¹ including:

⁶⁰ See, e.g., *United States v. Burroughs*, 810 F.3d 833, 835, n.1 (D.C.Cir. 2016) (“We grant the government’s motion to take judicial notice of a Google Map. It is a ‘source whose accuracy cannot be reasonably questioned,’ at least for the purpose of identifying the area where Burroughs was arrested and the general layout of the block.”); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (relying on Google Maps to determine the distance between two cities; the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed. R. Evid. 201(b)(2).). See also *Cline v. City of Mansfield*, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47 pm on a particular date according to www.timeanddate.com).

⁶¹ See, e.g., *United States v. Head*, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) (“The court may take judicial notice of information posted on government websites as it can be ‘accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’”); *Puerto Rico v. Shell Oil Co. (In re MTBE Prods. Liab. Litig.)*, 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) (“Courts routinely take judicial

- Federal, state, and local court websites.⁶²
- Federal, state, and local agency, department and other entities' websites.⁶³
- Foreign government websites.⁶⁴
- International organization websites.⁶⁵

2. Non-Government Websites. Generally, courts are reluctant to take judicial notice of non-governmental websites because the Internet “is an open source” permitting anyone to “purchas[e] an internet address and create a website” and so the information recorded is subject to dispute.⁶⁶ A few websites, however, as discussed above, have become a part of daily life — their accuracy is both objectively verifiable and actually verified millions of times a day. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

Examples of Information Found Authentic on Non-Governmental Websites Through Judicial Notice.

- Internet maps (*e.g.*, Google Maps, MapQuest).
- Calendar information.⁶⁷

notice of data on government websites because it is presumed authentic and reliable”).

⁶² See, *e.g.*, *Feingold v. Graff*, 516 F. App'x 223, 226 (3d Cir. 2013).

⁶³ See, *e.g.*, *Lawrence v. Fed. Home Loan Mortg. Corp.*, 2015 U.S. Dist. LEXIS 40012 (W.D. Tex. Mar. 30, 2015) (federal government's agreement with national bank as posted on government website); *Flores v. City of Baldwin Park*, 2015 U.S. Dist. LEXIS 22149 (C.D. Cal. Feb. 23, 2015) (municipal police department website).

⁶⁴ See, *e.g.*, *United States v. Broxmeyer*, 699 F.3d 265, 296 (2d Cir. 2012) (websites of governments of Vietnam and Brazil).

⁶⁵ See, *e.g.*, *Kirtsang v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1367 (2013) (World Bank website).

⁶⁶ *United States v. Kane*, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

⁶⁷ See, *e.g.*, *Tyler v. United States*, 2012 U.S. Dist. LEXIS 184007, at *9–*10 n.6 (N.D. Ga. Dec. 6, 2012); *Local 282, Int'l Bhd. of Teamsters v. Pile Found. Constr. Co.*, 2011 U.S. Dist. LEXIS 86644, at *17–*18 n.5 (E.D.N.Y. Aug. 5, 2011).

- Newspaper and periodical articles.⁶⁸
- Online versions of textbooks, dictionaries, rules, charters.⁶⁹

Most non-Governmental websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. Courts have declined requests to take judicial notice of the contents of Wikipedia entries,⁷⁰ except for the fact that the contents appear on the site as of a certain date of access.⁷¹

3. Wayback Machine. Archived versions of websites as displayed on the “wayback machine” (www.archive.org) are frequently the subject of judicial notice,⁷² but this is not always the case.⁷³ Note that it is only the contents of the archived pages that may warrant judicial notice—the dates assigned to archived pages may not apply to images linked to them, and more generally, links on archived pages may direct to the live web if the object of the old link is no longer available.

⁶⁸ See, e.g., *Ford v. Artiga*, 2013 U.S. Dist. LEXIS 106805, at *19 n.5 (E.D. Cal. July 30, 2013); *HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012).

⁶⁹ See, e.g., *United States v. Mosley*, 672 F.3d 586, 591 (8th Cir. 2012) (PHYSICIANS’ DESK REFERENCE); *Shuler v. Garrett*, 2014 U.S. App. LEXIS 2772, at *7 (6th Cir. Feb. 14, 2014) (OXFORD ENGLISH DICTIONARY); *Dealer Computer Servs. v. Monarch Ford*, 2013 U.S. Dist. LEXIS 11237, at *11 & n.3 (E.D. Cal. Jan. 25, 2013) (American Arbitration Association rules); *Morgan Stanley Smith Barney LLC v. Monaco*, 2014 U.S. Dist. LEXIS 149419 (D. Colo. Aug. 26, 2014) (FINRA rules); *Famous Music Corp. v. 716 Elmwood, Inc.*, 2007 U.S. Dist. LEXIS 96789, at *12–*13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP).

⁷⁰ See, e.g., *Blanks v. Cate*, 2013 U.S. Dist. LEXIS 11233, at *8 n.4 (E.D. Cal. Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry “as such information is not sufficiently reliable”); *Stein v. Bennett*, 2013 U.S. Dist. LEXIS 126667, at *20-21 n.10 (M.D. Ala. Sept. 5, 2013) (“Wikipedia is not a source that warrants judicial notice”); *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) (“The Court declines Plaintiff’s request to take judicial notice of the Wikipedia definition of Parkinson’s Disease because the internet is not typically a reliable source of information”).

⁷¹ See, e.g., *McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, at *4-5 n.3 (C.D. Cal. Jan. 13, 2014) (“While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein”).

⁷² See, e.g., *Under a Foot Plant Co. v. Exterior Design, Inc.*, 2015 U.S. Dist. LEXIS 38190 (D. Md. Mar. 25, 2015) (“District courts have routinely taken judicial notice of content from The Internet Archive”).

⁷³ See, e.g., *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (proffered Wayback Machine printouts not authenticated absent certification from representative of InternetArchive.org).

APPENDIX

Federal Rules of Evidence Most Commonly Used to Establish Authenticity of Digital Evidence

Rule 901. Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

* * *

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

* * *

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

Rule 902. Evidence That Is Self-Authenticating

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

* * *

- (5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

* * *

- (11) ***Certified Domestic Records of a Regularly Conducted Activity.***

The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

- (12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a

criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Proposed Additions to Rule 902, Projected Effective Date December 1, 2017:

(13) Certified Records Generated by an Electronic Process or System.

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

(14) Certified Data Copied from an Electronic Device, Storage Medium,

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

Rule 201. Judicial Notice of Adjudicative Facts

- (a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
- (1) is generally known within the trial court's territorial jurisdiction; or
 - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) **Taking Notice.** The court:
- (1) may take judicial notice on its own; or
 - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) **Timing.** The court may take judicial notice at any stage of the proceeding.

* * *

TAB 2D

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29, 2016

Alexandria, Virginia

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

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten (by telephone)
Hon. John A. Woodcock
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James Dever, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Zoe Oreck, American Association for Justice
Susan Steinman, American Association for Justice
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Jayme Herschkopf, Supreme Court Fellow
Derek Webb, Law Clerk to Judge Sutton

I. Opening Business

Approval of Minutes

The minutes of the Fall, 2015 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January, 2016 meeting of the Standing Committee. The Evidence Rules Committee had no action items at the meeting. Judge Sessions reported to the Standing Committee about the Hearsay Symposium that the Committee had sponsored in the Fall of 2015. Ideas from that Symposium will be part of the Committee's agenda for the near future.

Departure of Committee Members

Judge Sessions and the entire Committee expressed regret that the terms of two valued Committee members --- Brent Appel and Paul Shechtman --- were ending. Both Brent and Paul were thanked for their stellar service to the Committee. Both stated their appreciation for the work of the Evidence Rules Committee, the quality of its decisionmaking, and the collegiality of the members.

II. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, a statement in the document is admissible under the exception for the truth of its contents. At the Spring, 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee proposed to eliminate Rule 803(16), with the expectation that old documents that are reliable could still be admitted as business records or under the residual exception, and also with the recognition that many documents currently offered under Rule 803(16) could be admitted as party-opponent statements or for the non-hearsay purpose of notice.

The Committee's proposal to abrogate Rule 803(16) was unanimously approved by the Standing Committee for release for public comment. Over 200 public comments were received, and a public hearing was held. Almost all the comment was negative. Most of the comments were to the effect that without the ancient documents exception, important documents in certain

specific types of litigation would no longer be admissible --- or would be admissible only by expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment included cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The commenters contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), and which would lead to more costs for proponents.

Many of the comments were duplicative, and some were mistaken about the consequences of the change proposed. For example, some of the commenters argued that the amendment would make it impossible to authenticate ancient documents --- but there is no proposal to amend the rules on authentication. Other commenters stated that the amendment would make it harder to prove that a defendant knew about the dangers of a product --- but if a document is offered for notice, it is not covered by the hearsay rule in the first place. Yet on the whole, the public comment established that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases.

At the meeting, the Committee was presented with three basic alternatives for responding to the public comment: 1) continue to propose the elimination of Rule 803(16), while adding to the Committee Note the Committee's expectation that the reliable hearsay in ancient documents would be admissible under the business records exception or the residual exception; 2) propose a limitation on, rather than elimination of, Rule 803(16); or 3) withdraw the amendment and try to find some way to monitor whether and when ESI is being offered under the ancient documents exception.

The Committee first decided that it was not appropriate to continue with the proposal to eliminate Rule 803(16) --- the public comment did raise concerns about the effect of the amendment and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comment also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used --- in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents --- such as CERCLA cases and cases involving title dispute in "rails to trails" litigation --- and that elimination of the ancient documents exception would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

The Committee next decided that the "do nothing" approach was not acceptable. The Committee unanimously believed that the ESI problem was real --- because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and

texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically --- that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remained convinced that it was appropriate and necessary to get out ahead of this problem --- especially because the use of the ancient documents exception is so difficult to monitor. (The FJC representative outlined to the Committee in detail how difficult it would be to conduct a targeted survey of judges and litigants on the use of ancient documents in litigation.) Moreover, the Committee adhered to its position that Rule 803(16) was simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable.

The Committee then moved to drafting alternatives that would limit rather than eliminate Rule 803(16). The alternatives provided by the Reporter, in response to the public comment, were:

- 1) “Grandfathering” – limiting the ancient documents exception to documents prepared before a certain date;
- 2) Adding a necessity requirement --- applying the exception only if the proponent shows that there is no other equally probative evidence to prove the point for which the ancient document is offered;
- 3) Limiting the exception to hardcopy;
- 4) Adding a provision that ancient documents would not be admissible if the opponent could show they were untrustworthy;
- 5) Extending the time period for ancient documents from 20 to 30 years; and
- 6) Adding a requirement, as in the California rule, that a statement in an ancient document would be admissible only if it has been acted on as true by someone with an interest in the matter (often referred to as a “reliance” requirement).

The Committee thoroughly discussed these alternatives. Some were easily rejected. Thus, limiting the exception to hardcopy was rejected because hardcopy might well be derived from ESI, while on the other hand, an old hardcopy document might be digitized --- and it would be nonsensical to provide that the old hardcopy would be admissible while the same document in digitized form would not. Extending the time period for ancient documents from 20 to 30 years amounted to “kicking the can down the road” because it would simply delay the inevitable decision for ten years --- resulting in two amendments to the same rule (or more than two as the can gets kicked further) where one should do. And adding a reliance requirement would limit the use of ancient documents in the very cases where they are now found necessary, because in many of these cases the plaintiff is introducing an old document precisely to show that a party

ignored the document; moreover, in many cases, the fact of reliance might well have to be *shown* by ancient documents.

Most of the discussion was about the remaining alternatives --- grandfathering, necessity, and trustworthiness burden-shifting. Ultimately the Committee decided that adding either a necessity requirement or a trustworthiness burden-shifting requirement to the rule would not sufficiently address the public concerns about additional costs in proving up old hardcopy documents. Adding either of these requirements would lead to challenges, *in limine* hearings, and difficult factual determinations about documents that were prepared long ago. The Committee concluded that the best result would be to turn back to its original concern --- the explosion of ESI --- and to leave the current use of ancient documents where it found it. That could only be done by an amendment that would allow the use of hearsay in ancient documents in all the cases in which they were currently being used, but to eliminate the exception going forward in order to prevent the use of Rule 803(16) as a safe harbor for unreliable ESI.

In discussions about the appropriate date for ending the ancient documents exception, the Committee considered several alternatives, and finally --- and unanimously --- decided that 1998 was a fair date. The Committee recognized, of course, that any cutoff date would have a degree of arbitrariness, but it also recognized that the ancient documents exception itself set an arbitrary time period for its applicability. The Committee determined that the cut-off date of January 1, 1998 would mean that the rule would not affect the admissibility of ancient documents in any of the existing cases that were highlighted in the public comment; also, 1998 was a fair date for addressing the rise of ESI.

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

After extensive discussion, the Evidence Rules Committee unanimously approved the following amendment to Rule 803(16), to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference:

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

The Committee determined that it was not necessary to send out the proposed amendment for a new round of public comment, as the amendment would not affect the application of the ancient documents exception in any of the cases discussed in any of the public comments. Moreover, a number of the public comments specifically suggested that a grandfathering provision would properly address the Committee's ESI-related concerns while not affecting the use of the exception in the cases in which it is needed and is currently being used.

Finally, the Committee reviewed and approved the proposed Committee Note, which emphasizes the following points:

- The amendment addresses the concern about ESI, and there is no effect on the current use of the exception for documents prepared before 1998.
- In cases involving matters such as latent diseases going forward --- i.e., using records prepared after January 1, 1998 --- the ancient documents exception should not be necessary because of the existence of reliable ESI, and the ability to admit the evidence under reliability-based exceptions such as Rules 803(6) and 807.
- The limitation of the ancient documents exception is not intended to provide a signal that old documents are somehow not to be admitted under other exceptions, particularly Rule 807.
- A document prepared before 1998 might subsequently be altered; to the extent that is so, the alterations would not qualify for admissibility under Rule 803(16).

The proposed Committee Note to the amendment to Rule 803(16), as unanimously approved by the Committee, reads as follows:

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

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

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

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

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the

original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

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

III. Proposed Amendments to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Spring 2015 meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person’s testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee’s proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed

amendment was issued for public comment. The public comment was sparse, but generally favorable. A few of the comments provided suggestions for additions to the Committee Note. And one comment, by professors, made an argument that Rule 902(13) is in tension with the Confrontation Clause.

At the meeting, the Committee, in response to the public comments, unanimously agreed to three changes to the Committee Notes:

- A clarification, in both Committee Notes, that the reference to the certification requirements of Rule 902(11) was only to the procedural requirements for a valid certification, and not to the information being certified in that rule. Under Rule 902(11), the content of the certification is an attestation that the admissibility requirements of the business records exception have been met. But the new proposals do not require, or permit, the witness's certification to attest to any aspect of admissibility other than authenticity.

- A minor clarification of the description of "hash value" in the Committee Note to Rule 902(14).

- New language in both Committee Notes --- suggested by the Federal Magistrate Judges Association --- observing that a challenge to the authenticity of electronic evidence may require advance access to technical information and that the need for such access should inform the notice requirements.

The Committee then discussed the concern raised by some professors that a certification made pursuant to Rule 902(13) might violate the defendant's right to confrontation in criminal cases. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz*. The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation --- a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause.

The Committee noted that even the professors agreed that Rule 902(14) presented no constitutional issue, because the certificate would state only that the electronic data is a true copy --- a process clearly permitted by *Melendez-Diaz*. As to Rule 902(13), the certification is a bit more complicated, because the witness may be attesting that the process leads to an accurate result; but that is no different than certifications under Rule 902(11), under which the affiant states that the record meets the reliability requirements of the business records exception. And these certificates have been uniformly held to be constitutional by the lower courts. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if

the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

After full discussion, the Committee unanimously voted to approve proposed Rules 902(13) and (14), and their proposed Committee Notes, to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference. The proposed amendments and Committee Notes provide as follows:

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

Committee Note

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

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

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

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

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

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

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

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

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

Committee Note

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

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

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

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

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

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is

proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

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

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

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was submitted to the Committee for its review and discussion.

The Committee reviewed the pamphlet and found that it would be very helpful to the bench and bar.

It was noted that there is still an issue as to whether the Advisory Committee should be listed as a co-author, or whether the attribution should be less direct --- such as some indication that it had been approved or supported by the Advisory Committee. Another possibility is that the Committee would not be referred to at all. The pamphlet will be submitted as an action item for the Standing Committee at its next meeting, so that the Standing Committee can determine how the Advisory Committee's role in the pamphlet should be described if at all.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- is an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

With this much agreed upon, the Committee considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide “reasonable written notice of an intent to offer evidence under” the specific rule, and to “make the substance of the evidence available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.” For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules.

For one thing, the template would result in a change to Rule 404(b) that would require the defendant to provide notice for “reverse 404(b)” evidence in a criminal case --- such a change should not be made simply for uniformity’s sake. For another, the “substance” requirement would probably constitute a tightening of the government’s disclosure obligations under Rule 404(b), which currently requires a disclosure of the “general nature” of the evidence --- again, such a change should not be made purely for uniformity’s sake, especially given the fact that Rule 404(b) covers a different kind of evidence than Rule 807. Finally, two of the notice provisions (404(b) and 609(b)) require notice to be provided “before trial” while the other two (807 and 902(11)) require notice to be provided “before the trial or hearing.” That difference is justified because the notice provisions in Rules 404(b) and 609(b) are likely to be invoked only

in the context of a trial, whereas Rules 807 and 902(11) might be invoked on summary judgment as well. It would be counterproductive to change two of these rules simply to provide uniformity.

After discarding the template, the Committee moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members were in favor written notice requirements. Rules 404(b) and 807 currently do not provide for written notice. **Committee members unanimously agreed that a written notice requirement should be added to Rule 807.** But the DOJ representative argued that there was no need to add a requirement of written notice to Rule 404(b), because the Department (the only litigant subject to the Rule 404(b) notice requirement) routinely provides notice in writing. The Committee agreed that there was no need to amend Rule 404(b) if that amendment would have no effect.

The Committee next discussed the Rule 807 requirement that the proponent disclose “the statement and its particulars, including the declarant’s name and address.” After discussion, the Committee determined that --- independent of any uniformity project --- this phrase should be amended. For one thing, the term “particulars” has led in some cases to petty disputes about the details of the notice provided. For another, the requirement that the proponent disclose the address of the declarant is nonsensical when the declarant is unavailable; it is unnecessary when the declarant is a person or entity whose address is known or can easily be determined; and it is problematic in cases in which disclosure of the address might raise security or privacy issues. **The Committee concluded unanimously that the requirement of disclosing an address should be deleted from Rule 807, and that the term “substance” should replace “particulars.”**

The Chair then observed that the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. In sum, it would be appropriate to propose all amendments to Rule 807 at one time.

The Committee further agreed that the proposed amendment to Rule 404(b) --- to delete the requirement that the defendant request notice --- should be held off until other amendments were ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee --- that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant’s name and address, -- including its~~

substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

The working draft of the Committee Note provides as follows:

The notice provision has been amended to make three changes in the operation of the Rule.

First, the Rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be otherwise obtained by the opponent, then the opponent can seek relief from the court.

Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has

shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is made during the trial, the general requirement that notice must be in writing need not be met.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

VI. Proposal to Expand the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility, and it could also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

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

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; and

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

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

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

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

Finally, the Committee decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

VII. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

At the Spring meeting, the Committee considered two possible ways to amend Rule 801(d)(1)(A) to provide for broader substantive admissibility of prior inconsistent statements. The current provision provides substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute that it was ever made. Several Committee members noted that it would often be costly and

distracting to seek to prove whether a prior inconsistent statement was made if there is no reliable record of it.

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.

The working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements provides as follows:

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

* * *

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial;

or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof that the witness made the statement is that it is video recorded. That is the safeguard provided by the amendment.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

VIII. Proposals to Amend Rule 803(2)

Four separate proposals have been made by academics for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule --- requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already requires the statement to be made while under the continuous influence of the startling event. The single case cited as problematic – *United States v. Napier* --- is one in which there is a new startling event, and the declarant made a statement that related not only to that new event but also to a previous startling event. Adding the word "continuous" would not change the result in that case. More importantly, the case is correctly decided because the statement was in fact made while the declarant was under the effect of the second startling event. Finally, even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language --- derived from the 2014 amendment to Rule 803(6) --- that would allow the court to exclude the statement if the opponent could show that the excited utterance was in fact untrustworthy. Another proposal was to add language --- derived from Rule 804(b)(3) --- that would require the proponent to show corroborating circumstances

clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2) --- consideration would have to be given to similar treatment for other exceptions that have been found controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2) --- specifically whether there is support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data supporting both of these premises. That is, social science data support the premises that 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2) --- or Rule 803(1), for that matter --- due to any reliability concerns.

IX. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. Similarly, a Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a). The Committee directed the Reporter to prepare a memorandum for the Spring meeting that would evaluate the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Reporter prepared the report for the Spring meeting. The report suggested that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible). The Committee, after deliberation, agreed with this assessment.

In the memorandum for the Committee, the Reporter raised as a lesser alternative a system in which the categorical hearsay exceptions were retained, but two changes could be made: 1) add a safety valve applicable to all the exceptions allowing a judge to exclude

otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. Such a system would attempt to address two oft-stated critiques about the hearsay exceptions: 1) that many of them admit unreliable evidence; and 2) that the categorical system does not adapt well to hearsay that is reliable but doesn't fit into exceptions.

But the Committee unanimously rejected the proposed alternative, on the ground that it would inject too much discretion into the system. At the Hearsay Symposium, the Committee heard loud and clear from the lawyers that rules were needed to provide guidance, stability and consistency. Allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency, making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee opted to consider modest changes to the residual exception, discussed above --- with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. Committee members recognized that the change to the residual exception would be in the nature of a tightrope walk, which is one of the reasons that a miniconference on the possible change would be so useful.

X. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a nolo contendere plea; and 2) misdemeanor convictions.

Judge Graber, a member of the Standing Committee, asked the Advisory Committee to consider whether these two limitations on the exception were justified --- if not, the proposal would be to eliminate those carve-outs and treat nolo contendere and misdemeanor convictions the same as other convictions under the Rule.

The Reporter prepared a memorandum, suggesting that the two limitations in Rule 803(22) were in fact justified. The Committee agreed with the Reporter's assessment as to both those limitations. The Committee's rationales were as follows:

1. The reason for the nolo contendere carve-out is that Rule 410 provides that evidence of a nolo *plea* is not admissible in a subsequent civil or criminal case. As the Ninth Circuit has stated, "Rule 410's exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006). It might be argued that allowing nolo pleas is bad policy, but consideration of that question is beyond the scope of

evidence rulemaking. Assuming that allowing nolo pleas is substantively correct, then the decision made to protect them as a means of encouraging compromise in Rule 410 is valid, and that policy should not be undermined by allowing admission of the facts supporting the conviction under Rule 803(22).

2. The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. One Committee member pointed out that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail. Another member pointed out that if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel; thus a fair number of misdemeanor convictions are imposed without the defendant having a lawyer. Committee members recognized that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) is not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

The Committee voted unanimously not to proceed with an amendment to Rule 803(22).

XI. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Reporter informed the Committee of a law review article that advocated elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Reporter stated that before writing up a memorandum on the subject for the next meeting, he wished to get the Committee's preliminary reaction to eliminating the subdivision, as it presented a question of process: because Rule 704(b) was directly enacted by Congress, would it be appropriate to propose its elimination?

The Committee determined that two special circumstances applied that should counsel caution: 1) The proposal was to eliminate the exception entirely, as opposed to making changes that might improve the rule; and 2) Rule 704(b) was part of the Insanity Defense Reform Act --- a broad statutory overhaul of the insanity defense; because Rule 704 (b) was part of an integrated approach, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence.

Consequently, the Committee unanimously concluded that it would not proceed with the proposal to eliminate Rule 704(b).

XII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person’s presence --- for example, by a tweet or Facebook post.

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Spring meeting, the Reporter submitted, for the Committee’s information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

XIII. Crawford Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter’s memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court’s muddled decision in *Williams v. Illinois*: meaning that courts

are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. And the fact that a new appointment to the Court might affect the development of the law of confrontation is another reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

XIV. Next Meeting

The location and date of the next meeting is yet to be determined.

Respectfully submitted,

Daniel J. Capra

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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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WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: May 18, 2016

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

- (1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term “supersedeas bond”;
- (2) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge’s disqualification;
- (3) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number; and

- (4) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

Part III of this memorandum presents several information items. One item concerns whether Appellate Rules 26.1 and 29(c) should require litigants to make additional disclosures to aid judges in deciding whether to recuse themselves.

Detailed information about the Committee’s activities can be found in the attached draft of the minutes of the April meeting and in the attached agenda. The Committee has scheduled its next meeting for October 13-14, 2016, in Washington, D.C. Judge Neil Gorsuch will preside as the new chair of the Advisory Committee.

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term “supersedeas bond” to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: “If an appeal is taken, the appellant may obtain a stay by supersedeas bond” The proposed amendments will eliminate the antiquated term “supersedeas” and allow an appellant to provide “a bond or other security.” A letter of credit is one possible example of security other than a bond.

The Appellate Rules use the term “supersedeas bond” in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required amendments merely change the term “supersedeas bond” to “bond or other security,” with slight variations depending on the context. The proposed amendments to Rule 8(b) are a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the “surety” who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term “surety” is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

3 (1) **Initial Motion in the District Court.** A party must ordinarily move first
4 in the district court for the following relief:

5 * * *

6 (B) approval of a ~~supersedeas bond~~ or other security provided to obtain
7 a stay of judgment; * * *

8 * * *

9 (2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for
10 the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one
11 of its judges.

12 * * *

13 (E) The court may condition relief on a party’s filing a bond or other
14 ~~appropriate~~ security in the district court.

15 **(b) Proceeding Against a Surety or Other Security Provider.** If a party gives
16 security in the form of a bond, other security, or stipulation, or other undertaking with
17 one or more sureties or other security providers, each surety provider submits to the
18 jurisdiction of the district court and irrevocably appoints the district clerk as ~~the~~
19 ~~surety’s~~ its agent on whom any papers affecting the ~~surety’s~~ its liability on the bond
20 or undertaking may be served. On motion, a ~~surety’s~~ security provider’s liability may
21 be enforced in the district court without the necessity of an independent action. The
22 motion and any notice that the district court prescribes may be served on the district
23 clerk, who must promptly mail a copy to each surety whose address is known.

24 **Committee Note**

25 The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the
26 amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party
27 to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to
28 enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by
29 providing a “bond or other security.”

30 **Rule 11. Forwarding the Record**

31 * * *

32 **(g) Record for a Preliminary Motion in the Court of Appeals.** If, before the
33 record is forwarded, a party makes any of the following motions in the court of
34 appeals:

- 35 • for dismissal;
- 36 • for release;
- 37 • for a stay pending appeal;
- 38 • for additional security on the bond on appeal or on a ~~supersedeas bond~~ or
39 other security provided to obtain a stay of judgment; or
- 40 • for any other intermediate order—

41 the district clerk must send the court of appeals any parts of the record designated by
42 any party.

43 **Committee Note**

44 The amendment of subdivision (g) conforms this rule with the amendment of
45 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a
46 “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the
47 judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing
48 a “bond or other security.”

49 **Rule 39. Costs**

50 * * *

51 **(e) Costs on Appeal Taxable in the District Court.** The following costs on
52 appeal are taxable in the district court for the benefit of the party entitled to costs
53 under this rule:

- 54 (1) the preparation and transmission of the record;
- 55 (2) the reporter’s transcript, if needed to determine the appeal;
- 56 (3) premiums paid for a ~~supersedeas bond~~ or other bond security to preserve
57 rights pending appeal; and

58 (4) the fee for filing the notice of appeal.

59 **Committee Note**

60 The amendment of subdivisions (e)(3) conforms this rule with the amendment of
61 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a
62 “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the
63 judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing
64 a “bond or other security.”

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: “The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge.” The D.C., Fifth, and Ninth Circuits have similar local rules. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. Revised Proposal for Publication

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act “by local rule.” Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between “amicus curiae” and changing of the phrase “disqualification of a judge” to “a judge’s disqualification.”

1 **Rule 29. Brief of an Amicus Curiae**

2 (a) **When Permitted.** The United States or its officer or agency or a state may file
3 an amicus= curiae¹ brief without the consent of the parties or leave of court. Any
4 other amicus curiae may file a brief only by leave of court or if the brief states that
5 all parties have consented to its filing, except that a court of appeals may strike² or
6 may prohibit³ the filing of an amicus brief that would result in a judge’s
7 disqualification.⁴

8 * * *

9 **Committee Note**

10 The amendment authorizes orders or local rules, such as those previously adopted
11 in some circuits, that prohibit the filing of an amicus brief by party consent if the
12 brief would result in a judge’s disqualification. The amendment does not alter or
13 address the standards for when an amicus brief requires a judge’s disqualification.⁵

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a)

¹ The Style Consultants proposed removing the hyphen between the words “amicus-curiae” in line 3. The words “amicus curiae” without a hyphen appear in the title of the Rule and in line 4. For consistency, they should all be the same.

² The word “strike” is new. At the January 2016 meeting, a member of the Standing Committee raised a question whether the power to “prohibit” a filing was sufficient if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. The revised language would allow the court to “strike” the brief.

³ The January 2016 version of this rule said “. . . may by local rule prohibit” A member of the Standing Committee proposed deleting the words “by local rule” in line 6 so that judges could act either by order in an individual case or by creating a local rule.

⁴ The Style Consultants proposed replacing the words “disqualification of a judge” with “a judge’s disqualification.” Members of the Standing Committee supported this change.

⁵ The Advisory Committee revised this note at its April 2016 meeting.

should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the

lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question. The proposed deletion is as follows:

1 **Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma**
2 **Pauperis**
3 * * *
4 12. State the city and state of your legal residence.
5 Your daytime phone number: (____) _____
6 Your age: _____ Your years of schooling: _____
7 ~~Last four digits of your social-security number: _____~~

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee’s progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the “user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.” Third, proposed Rule 25(c)(2) addresses electronic service by saying that such service “may be made by sending it to a registered user by filing it with the court’s electronic-filing system or by using other electronic means that the person consented to in writing.” Fourth, proposed Rule 25(d)(1) is revised to make proof of service of process required only for papers that are not served electronically.

1 **Appellate Rule 25. Filing and Service**
2 **(a) Filing.**

3 (1) **Filing with the Clerk.** A paper⁶ required or permitted to
4 be filed in a court of appeals must be filed with the clerk.

5 (2) **Filing: Method and Timeliness.**⁷

6 **(A) Nonelectronic Filing**

7 ~~(A)~~(i) **In general.** ~~Filing~~ For a paper not filed
8 electronically,⁸ filing may be accomplished by mail addressed
9 to the clerk, but such filing is not timely unless the clerk
10 receives the papers within the time fixed for filing.

11 ~~(B)~~(ii) **A brief or appendix.** A brief or
12 appendix not filed electronically is timely filed, however, if
13 on or before the last day for filing, it is:

14 (i)• mailed to the clerk by First-Class
15 Mail, or other class of mail that is at least as
16 expeditious, postage prepaid; or

17 (ii)• dispatched to a third-party
18 commercial carrier for delivery to the clerk
19 within 3 days.

20 ~~(C)~~(iii) **Inmate filing.** A paper not filed
21 electronically ~~filed~~ by an inmate confined in an
22 institution is timely if deposited in the institution's
23 internal mailing system on or before the last day for
24 filing. If an institution has a system designed for legal
25 mail, the inmate must use that system to receive the

⁶ The term “paper” includes electronically filed documents under Appellate Rule 25(a)(2)(B)(iv).

⁷ Appellate Rules 25(a)(2)(A) & (B) follow the approach of proposed Civil Rule 5(d)(2) and (3), addressing nonelectronic filing and electronic filing in separate sections.

⁸ This rule follows the approach of proposed Civil Rule 5(d)(2), which uses the term “paper not filed electronically.”

26 benefit of this rule. Timely filing may be shown by a
27 declaration in compliance with 28 U.S.C. § 1746 or
28 by a notarized statement, either of which must set
29 forth the date of deposit and state that first-class
30 postage has been prepaid.

31 ~~(D) **Electronic filing.** A court of appeals may by local~~
32 ~~rule permit or require papers to be filed, signed, or verified by~~
33 ~~electronic means that are consistent with technical standards,~~
34 ~~if any, that the Judicial Conference of the United States~~
35 ~~establishes. A local rule may require filing by electronic~~
36 ~~means only if reasonable exceptions are allowed. A paper~~
37 ~~filed by electronic means in compliance with a local rule~~
38 ~~constitutes a written paper for the purpose of applying these~~
39 ~~rules.⁹~~

40 **(B) Electronic Filing and Signing.**

41 **(i) By a Represented Person — Required;**
42 **Exceptions.** A person represented by an attorney
43 must file electronically, unless nonelectronic filing is
44 allowed by the court for good cause or is allowed or
45 required by local rule.

46 **(ii) Unrepresented Person — When Allowed**
47 **or Required.** A person not represented by an
48 attorney:

- 49 • may file electronically only if
- 50 allowed by court order or by local rule; and

⁹ The subject of Appellate Rule 25(a)(2)(D) will be addressed in Appellate Rule 25(a)(2)(B).

51 • may be required to file electronically
52 only by court order, or by a local rule that
53 includes reasonable exceptions.

54 (iii) **Signing.** The user name and password of
55 an attorney of record, together with the attorney's
56 name on a signature block, serves as the attorney's
57 signature.

58 (iv) **Same as Written Paper.** A paper filed
59 electronically is a written paper for purposes of these
60 rules.

61 (3) **Filing a Motion with a Judge.** If a motion requests relief
62 that may be granted by a single judge, the judge may permit the
63 motion to be filed with the judge; the judge must note the filing date
64 on the motion and give it to the clerk.

65 (4) **Clerk's Refusal of Documents.** The clerk must not refuse
66 to accept for filing any paper presented for that purpose solely
67 because it is not presented in proper form as required by these rules
68 or by any local rule or practice.

69 (5) **Privacy Protection.** An appeal in a case whose privacy
70 protection was governed by Federal Rule of Bankruptcy Procedure
71 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of
72 Criminal Procedure 49.1 is governed by the same rule on appeal. In
73 all other proceedings, privacy protection is governed by Federal Rule
74 of Civil Procedure 5.2, except that Federal Rule of Criminal
75 Procedure 49.1 governs when an extraordinary writ is sought in a
76 criminal case.

77 **(b) Service of All Papers Required.** Unless a rule requires service
78 by the clerk, a party must, at or before the time of filing a paper, serve a copy

79 on the other parties to the appeal or review. Service on a party represented by
80 counsel must be made on the party's counsel.

81 **(c) Manner of Service.**

82 (1) ~~Service~~ Nonelectronic service¹⁰ may be any of the
83 following:

84 (A) personal, including delivery to a responsible
85 person at the office of counsel;

86 (B) by mail; or

87 (C) by third-party commercial carrier for delivery
88 within 3 days; ~~or~~

89 ~~(D) by electronic means, if the party being served
90 consents in writing.~~¹¹

91 ~~(2) If authorized by local rule, a party may use the court's
92 transmission equipment to make electronic service under Rule
93 25(c)(1)(D)~~¹² Electronic service may be made by sending it to a
94 registered user by filing it with the court's electronic-filing system or
95 by using other electronic means that the person consented to in
96 writing.¹³

97 (3) When reasonable considering such factors as the
98 immediacy of the relief sought, distance, and cost, service on a party

¹⁰ Proposed Civil Rule 5(b)(2) addresses both electronic and non-electronic service. To retain the structure of the current Appellate Rule 25(c), the proposed revision addresses nonelectronic service in Rule 25(c)(1) and electronic service in Rule 25(c)(2).

¹¹ The proposed Appellate Rule 25(c)(2) makes the current Appellate Rule 25(c)(1)(D) unnecessary.

¹² The deleted clause is similar to the deleted clause in Civil Rule 5(b)(3).

¹³ This sentence comes from proposed Civil Rule 5(b)(2)(E).

99 must be by a manner at least as expeditious as the manner used to file
100 the paper with the court.

101 (4) Service by mail or by commercial carrier is complete on
102 mailing or delivery to the carrier. Service by electronic means is
103 complete on ~~transmission~~ filing, unless the party making service is
104 notified that the paper was not received by the party served.¹⁴

105 (d) Proof of Service.

106 (1) A paper presented for filing other than through the court's
107 electronic filing system¹⁵ must contain either of the following:

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

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

112 (i) the date and manner of service;

113 (ii) the names of the persons served; and

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

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

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

¹⁴ This provision is similar to the last clause of Civil Rule 5(b)(2)(E).

¹⁵ A paper filed through the court's electronic filing system does not need to include this information because the electronic filing system will automatically provide it.

123 (e) **Number of Copies.** When these rules require the filing or
124 furnishing of a number of copies, a court may require a different number by
125 local rule or by order in a particular case.

126 **Committee Note**

127 The amendments conform Rule 25 to the amendments to Federal Rule of
128 Civil Procedure 5 on electronic filing, signature, service, and proof of service. They
129 establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic
130 filing mandatory. The rule recognizes exceptions for persons proceeding without an
131 attorney, exceptions for good cause, and variations established by local rule. The
132 amendments establish national rules regarding the methods of signing and serving
133 electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments
134 dispense with the requirement of proof of service for electronic filings in Rule
135 25(d)(1).

III. Information Items

A. Disclosure Requirements under Rules 26.1 & 29(c) [Item 08-AP-R]

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require. If some circuits have concluded that more disclosure is necessary to allow an informed decision on recusal or disqualification, then should the national rules require disclosure of this information in every circuit? In each instance, the Committee has sought to assess both the benefits of additional requirements and the burden on litigants.

The Committee has not developed a firm view on whether amendments are warranted. What follows are the Committee’s most recent discussion drafts of Rules 26.1 and 29(c). The Committee welcomes any feedback from the Standing Committee on the merit of requiring additional disclosures in the federal rules.

1 **Rule 26.1. Corporate Disclosure Statement**

2 **(a) Who Must File; What Must Be Disclosed.** Any ~~nongovernmental-~~
3 ~~corporate~~¹⁶ party to a proceeding in a court of appeals must file a statement that lists:

4 (1) any parent¹⁷ corporation, and any publicly held ~~corporation~~ entity,¹⁸ ~~that~~
5 ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the
6 party or states that there is no such corporation or entity;

7 (2) the names of all judges¹⁹ in the matter²⁰ and in any related state matter;

8 (3) the names of all lawyers and legal organizations that have appeared or are
9 expected to appear for the party in the matter; and

10 * * *

¹⁶ At the April 2016 meeting, it was the sense of the Committee that this rule no longer should apply only to corporations because the proposed new disclosure requirements now extend to facts beyond corporate ownership.

¹⁷ The Committee considered but rejected a suggestion that litigants must disclose not only parent corporations but also “affiliates.” The Committee was unsure how to define affiliates and worried about the burden of such a disclosure requirement.

¹⁸ The Committee is unsure whether Rule 26.1 should require litigants to identify publicly held entities other than corporations (e.g., limited liability partnerships, etc.). The Fourth Circuit requires litigants to disclose whether “10% or more of the stock of a party/amicus [is] owned by a publicly held corporation or *other publicly held entity.*” U.S. Court of Appeals for the Fourth Circuit, Disclosure of Corporate Affiliations Form, <http://www.ca4.uscourts.gov/docs/pdfs/discl.pdf?sfvrsn=10> (emphasis added).

¹⁹ The October 2015 discussion draft said “trial judges.”

²⁰ The Committee considered other possible words, such as “case” or “proceeding,” but concluded that “matter” was best because it would cover appeals from matters before agencies.

11 (d) Organizational Victim in a Criminal Case. In a criminal case if an
12 organization is a victim of [the alleged] criminal activity, the government must file
13 a statement identifying the victim, unless the government shows good cause for not
14 complying with this requirement.²¹ If the organizational victim is a corporation or
15 publicly held entity, the statement must also disclose the information required by
16 Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

17 (e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the
18 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
19 party—must file a statement that lists:

- 20 (1) any debtor not named in the caption;
- 21 (2) the members of each committee of creditors;
- 22 (3) the parties to any adversary proceeding; and
- 23 (4) any active participants in a contested matter.

24 (f) Intervenors. A person who wants to intervene must file a statement that
25 discloses the information required by Rule 26.1.

26 **Committee Note**

27 ALTERNATIVE A: Drawing on local rules, the amendment requires additional
28 disclosures that may inform a judge’s decision about whether recusal is warranted.

29 ALTERNATIVE B: Under federal law and ethical standards, judges must decide
30 whether to recuse themselves from participating in cases for various reasons. Before
31 this amendment, Rule 26(a) required corporations to disclose only “any parent
32 corporation and any publicly held corporation that owns 10% or more of its stock.”
33 Local rules of court have attempted to help judges determine whether recusal is
34 necessary by requiring the parties to make additional disclosures. The amendment to
35 subdivision (a) follows the lead of these local rules by requiring the listed additional

²¹ The bracketed phrase is based on a recent discussion draft of a proposed amendment to Criminal Rule 12.4. In the Appellate Rules version, the “good cause” exception appears at the end of the sentence rather than the start because of other words at the start of the sentence. No difference in meaning is intended.

36 disclosures. Subdivision (d) requires disclosure of organizational victims in criminal
37 cases because a judge might have an interest in one of the victims. But the disclosure
38 requirement is relaxed in situations in which disclosure would be overly burdensome
39 to the government. For example, thousands of corporations might be the victims of
40 a criminal antitrust violation, and the government may have great difficulty identifying
41 all of them. Subdivision (e) is based on local rules and requires disclosures unique to
42 bankruptcy cases. Subdivision (f) imposes disclosure requirements on a person who
43 wants to intervene so that judges may decide whether they are disqualified from ruling
44 on the intervention motion.

45 **Rule 29. Brief of an Amicus Curiae**

46 * * *

47 (c) **Contents and Form.** * * * An amicus brief need not comply with Rule
48 28, but must include the following:

49 (1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with the
50 information required of parties by Rule 26.1(a)(1), unless the amicus curiae
51 is an individual or governmental unit;

52 * * *

53 (5) unless the amicus curiae is one listed in the first sentence of Rule
54 29(a), a statement that indicates whether:

55 (A) a party's counsel authored the brief in whole or in part;

56 (B) a party or a party's counsel contributed money that was intended
57 to fund preparing or submitting the brief;

58 (C) a person— other than the amicus curiae, its members, or its
59 counsel— contributed money that was intended to fund preparing or
60 submitting the brief and, if so, identifies each such person; and

61 (D) a lawyer or legal organization authored the brief in whole or in
62 part, and, if so, identifies each such lawyer or legal organization.

63 **Committee Note**

64 Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a).
65 Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures
66 about the lawyers and legal organizations who participated in writing an amicus brief
67 because a judge also may need this information in order to decide whether recusal is
68 required.

B. Miscellaneous Items

The Committee discussed five other agenda items at its April 2016 meeting. Item No.12-AP-F concerned proposed amendments to Civil Rule 23 to address class action settlement objectors. The Civil Committee’s latest proposal would require a district court to approve any payment offered to a class action objector for withdrawing an objection. The proposal would not require amendment of the Appellate Rules. After considering the matter, the sense of the Committee was that an Appellate Rule is not warranted, and that the matter ultimately is a policy question for the Civil Rules Committee.

Item No. 16-AP-A was a proposal to extend the period of filing a notice of appeal in a criminal case from 14 days to 30 days. The Committee previously considered and rejected essentially the same proposal. Item No. 11-AP-E concerned a suggestion that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Committee discussed Item No.11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action. After reviewing considerations on both sides, and the history of Item No. 11-AP-E, the Committee decided to take no action and to remove Item No. 16-AP-A from its agenda.

Item No. 12-AP-B concerned a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

1 If you are a prisoner seeking to appeal a judgment in a civil action or
2 proceeding (not including a decision in a habeas corpus proceeding or a
3 proceeding under 28 U.S.C. § 2255), you must attach a statement certified by
4 the appropriate institutional officer showing all receipts, expenditures, and
5 balances during the last six months in your institutional accounts. If you have

- 1 multiple accounts, perhaps because you have been in multiple institutions,
2 attach one certified statement of each account.

The proposed parenthetical phrase is consistent with case law and may prevent some confusion. But after discussing the matter, the Committee decided not to amend the form because the current language already tracks the applicable statute on disclosure, 28 U.S.C. § 1915(a)(2),²² and the burden imposed by mistaken filing of unnecessary account statements is not great. The Committee agreed to remove this item from its agenda.

Item No. 15-AP-F concerned recovery of the \$500 docketing fee as a cost. Most circuits have interpreted Rule 39(e)(4) as implicitly making the docketing fee a cost that is taxable in the court of appeals. At least three circuits, however, require appellants to recover this fee in the district court. The sense of the Committee was that no amendment to Appellate Rule 39(e)(4) is necessary because the majority of courts are correctly interpreting the Rule. The Committee decided to remove this item from the agenda and asked the Chair to bring the matter to the attention of the chief judges of the circuits.

The Committee also considered a memorandum prepared by Mr. Derek Webb, who is a law clerk to Judge Sutton. The memorandum listed a number of possible circuit splits on issues arising under the Appellate Rules. Mr. Webb suggested three issues that might warrant inclusion on the Committee’s agenda in the future: (1) whether delay by prison authorities in delivering the order from which a prisoner wishes to appeal should be counted in computing time for appeal under Rule 4; (2) whether the costs for which a bond may be required under Rule 7 include attorney’s fees; and (3) whether “the court” in Rule 39(a)(4) refers to the appellate court or the district court. The Committee thought the incoming Chair and the Reporter could decide whether to include any of these matters on the discussion agenda for the October 2016 meeting.

Enclosures:

1. Draft Minutes from the April 5, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Text of Proposed Revisions for Publication

²² Section 1915(a)(2) says: “A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice.”

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TAB 3B

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

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

3 (1) **Initial Motion in the District Court.** A party
4 must ordinarily move first in the district court for
5 the following relief:

6 * * * * *

7 (B) approval of a ~~supersedeas bond~~ or other
8 security provided to obtain a stay of
9 judgment; or

10 * * * * *

11 (2) **Motion in the Court of Appeals; Conditions**
12 **on Relief.** A motion for the relief mentioned in
13 Rule 8(a)(1) may be made to the court of appeals
14 or to one of its judges.

15 * * * * *

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 (E) The court may condition relief on a party's
17 filing a bond or other appropriate security in
18 the district court.

19 (b) **Proceeding Against a Surety or Other Security**

20 **Provider**. If a party gives security in the form of a
21 bond, other security, ~~or stipulation,~~ or other
22 undertaking with one or more sureties or other
23 security providers, each ~~surety~~ provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as ~~the surety's~~ its agent on
26 whom any papers affecting ~~the surety's~~ its liability on
27 the bond or undertaking may be served. On motion, a
28 ~~surety's~~ security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the

32 district clerk, who must promptly mail a copy to each
33 surety whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

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1 **Rule 11. Forwarding the Record**

2 * * * * *

3 **(g) Record for a Preliminary Motion in the Court of**

4 **Appeals.** If, before the record is forwarded, a party
5 makes any of the following motions in the court of
6 appeals:

- 7 • for dismissal;
- 8 • for release;
- 9 • for a stay pending appeal;
- 10 • for additional security on the bond on appeal or
- 11 on a supersedeas bond or other security provided
- 12 to obtain a stay of judgment; or
- 13 • for any other intermediate order—

14 the district clerk must send the court of appeals any
15 parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 (1) **Filing with the Clerk.** A paper required or
4 permitted to be filed in a court of appeals must
5 be filed with the clerk.

6 (2) **Filing: Method and Timeliness.**

7 **(A) Nonelectronic Filing**

8 ~~(A)(i)~~ **In general.** ~~Filing~~For a paper
9 not filed electronically, filing
10 may be accomplished by mail
11 addressed to the clerk, but filing
12 is not timely unless the clerk
13 receives the papers within the
14 time fixed for filing.

15 ~~(B)(ii)~~ **A brief or appendix.** A brief or
16 appendix not filed electronically

17 is timely filed, however, if on or
 18 before the last day for filing, it is:
 19 ~~(i)~~ mailed to the clerk by ~~First-~~
 20 ~~Class Mail~~first-class mail,
 21 or other class of mail that is
 22 at least as expeditious,
 23 postage prepaid; or
 24 ~~(ii)~~ dispatched to a third-party
 25 commercial carrier for
 26 delivery to the clerk within
 27 3 days.

28 ~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not
 29 filed electronically by an inmate
 30 confined in an institution is
 31 timely if deposited in the
 32 institution's internal mailing
 33 system on or before the last day

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34 for filing. If an institution has a
35 system designed for legal mail,
36 the inmate must use that system
37 to receive the benefit of this rule.
38 Timely filing may be shown by a
39 declaration in compliance with
40 28 U.S.C. § 1746 or by a
41 notarized statement, either of
42 which must set forth the date of
43 deposit and state that first-class
44 postage has been prepaid.

45 ~~(D) **Electronic filing.** A court of appeals may~~
46 ~~by local rule permit or require papers to be~~
47 ~~filed, signed, or verified by electronic~~
48 ~~means that are consistent with technical~~
49 ~~standards, if any, that the Judicial~~
50 ~~Conference of the United States establishes.~~

51 ~~A local rule may require filing by electronic~~
52 ~~means only if reasonable exceptions are~~
53 ~~allowed. A paper filed by electronic means~~
54 ~~in compliance with a local rule constitutes a~~
55 ~~written paper for the purpose of applying~~
56 ~~these rules.~~

57 **(B) Electronic Filing and Signing.**

58 **(i) By a Represented Person—**
59 **Required; Exceptions. A**
60 **person represented by an**
61 **attorney must file electronically,**
62 **unless nonelectronic filing is**
63 **allowed by the court for good**
64 **cause or is allowed or required**
65 **by local rule.**

10 FEDERAL RULES OF APPELLATE PROCEDURE

66 (ii) Unrepresented Person—When

67 Allowed or Required. A person

68 not represented by an attorney:

69 • may file electronically only if

70 allowed by court order or by

71 local rule; and

72 • may be required to file

73 electronically only by court

74 order, or by a local rule that

75 includes reasonable

76 exceptions.

77 (iii) Signing. The user name and

78 password of an attorney of

79 record, together with the

80 attorney's name on a signature

81 block, serves as the attorney's

82 signature.

83 (iv) Same as Written Paper. A
84 paper filed electronically is a
85 written paper for purposes of
86 these rules.

87 (3) **Filing a Motion with a Judge.** If a motion
88 requests relief that may be granted by a single
89 judge, the judge may permit the motion to be
90 filed with the judge; the judge must note the
91 filing date on the motion and give it to the clerk.

92 (4) **Clerk’s Refusal of Documents.** The clerk must
93 not refuse to accept for filing any paper
94 presented for that purpose solely because it is not
95 presented in proper form as required by these
96 rules or by any local rule or practice.

97 (5) **Privacy Protection.** An appeal in a case whose
98 privacy protection was governed by Federal Rule
99 of Bankruptcy Procedure 9037, Federal Rule of

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100 Civil Procedure 5.2, or Federal Rule of Criminal
101 Procedure 49.1 is governed by the same rule on
102 appeal. In all other proceedings, privacy
103 protection is governed by Federal Rule of Civil
104 Procedure 5.2, except that Federal Rule of
105 Criminal Procedure 49.1 governs when an
106 extraordinary writ is sought in a criminal case.

107 **(b) Service of All Papers Required.** Unless a rule
108 requires service by the clerk, a party must, at or before
109 the time of filing a paper, serve a copy on the other
110 parties to the appeal or review. Service on a party
111 represented by counsel must be made on the party's
112 counsel.

113 **(c) Manner of Service.**

114 (1) ~~Service~~Nonelectronic service may be any of the
115 following:

116 (A) personal, including delivery to a
117 responsible person at the office of counsel;

118 (B) by mail; or

119 (C) by third-party commercial carrier for
120 delivery within 3 days; ~~or.~~

121 ~~(D) by electronic means, if the party being~~
122 ~~served consents in writing.~~

123 (2) ~~If authorized by local rule, a party may use the~~
124 ~~court's transmission equipment to make~~
125 ~~electronic service under Rule 25(e)(1)(D)~~

126 Electronic service may be made by sending it to
127 a registered user by filing it with the court's
128 electronic-filing system or by using other
129 electronic means that the person consented to in
130 writing.

131 (3) When reasonable considering such factors as the
132 immediacy of the relief sought, distance, and

14 FEDERAL RULES OF APPELLATE PROCEDURE

133 cost, service on a party must be by a manner at
134 least as expeditious as the manner used to file the
135 paper with the court.

136 (4) Service by mail or by commercial carrier is
137 complete on mailing or delivery to the carrier.
138 Service by electronic means is complete on
139 ~~transmission~~filing, unless the party making
140 service is notified that the paper was not received
141 by the party served.

142 (d) Proof of Service.

143 (1) A paper presented for filing other than through
144 the court's electronic filing system must contain
145 either of the following:

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

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

150 (i) the date and manner of service;
151 (ii) the names of the persons served; and
152 (iii) their mail or electronic addresses,
153 facsimile numbers, or the addresses of
154 the places of delivery, as appropriate
155 for the manner of service.

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

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

163 (e) **Number of Copies.** When these rules require the
164 filing or furnishing of a number of copies, a court may
165 require a different number by local rule or by order in
166 a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

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Rule 29. Brief of an Amicus Curiae

- (a) **When Permitted.** The United States or its officer or agency or a state may file an ~~amicus curiae~~amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike or may prohibit the filing of an amicus brief that would result in a judge's disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

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1 **Rule 39. Costs**

2 * * * * *

3 (e) **Costs on Appeal Taxable in the District Court.** The
4 following costs on appeal are taxable in the district
5 court for the benefit of the party entitled to costs under
6 this rule:

- 7 (1) the preparation and transmission of the record;
8 (2) the reporter's transcript, if needed to determine
9 the appeal;
10 (3) premiums paid for a ~~supersedeas~~ bond or other
11 ~~bond~~security to preserve rights pending appeal;
12 and
13 (4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

Rule 62(b)(2) allows a party to obtain a stay by providing a “bond or other security.”

**Form 4. Affidavit Accompanying Motion for Permission
to Appeal in Forma Pauperis**

* * * * *

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: _____~~

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TAB 3C

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**Advisory Committee on Appellate Rules
Table of Agenda Items —April 2016**

| <u>FRAP Item</u> | <u>Proposal</u> | <u>Source</u> | <u>Current Status</u> |
|------------------|--|----------------------|--|
| 07-AP-E | Consider possible FRAP amendments in response to Bowles v. Russell (2007). | Mark Levy, Esq. | Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |
| 07-AP-I | Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage. | Hon. Diane Wood | Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |
| 08-AP-A | Amend FRAP 3(d) concerning service of notices of appeal. | Hon. Mark R. Kravitz | Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 |

| <u>FRAP Item</u> | <u>Proposal</u> | <u>Source</u> | <u>Current Status</u> |
|------------------|--|------------------------------|--|
| 08-AP-C | Abolish FRAP 26(c)'s three-day rule. | Hon. Frank H. Easterbrook | Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |
| 08-AP-R | Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c) | Hon. Frank H. Easterbrook | Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 |
| 09-AP-B | Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state" | Daniel I.S.J. Rey-Bear, Esq. | Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017 |
| 11-AP-C | Amend FRAP 3(d)(1) to take account of electronic filing | Harvey D. Ellis, Jr., Esq. | Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 |
| 11-AP-D | Consider changes to FRAP in light of CM/ECF | Hon. Jeffrey S. Sutton | Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee |

| <u>FRAP Item</u> | <u>Proposal</u> | <u>Source</u> | <u>Current Status</u> |
|------------------|--|---|--|
| 12-AP-B | Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants | Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL) | Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee |
| 12-AP-D | Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8 | Kevin C. Newsom, Esq. | Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee |
| 12-AP-E | Consider treatment of length limits, including matters now governed by page limits | Professor Neal K. Katyal | Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |
| 12-AP-F | Consider amending FRAP 42 to address class action appeals | Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison | Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 |
| 13-AP-B | Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc | Roy T. Englert, Jr., Esq. | Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |

| <u>FRAP Item</u> | <u>Proposal</u> | <u>Source</u> | <u>Current Status</u> |
|------------------|---|---------------------------|---|
| 13-AP-H | Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013) | Hon. Steven M. Colloton | Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16 |
| 14-AP-D | Consider possible changes to Rule 29's authorization of amicus filings based on party consent | Standing Committee | Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee |
| 15-AP-A | Consider adopting rule presumptively permitting pro se litigants to use CM/ECF | Robert M. Miller, Ph.D. | Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee |
| 15-AP-B | Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C) | Reporter | Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15 |
| 15-AP-C | Consider amendment to Rule 31(a)(1)'s deadline for reply briefs | Appellate Rules Committee | Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16 |
| 15-AP-D | Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal) | Paul Ramshaw, Esq. | Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 |
| 15-AP-E | Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants | Sai | Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved 10/16 for submission to Standing Committee |
| 15-AP-H | Electronic filing by pro se litigants | Robert M. Miller, Ph.D. | Awaiting initial discussion Discussed and retained on agenda 10/15 |

TAB 3D

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**DRAFT Minutes of the Spring 2016 Meeting of the
Advisory Committee on Appellate Rules**

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

- (1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."
- (2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.
- (3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits" The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

- (1) line 3: strike the hyphen in "amicus-curiae"
- (2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants
- (3) line 6: strike "by local rule"
- (4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney members said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term “proceeding” or “case” or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

- (1) The “except clause” in line 3 should be deleted so that Rule 26.1 applies to all parties.
- (2) The term “affiliated” in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

- (3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14
- (4) The “good cause” exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.
- (5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.
- (6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.
- (7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the \$5 fee for filing a notice of appeal and the \$500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the \$500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

TAB 4

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR
REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016. Draft Minutes of this meeting are attached.

Part I of this Report presents recommendations to approve publication this summer of proposed amendments to Civil Rules 5 (e-filing and e-service); 23 (class actions); and 62 (stays of execution of judgment).

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Court Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

Part III describes other work. The first segment describes proposals under active consideration for eventual publication and adoption. These proposals include a new subdivision in Rule 5.2 that would establish a procedure for redacting information that was improperly included in a court filing; a renewal of the extensive work that was done ten years ago to evaluate concerns about the operation of Rule 30(b)(6)(deposition of an entity); and consideration of the Rule 81(c) provisions for demanding a jury trial after a case is removed from state court. The second segment briefly notes action on a number of suggestions that were submitted to the Committee through the public submission process.

I. RECOMMENDATIONS FOR PUBLICATION

A. RULE 23

The Civil Rules Advisory Committee recommends publication of the following preliminary draft of amendments to Rule 23.

1 **Rule 23. Class Actions**
2

3 * * * * *

4
5 **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes;
6 Subclasses.**

7 * * * * *

8
9
10 **(2) *Notice.***

11 * * * * *

12
13
14 **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or
15 upon ordering notice under Rule 23(e)(1) to a class proposed to be
16 certified for purposes of settlement under Rule 23(b)(3)—the court
17 must direct to class members the best notice that is practicable under
18 the circumstances, including individual notice to all members who
19 can be identified through reasonable effort. The notice may be by
20 United States mail, electronic means, or other appropriate means.
21 * * * * *

22 * * * * *

23
24
25 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses
26 of a certified class—or a class proposed to be certified for purposes of
27 settlement—may be settled, voluntarily dismissed, or compromised only with the
28 court's approval. The following procedures apply to a proposed settlement, voluntary
29 dismissal, or compromise:
30

31 **(1) Notice to the Class.**

32
33 **(A)** Information That Parties Must Provide to the Court. The parties
34 must provide the court with information sufficient to enable it to
35 determine whether to give notice of the proposal to the class.
36

37 **(B)** Grounds for a Decision to Give Notice. The court must direct notice
38 in a reasonable manner to all class members who would be bound by
39 the proposal if giving notice is justified by the parties' showing that
40 the court will likely be able to:
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42 **(i)** approve the proposal under Rule 23(e)(2); and

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- (ii)** certify the class for purposes of judgment on the proposal.

- (2)** ***Approval of the Proposal.*** If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:-

 - (A)** the class representatives and class counsel have adequately represented the class;
 - (B)** the proposal was negotiated at arm's length;
 - (C)** the relief provided for the class is adequate, taking into account:

 - (i)** the costs, risks, and delay of trial and appeal;
 - (ii)** the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
 - (iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv)** any agreement required to be identified under Rule 23(e)(3); and
 - (D)** class members are treated equitably relative to each other.

- (3)** ***Identification of Side Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

- (4)** ***New Opportunity to Be Excluded.*** If the class was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

- (5)** ***Class-Member Objections.***

 - (A)** ***In General.*** Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

 - (B)** ***Court Approval Required For Payment to an Objector or Objector's Counsel.*** Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

 - (i)** forgoing or withdrawing an objection, or

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(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure For Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

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(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1), if a petition for to appeal is filed. A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Committee Note

1 Rule 23 is amended mainly to address issues related to settlement, and also to take account
2 of issues that have emerged since the rule was last amended in 2003.

3 **Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice
4 to the class regarding a proposed class-action settlement only after determining that the prospect of
5 class certification and approval of the proposed settlement justifies giving notice. This decision is
6 sometimes inaccurately called “preliminary approval” of the proposed class certification in
7 Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both
8 Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain
9 date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring
10 repeat notices to the class can be wasteful and confusing to class members, and costly as well.

11 Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to
12 class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual
13 notice requirement for class members in Rule 23(b)(3) class actions, many courts read the rule to
14 require notice by first class mail in every case. But technological change since 1974 has meant that
15 other forms of communication are more reliable and important to many. Courts and counsel have
16 begun to employ new technology to make notice more effective, and sometimes less costly. Because
17 there is no reason to expect that technological change will halt soon, courts giving notice under this
18 rule should consider existing technology, including class members’ likely access to such technology,
19 when selecting a method of giving notice.

20 Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them.
21 The rule continues to call for giving class members “the best notice that is practicable.” It does not
22 specify any particular means as preferred. Although it may often be true that electronic methods of
23 notice, for example by email, are the most promising, it is important to keep in mind that a
24 significant portion of class members in certain cases may have limited or no access to email or the
25 Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus
26 on the means most likely to be effective in the case before the court. The amended rule emphasizes

27 that the court must exercise its discretion to select appropriate means of giving notice. Courts should
28 take account not only of anticipated actual delivery rates, but also of the extent to which members
29 of a particular class are likely to pay attention to messages delivered by different means. In
30 providing the court with sufficient information to enable it to decide whether to give notice to the
31 class of a proposed class-action settlement under Rule 23(e)(1), it may often be important to include
32 a report about the proposed method of giving notice to the class.

33 In determining whether the proposed means of giving notice is appropriate, the court should
34 give careful attention to the content and format of the notice and, if this notice is given under
35 Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain
36 relief. Particularly if the notice is by electronic means, care is necessary regarding access to online
37 resources, the manner of presentation, and any response expected of class members. As the rule
38 directs, the means should be the “best * * * that is practicable” in the given case. The ultimate goal
39 of giving notice is to enable class members to make informed decisions about whether to opt out or,
40 in instances where a proposed settlement is involved, to object or to make claims. Means, format,
41 and content that would be appropriate for class members likely to be sophisticated, for example in
42 a securities fraud class action, might not be appropriate for a class made up in significant part of
43 members likely to be less sophisticated. As with the method of notice, the form of notice should be
44 tailored to the class members' anticipated understanding and capabilities. The court and counsel may
45 wish to consider the use of class notice experts or professional claims administrators.

46 Attention should focus also on the method of opting out provided in the notice. The
47 proposed method should be as convenient as possible, while protecting against unauthorized opt-out
48 notices. The process of opting out should not be unduly difficult or cumbersome. As with other
49 aspects of the notice process, there is no single method that is suitable for all cases.

50 **Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit that
51 its procedural requirements apply in instances in which the court has not certified a class at the time
52 that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then
53 should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified
54 under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about
55 the opt-out rate could then be available to the court at the time that it considers final approval of the
56 proposed settlement.

57 **Subdivision (e)(1).** The decision to give notice of a proposed settlement to the class is an
58 important event. It should be based on a solid record supporting the conclusion that the proposed
59 settlement will likely earn final approval after notice and an opportunity to object. The amended rule
60 makes clear that the parties must provide the court with information sufficient to enable it to decide
61 whether notice should be sent. At the time they seek notice to the class, the proponents of the
62 settlement should ordinarily provide the court with all available materials they intend to submit in
63 support of approval under Rule 23(e)(2). That would give the court a full picture and make this
64 information available to the members of the class. The amended rule also specifies the standard the
65 court should use in deciding whether to send notice—that notice is justified by the parties' showing
66 regarding the likely approval of the proposal. The prospect of final approval should be measured
67 under amended Rule 23(e)(2), which provides criteria for the final settlement review.

68 If the court has not previously certified a class, this showing should also provide a basis for
69 the court to conclude that it likely will be able to certify a class for purposes of settlement. Although
70 the order to send notice is often inaccurately called “preliminary approval” of class certification, it
71 is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B)
72 calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

73 There are many types of class actions and class-action settlements. As a consequence, no
74 single list of topics to be addressed in the submission to the court would apply to each case. Instead,
75 the subjects to be addressed depend on the specifics of the particular class action and proposed
76 settlement. But some general observations can be made.

77 One key element is class certification. If the court has already certified a class, the only
78 information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for
79 any change in the class certified, or of the claims, defenses, or issues regarding which certification
80 was granted. But if a class has not been certified, the parties must ensure that the court has a basis
81 for concluding that it likely will be able, after the final hearing, to certify the class. Although the
82 standards for certification differ for settlement and litigation purposes, the court cannot make the
83 decision regarding the prospects for certification without a suitable basis in the record. The decision
84 to certify the class for purposes of settlement cannot be made until the hearing on final approval of
85 the proposed settlement. If the settlement is not approved and certification for purposes of litigation
86 is later sought, the parties' earlier submissions in regard to the proposed certification for settlement
87 should not be considered in deciding on certification.

88 Regarding the proposed settlement, a great variety of types of information might
89 appropriately be included in the submission to the court. A basic focus is the extent and type of
90 benefits that the settlement will confer on the members of the class. Depending on the nature of the
91 proposed relief, that showing may include details of the claims process that is contemplated and the
92 anticipated rate of claims by class members. If the notice to the class calls for submission of claims
93 before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important
94 to provide that the parties will report back to the court on the actual claims experience. And because
95 some funds are frequently left unclaimed, it is often important for the settlement agreement to
96 address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the
97 American Law Institute, Principles of Aggregate Litigation (2010).

98 It is important for the parties to supply the court with information about the likely range of
99 litigated outcomes, and about the risks that might attend full litigation. In that connection,
100 information about the extent of discovery completed in the litigation or in parallel actions may often
101 be important. In addition, as suggested by Rule 23(b)(3)(A), information about the existence of other
102 pending or anticipated litigation on behalf of class members involving claims that would be released
103 under the proposal—including the breadth of any such release—may be important.

104 The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that
105 ordinarily should be addressed in the parties' submission to the court. In some cases, it will be
106 important to relate the amount of an award of attorney's fees to the expected benefits to the class,
107 and to take account of the likely claims rate. One method of addressing this issue is to defer some
108 or all of the award of attorney's fees until the court is advised of the actual claims rate and results.
109 Another topic that normally should be considered is any agreement that must be identified under
110 Rule 23(e)(3).

111 The parties may supply information to the court on any other topic that they regard as
112 pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may
113 direct the parties to supply further information about the topics they do address, or to supply
114 information on topics they do not address. It must not direct notice to the class until the parties'
115 submissions show it is likely that the court will have a basis to approve the proposal after notice to
116 the class and a final approval hearing.

117 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is
118 that it be fair, reasonable, and adequate. This standard emerged from case law implementing
119 Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized
120 in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light
121 on this central concern. Overall, these factors focused on comparable considerations, but each circuit
122 developed its own vocabulary for expressing these concerns. In some circuits, these lists have
123 remained essentially unchanged for thirty or forty years. The goal of this amendment is not to
124 displace any of these factors, but rather to focus the court and the lawyers on the core concerns of
125 procedure and substance that should guide the decision whether to approve the proposal.

126 One reason for this amendment is that a lengthy list of factors can take on an independent
127 life, potentially distracting attention from the central concerns that inform the settlement-review
128 process. A circuit's list might include a dozen or more separately articulated factors. Some of those
129 factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that
130 are relevant may be more or less important to the particular case. Yet counsel and courts may feel
131 it necessary to address every single factor on a given circuit's list in every case. The sheer number
132 of factors can distract both the court and the parties from the central concerns that bear on review
133 under Rule 23(e)(2).

134 This amendment therefore directs the parties to present the settlement to the court in terms
135 of a shorter list of core concerns, by focusing on the primary procedural considerations and
136 substantive qualities that should always matter to the decision whether to approve the proposal.

137 Approval under Rule 23(e)(2) is required only when class members would be bound under
138 Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine
139 whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment
140 based on the proposal.

141 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
142 “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up to
143 the proposed settlement. Attention to these matters is an important foundation for scrutinizing the
144 specifics of the proposed settlement. If the court has appointed class counsel or interim class
145 counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus
146 at this point is on the actual performance of counsel acting on behalf of the class.

147 The information submitted under Rule 23(e)(1) may provide a useful starting point in
148 assessing these topics. For example, the nature and amount of discovery in this or other cases, or
149 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class
150 had an adequate information base. The pendency of other litigation about the same general subject
151 on behalf of class members may also be pertinent. The conduct of the negotiations may be important
152 as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those
153 negotiations may bear on whether they were conducted in a manner that would protect and further
154 the class interests.

155 In undertaking this analysis, the court may also refer to Rule 23(g)'s criteria for appointment
156 of class counsel; the concern is whether the actual conduct of counsel has been consistent with what
157 Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any award of
158 attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

159 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a “substantive”
160 review of the terms of the proposed settlement. The relief that the settlement is expected to provide

161 to class members is a central concern. Measuring the proposed relief may require evaluation of the
162 proposed claims process and a prediction of how many claims will be made; if the notice to the class
163 calls for pre-approval submission of claims, actual claims experience may be important. The
164 contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the
165 proposed relief, particularly regarding the equitable treatment of all members of the class.

166 Another central concern will relate to the cost and risk involved in pursuing a litigated
167 outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries
168 might be and the likelihood of success in obtaining such results. That forecast cannot be done with
169 arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

170 If the class has not yet been certified for trial, the court may consider whether certification
171 for litigation would be granted were the settlement not approved.

172 Examination of the attorney-fee provisions may also be important to assessing the fairness
173 of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule
174 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class
175 can be an important factor in determining the appropriate fee award. Provisions for reporting back
176 to the court about actual claims experience, and deferring a portion of the fee award until the claims
177 experience is known, may bear on the fairness of the overall proposed settlement.

178 Often it will be important for the court to scrutinize the method of claims processing to
179 ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat
180 unjustified claims, but unduly demanding claims procedures can impede legitimate claims.
181 Particularly if some or all of any funds remaining at the end of the claims process must be returned
182 to the defendant, the court must be alert to whether the claims process is unduly demanding.

183 Paragraph (D) calls attention to a concern that may apply to some class action settlements—
184 inequitable treatment of some class members vis-a-vis others. Matters of concern could include
185 whether the apportionment of relief among class members takes appropriate account of differences
186 among their claims, and whether the scope of the release may affect class members in different ways
187 that affect the apportionment of relief.

188 **Subdivision (e)(3).** A heading is added to subdivision (e)(3) in accord with style
189 conventions. This addition is intended to be stylistic only.

190 **Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style
191 conventions. This addition is intended to be stylistic only.

192 **Subdivision (e)(5).** Objecting class members can play a critical role in the settlement-
193 approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit
194 objections to the proposal. The submissions required by Rule 23(e)(1) may provide information
195 important to decisions whether to object or opt out. Objections can provide the court with important
196 information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

197 **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for
198 every withdrawal of an objection. An objector should be free to withdraw on concluding that an
199 objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other
200 consideration in connection with withdrawing the objection.

201 The rule is also amended to clarify that objections must provide sufficient specifics to enable
202 the parties to respond to them and the court to evaluate them. One feature required of objections is
203 specification whether the objection asserts interests of only the objector, or of some subset of the
204 class, or of all class members. Beyond that, the rule directs that the objection state its grounds “with
205 specificity.” Failure to provide needed specificity may be a basis for rejecting an objection. Courts
206 should take care, however, to avoid unduly burdening class members who wish to object, and to
207 recognize that a class member who is not represented by counsel may not present objections that
208 adhere to technical legal standards.

209 **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal
210 under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance
211 under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): “In some situations,
212 there may be a basis for making an award to other counsel whose work produced a beneficial result
213 for the class, such as * * * attorneys who represented objectors to a proposed settlement under
214 Rule 23(e).”

215 But some objectors may be seeking only personal gain, and using objections to obtain
216 benefits for themselves rather than assisting in the settlement-review process. At least in some
217 instances, it seems that objectors—or their counsel—have sought to extract tribute to withdraw their
218 objections or dismiss appeals from judgments approving class settlements. And class counsel
219 sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or
220 other consideration to these objectors.

221 The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.
222 Because the concern only applies when consideration is given in connection with withdrawal of an
223 objection, however, the amendment requires approval under Rule 23(e)(5)(i) only when
224 consideration is involved. The term “consideration” should be broadly interpreted, particularly when
225 the withdrawal includes some arrangements beneficial to objector counsel. If the consideration
226 involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h)
227 for an award of fees; the court may approve the fee if the objection assisted the court in
228 understanding and evaluating the settlement even though the settlement was approved as proposed.

229 Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or
230 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action
231 objector may produce much longer delay than an objection before the district court, it is important
232 to extend the court-approval requirement to apply in the appellate context. The district court is best
233 positioned to determine whether to approve such arrangements; hence, the rule requires that the
234 motion seeking approval be made to the district court.

235 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on
236 stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority
237 to decide whether to dismiss the appeal. This rule’s requirement of district court approval of any
238 consideration in connection with such dismissal by the court of appeals has no effect on the authority
239 of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing
240 consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied
241 with the district court’s order under Rule 23(e)(5)(B) may appeal the order.

242 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector’s
243 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies.
244 That procedure does not apply after the court of appeals’ mandate returns the case to the district
245 court.

246 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court should direct notice to
247 the class regarding a proposed class-action settlement in cases in which class certification has not
248 yet been granted only after determining that the prospect of eventual class certification justifies
249 giving notice. This decision is sometimes inaccurately characterized as “preliminary approval” of
250 the proposed class certification. But it does not grant or deny class certification, and review under
251 Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not
252 permitted until the district court decides whether to certify the class.

253 The rule is also amended to extend the time to file a petition for review of a class-action
254 certification order to 45 days whenever a party is the United States, one of its agencies, or a United
255 States officer or employee sued for an act or omission occurring in connection with duties performed
256 on the United States’ behalf. In such a case, the extension applies to a petition for permission to
257 appeal by any party. The extension of time recognizes—as under Rules 4(i) and 12(a) and Appellate
258 Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard
259 to these matters. The extension applies whether the officer or employee is sued in an official
260 capacity or an individual capacity; the defense is usually conducted by the United States even though
261 the action asserts claims against the officer or employee in an individual capacity. An action against
262 a former officer or employee of the United States is covered by this provision in the same way as an
263 action against a present officer or employee. Termination of the relationship between the individual
defendant and the United States does not reduce the need for additional time.

Report on Topics Still Under Study

After the Rule 23 Subcommittee gave careful attention to a range of topics not specifically included in the above preliminary draft of proposed amendments to Rule 23, it decided not to proceed with several of them. It also recommended that two additional topics remain under study, and the Advisory Committee approved that decision. Below is a brief summary of those two topics.

Pick-off issues: In recent years, there have been a number of instances in which defendants in putative class actions have sought to “pick off” the named class representative by offering all the individual relief he or she could obtain and moving to dismiss on grounds of mootness. In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Supreme Court held that such an offer does not moot a case because “an unaccepted settlement offer has no force.” The decision left open the possibility, however, that the outcome could be different if the defendant deposited the money in court and consented to entry of judgment against it in favor of the putative class representative. The Rule 23 Subcommittee has been monitoring activity in the lower courts since the Supreme Court’s decision. If pick-off issues continue to be important, it may return to considering these issues.

This recent discussion has also caused the Subcommittee to focus on the possibility of specifying in Rule 23 that the court must or may afford counsel time to find a replacement class representative if the initial proposed representative proves unable to continue in that role.

Ascertainability: The lower courts have, in recent years, fairly frequently addressed arguments about whether the membership in a proposed class was sufficiently ascertainable to support certification. The extent to which the lower courts’ views differ on this subject remains uncertain. In two cases (from the Sixth and Seventh Circuits), the Supreme Court has denied certiorari this year. Given the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this

issue, no proposal for amendment was brought forward. Nonetheless, the issue seemed to have sufficient currency and importance to be retained on the Subcommittee's agenda.

B. RULE 62

The Rule 62 provisions for staying execution were brought to the Committee and to the Appellate Rules Committee by independent and distinct questions. This Committee was asked about an apparent “gap” between the 14-day automatic stay provided by Rule 62(a) and the authority to issue a stay “pending disposition of” a post-judgment motion that might not be made until a time after expiration of the automatic stay. The Appellate Rules Committee was asked about authority to post security in a form other than a bond, and about authority to post a single security in a form that lasts through post-judgment proceedings in the district court and the conclusion of all proceedings on appeal. The Committee recommends approval of the following amendments for publication. They address all three of the questions that prompted the inquiry.

The groundwork has been laid by a subcommittee that includes representatives of the Appellate and Civil Rules Committees. Judge Scott Matheson chaired the subcommittee. The subcommittee began work on the three topics that launched the project, but also developed complicated drafts that sought to address several questions not treated in Rule 62. Many of the complications proved too difficult to address with any confidence. The drafts were then simplified. These simpler drafts were discussed both in the advisory committees and in the Standing Committee. These discussions continued to prune away provisions that directly recognized open-ended district-court authority to grant, amend, or deny stays, with or without security. In the end, the proposal is limited to address only the three questions that started the work. It eliminates the “gap” at the end of the automatic stay by extending the stay from 14 days to 30 days, and qualifies the automatic stay by allowing the court to order otherwise. Security can be posted by bond or in other forms; as in the present rule, the court must approve either the bond or a different form of security. And the security can be posted on terms that continue from the time it is approved to the time specified in the bond or security.

Subdivisions (a) through (d) of present Rule 62 are rearranged to bring related provisions closer together, easing the reader’s path through the rule. The remaining subdivisions, (e) through (h), are left unchanged. They were thoroughly explored in a memorandum prepared by Professor Struve as Reporter for the Appellate Rules Committee, and were considered by the subcommittee. In the end, it seemed better to leave them as they are.

The rearrangement of subdivisions (a) through (d) is so thorough that presentation in the traditional over- and underline form can be hard to follow. That version is left to the end. First comes the clean text of the rule as proposed for publication, including the Committee Note. The Committee Note provides a deliberately spare explanation of the underlying purposes. A somewhat more elaborate explanation follows, and it is then followed by the over- and underline version that illustrates the changes and rearrangement of the rule text.

Rule 62 Proposed for Publication

1 **Rule 62. Stay of Proceedings to Enforce a Judgment.**

2 **(a) Automatic Stay.** Except as provided in Rule 62(c) and (d), execution on a judgment and
3 proceedings to enforce it are stayed for 30 days after its entry, unless the court orders
4 otherwise.

5 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a
6 stay by providing a bond or other security. The stay takes effect when the court approves the
7 bond or other security and remains in effect for the time specified in the bond or security.

8 **(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order.** Unless the
9 court orders otherwise, the following are not stayed after being entered, even if an appeal is
10 taken:

- 11 (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
12 (2) a judgment or order that directs an accounting in an action for patent infringement.

13 **(d) Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final
14 judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify
15 an injunction, the court may suspend, modify, restore, or grant an injunction on terms for
16 bond or other terms that secure the opposing party's rights. If the judgment appealed from
17 is rendered by a statutory three-judge district court, the order must be made either:

- 18 (1) by that court sitting in open session; or
19 (2) by the assent of all its judges, as evidenced by their signatures.

20 * * * * *

Committee Note

1 Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for
2 staying a judgment are revised.

3 The provisions for staying an injunction, receivership, or order for a patent accounting are
4 reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning.
5 The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the
6 right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d)
7 apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise
8 deal with an injunction.

9 New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set
10 the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition
11 of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and
12 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the
13 automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry
14 of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during
15 this period. Setting the period at 30 days coincides with the time for filing most appeals in civil
16 actions, providing a would-be appellant the full period of appeal time to arrange a stay by other
17 means. A thirty-day automatic stay also suffices in cases governed by a 60-day appeal period.

18 Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay
19 or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk
20 that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow
21 immediate execution of a judgment that does not involve a payment of money. The court may
22 address the risks of immediate execution by ordering dissolution of the stay only on condition that
23 security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to
24 supersede it by ordering a stay that lasts longer or requires security.

25 Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of
26 former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is
27 entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic

28 stay has been lifted by the court. The new rule’s text makes explicit the opportunity to post security
29 in a form other than a bond. The stay takes effect when the court approves the bond or other security
30 and remains in effect for the time specified in the bond or security—a party may find it convenient
31 to arrange a single bond or other security that persists through completion of post-judgment
32 proceedings in the trial court and on through completion of all proceedings on appeal by issuance
33 of the appellate mandate. This provision does not supersede the opportunity for a stay under 28
34 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b)
35 changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new
36 subdivision (b), “a party” may obtain a stay. For example, a party may wish to secure a stay pending
37 disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing
38 whether it will want to appeal.

Further Discussion

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question grew from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay “pending disposition of any of” these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court’s necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint subcommittee led to consideration of many other questions.

The “gap” between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time. Several successive drafts included such a provision. It was abandoned, however, as unnecessarily broad. Instead, reliance was placed on a parallel amendment of Rule 62(a) that has carried through from the beginning of the subcommittee’s work. The amendment extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution. That risk is addressed at the end of proposed Rule 62(a): the automatic stay takes hold “unless the court orders otherwise.” The court may dissolve the stay, perhaps on condition that the judgment creditor post security for injuries caused by execution of a judgment that is later modified, set aside, or reversed. Or the court may supersede the automatic stay by ordering a stay on different terms, most likely by including some form of security to protect the judgment creditor.

The single-security question turned attention to present Rule 62(d)’s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure “If an appeal is taken,” and directs that “[t]he bond may be given upon or after filing the notice of appeal.” Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond “[a]t any time after judgment is entered.” Proposed Rule 62(b) also explicitly recognizes “a bond or other security.”

Consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: “the appellant may obtain a stay by supersedeas bond * * *.” There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. Successive proposed drafts recognized authority to refuse a stay for good cause even if adequate security is tendered. But in the end, ongoing practice and understanding prevailed. Proposed Rule 62(b) carries forward the critical language of present Rule 62(d): “The stay takes effect when the court approves the bond” or other security. This course means that present practice carries forward, including whatever measure of discretion the cases recognize to allow a stay on less than full security in exceptional circumstances.

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to “an interlocutory order or final judgment that grants, dissolves, or denies an injunction.” The formula in § 1292(a)(1) is more elaborate. Although the Committee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from orders that “continue” or “modify” an injunction.

Over- and Underline Rule 62(a) through (d)

1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

2 **(a) Automatic Stay.; ~~Exceptions for Injunctions, Receiverships, and Patent Accountings.~~**
3 Except as provided in Rule 62(c) and (d), stated in this rule, no execution may issue on a
4 judgment, nor may and proceedings be taken to enforce it; are stayed for 30 days until 14
5 days have passed after its entry, unless the court orders otherwise. But unless the court orders
6 otherwise, the following are not stayed after being entered, even if an appeal is taken:

7 ~~———(1) an interlocutory or final judgment in an action for an injunction or a receivership; or~~

8 ~~———(2) a judgment or order that directs an accounting in an action for patent infringement.~~

9 **(b) Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's
10 security, the court may stay the execution of a judgment — or any proceedings to enforce it
11 — pending disposition of any of the following motions:

12 ~~———(1) under Rule 50, for judgment as a matter of law;~~

13 ~~———(2) under Rule 52(b), to amend the findings or for additional findings;~~

14 ~~———(3) under Rule 59, for a new trial or to alter or amend a judgment; or~~

15 ~~———(4) under Rule 60, for relief from a judgment or order.~~

16 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a
17 stay by providing a bond or other security. The stay takes effect when the court approves the
18 bond or other security and remains in effect for the time specified in the bond or security.

19 **(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order.** Unless the
20 court orders otherwise, the following are not stayed after being entered, even if an appeal is
21 taken:

22 (1) an interlocutory or final judgment in an action for an injunction or receivership; or

23 (2) a judgment or order that directs an accounting in an action for patent infringement.

24 **(de) Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or
25 final judgment that grants, continues, modifies, refuses, dissolves, or denies ~~refuses to~~
26 dissolve or modify an injunction, the court may suspend, modify, restore, or grant an
27 injunction on terms for bond or other terms that secure the opposing party's rights. If the
28 judgment appealed from is rendered by a statutory three-judge district court, the order must
29 be made either:

30 (1) by that court sitting in open session; or

31 (2) by the assent of all its judges, as evidenced by their signatures.

32 ~~**(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by~~
33 ~~supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be~~
34 ~~given upon or after filing the notice of appeal or after obtaining the order allowing the~~
35 ~~appeal. The stay takes effect when the court approves the bond.~~

C. RULE 5: E-SERVICE AND E-FILING

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, have cooperated in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities ((b)(2)(E) would supersede it); and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The value of uniform expression extends beyond the Civil and Criminal Rules to include the Appellate and Bankruptcy Rules as well. But it has not seemed useful to attempt to restructure the Appellate, Bankruptcy, and Civil Rules to emulate the structure of the all-new Criminal Rule 49. All four advisory committees have cooperated in achieving what all believe to be the fullest desirable level of uniformity.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions—determining what exceptions to make would be difficult, and there were likely to be many of them.

A subset of these questions was considered again in preparing the present proposal. The Rules were scanned for words that direct one party to communicate with another party by means that might, or might not, embrace e-communication. There are several of these words, and they appear in many places. The most obvious example is "mail." Other familiar words include deliver (delivery); send; and notify (notice). Somewhat less familiar words include "provide"; "return[, sequester, or destroy]"; "supplement or correct"; and "furnish." Other words seem to imply tangible embodiment in paper, most commonly "written" and "writing." Taking on all of these provisions now would needlessly delay completion of the present e-filing and e-service proposals. Practice is adjusting comfortably to the electronic era. There will be time enough for a separate project to consider which circumstances justify, or perhaps even require, communicating or acting by electronic means.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person not represented by an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person not represented by an attorney may file electronically only if allowed by court order or local rule, and can be required to do so only by court order or by a local rule that includes reasonable exceptions. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Local rules in most districts already require attorneys to file electronically. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But e-filing can be required only by court order or by a local rule that includes reasonable exceptions. The language that a local rule must include reasonable exceptions is taken almost verbatim from present Rule 5(d)(3). It will protect against local-rule requirements that might impede access to courts, a concern that had troubled the Criminal Rules Committee with respect to habeas corpus and § 2255 proceedings.

1 Rule 5. Serving and Filing Pleadings and Other Papers

2 (d) Filing * * *

3 **(2) *Nonelectronic Filing* ~~How Filing is Made—In General.~~** A paper not filed electronically is
4 filed by delivering it:

5 (A) to the clerk; or

6 (B) to a judge who agrees to accept it for filing, and who must then note the filing date on
7 the paper and promptly send it to the clerk.

8 (3) *Electronic Filing and Signing, ~~or Verification.~~*

- 9 (A) *By a Represented Person—Generally Required; Exceptions.* A court may, by local rule,
10 allow papers to be filed, signed, or verified. A person represented by an attorney must
11 file electronically, unless nonelectronic filing is allowed by the court for good cause
12 or is allowed or required by local rule, by electronic means that are consistent with
13 any technical standards established by the Judicial Conference of the United States.
- 14 (B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by
15 an attorney:
- 16 (i) may file electronically only if allowed by court order or by local rule; and
- 17 (ii) may be required to file electronically only by court order, or by a local rule that
18 includes reasonable exceptions.
- 19 (C) *Signing.* The user name and password of an attorney of record, together with the
20 attorney’s name on a signature block, serves as the attorney’s signature.
- 21 (D) *Same as a Written Paper.* A paper filed electronically in compliance with a local rule
22 is a written paper for purposes of these rules.

Committee Note

1 Electronic filing has matured. Most districts have adopted local rules that require electronic
2 filing, and allow reasonable exceptions as required by the former rule. The time has come to seize
3 the advantages of electronic filing by making it generally mandatory in all districts for a person
4 represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be
5 allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

6 Filings by a person not represented by an attorney are treated separately. It is not yet possible
7 to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic
8 filing. Encounters with the court’s system may prove overwhelming to some. Attempts to work
9 within the system may generate substantial burdens on a pro se party, on other parties, and on the
10 court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local
11 rules or court order. Efficiently handled electronic filing works to the advantage of all parties and
12 the court. Many courts now allow electronic filing by pro se litigants with the court’s permission.
13 Such approaches may expand with growing experience in these and other courts, along with the
14 growing availability of the systems required for electronic filing and the increasing familiarity of
15 most people with electronic communication. Room is also left for a court to require electronic filing
16 by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file
17 electronically does not impede access to the court, and reasonable exceptions must be included in
18 a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely
19 to be exercised only to support special programs, such as one requiring e-filing in collateral
20 proceedings by pro se prisoners.

21 The user name and password of an attorney of record, together with the attorney’s name on
22 a signature block, serves as the attorney’s signature.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING. * * *

(2) *Nonelectronic Filing.* A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing.*

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user—and very few now are—is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(b) Service: How Made. * * ***

3 **(2) Service in General.** A paper is served under this rule by:

4 **(A)** handing it to the person * * *

5 **(E)** sending it to a registered user by filing it with the court's electronic-filing
6 system or sending it by other electronic means if that the person
7 consented to in writing—in either of which events service is complete
8 upon ~~transmission~~ filing or sending, but is not effective if the serving
9 party learns that it did not reach the person to be served; or * * *

Committee Note

1 Provision for electronic service was first made when electronic communication was not as
2 widespread or as fully reliable as it is now. Consent of the person served to receive service by
3 electronic means was required as a safeguard. Those concerns have substantially diminished, but
4 have not disappeared entirely, particularly as to persons proceeding without an attorney.

5 The amended rule recognizes electronic service on a registered user by filing with the court's
6 electronic-filing system. A court may choose to allow registration only with the court's permission.
7 But a party who registers will be subject to service by filing with the court's system unless the court
8 provides otherwise. With the consent of the person served, electronic service also may be made by
9 means that do not use the court's system. Consent can be limited to service at a prescribed address
10 or in a specified form, and may be limited by other conditions.

11 Because Rule 5(b)(2)(E) now authorizes service by filing with the court's electronic-filing
12 system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on
13 local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing
system or sending it by other electronic means that the person
consented to in writing—in either of which events service is complete
upon filing or sending, but is not effective if the serving party learns
that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b)(3) reads:

(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

Committee Note

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration or to qualify a registered user's participation in service through the court's facilities.

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by the court's electronic-filing system. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where service was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means

specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if “the serving party learns that it did not reach the person to be served.” That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(d) FILING.**

3 **(1) Required Filings: Certificate of Service.**

4 **(A) Papers after the Complaint.** Any paper after the complaint that is required to be served
5 ~~—together with a certificate of service—~~ must be filed within a reasonable time after
6 service. But disclosures under Rule 26(a)(1) or (2) and the following discovery
7 requests and responses must not be filed * * *.

8 **(B) Certificate.** A certificate of service must be filed within a reasonable time after service,
9 but a notice of electronic filing constitutes a certificate of service on any person
10 served by the court’s electronic-filing system.

Committee Note

1 The amendment provides that a notice of electronic filing generated by the court’s CM/ECF
2 system is a certificate of service on any person served by the court’s electronic-filing system. But
3 if the serving party learns that the paper did not reach the party to be served, there is no service under
4 Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

5 When service is not made by filing with the court’s electronic filing system, a certificate of
6 service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

(1) Required Filings: Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served
must be filed within a reasonable time after service. But disclosures under
Rule 26(a)(1) or (2) and the following discovery requests and responses must not be
filed * * *.

(B) Certificate. A certificate of service must be filed within a reasonable time after service,
but a notice of electronic filing constitutes a certificate of service on any person
served by the court’s electronic-filing system.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

(d) Filing * * *

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic filing system.

(2) *Nonelectronic Filing.* A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing.*

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule, and

- (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.
- (C) *Signing*. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.
- (D) *Same as Written Paper*. A paper filed electronically is a written paper for purposes of these rules.

II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part

of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of ESI, procedures for prompt resolution of discovery disputes, and “other appropriate matters.” Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure” used in the federal courts, and to recommend “[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]”

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. *Standing Order.* This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order, which includes comments received during the Civil Rules committee meeting in April, is as follows:

“The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court’s inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the court may [for good cause] defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss [for lack of subject-matter jurisdiction, personal jurisdiction, sovereign immunity, or absolute immunity of a public official]. The time can be set by the court at any time no later than the time set by paragraph 4, measured from entry of the order that decides the motion. [If the court does not set a time, it is set by paragraph 4 as measured from entry of the order that decides the motion].

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the

parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pre-trial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons whom you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person whom you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology-assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.

d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.”

2. *User’s Manual.* The pilot project will require something of a “user’s manual” for the pilot judges. The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. *Timing, Participation, and Other Issues.*

We propose that the initial disclosure pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate. We would appreciate your thoughts on this issue.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory disclosures be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the disclosures required by the pilot, defeating in part the purpose of prompt and complete disclosures early in every case. We would appreciate your thoughts on this issue as well.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the “just, speedy, and inexpensive determination of every action.” Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district “dashboard” that are decided

slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. *Participants*

- A. Civil Rules and Standing Committees
- B. CACM
- C. FJC

3. *Timetable*

- A. April 2016—approval by Civil Rules Committee
- B. June 2016—approval by Standing Committee, CACM, and FJC
- C. September 2016—approval by the Judicial Conference
- D. Early 2017—initial implementation
- E. End of 2020—completion

4. *Criteria for district courts to participate*

- A. Court must be willing to make the pilot's requirements mandatory.

- B. All judges on the district court must be willing to participate.
- C. At least three to five district courts need to participate.

This pilot project is less refined than the mandatory disclosures pilot and will require significant work over the next several months. Because of the schedule we hope to follow, we need your input now. We would appreciate your careful review and your comments and suggestions.

III. REPORT ON PROJECTS

A. ONGOING PROJECTS

1. RULE 5:2: MOTION TO REDACT

The Bankruptcy Rules Committee is considering the addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Although Rule 9037(h) has been developed to a point that would support a recommendation for publication, the Bankruptcy Rules Committee has decided that it is better to defer publication while the Appellate, Civil, and Criminal Rules Committees explore parallel amendments to the rules that parallel Rule 9037. There has been some hope that the courts' electronic filing system might be developed to effect automatic redaction of personal identifying information improperly included in court filings. Nonetheless, it is useful to move ahead with work that can be put aside if a reliable technological solution can be found.

This report of progress on a possible Civil Rule 5.2(i) is offered for two purposes. The first is the intrinsic purpose of exploring the need for a new rule and the best shape it might take.

The second purpose is to reflect on the unavoidable growing pains that commonly attend efforts to achieve the maximum level of appropriate uniformity when several different committees approach the same topic. The Standing Committee is responsible for all rules that it recommends to the Judicial Conference and, through the Conference, to the Supreme Court and Congress. When two or more rules are intended to mean the same thing, they should say it in the same way. But there are many possible ways of saying something, and minds both disciplined and creative may disagree on the most accurate way of saying it. Intellectual commitments can be hard to reconcile, even if professional detachment succeeds in putting aside any element of pride of authorship. The early draft Civil Rule 5.2(i) is presented below with footnotes that identify several styling choices. There are many reasons to avoid discussion of them by the Standing Committee itself. The advisory committees are responsible for reaching consensus on their own. But it may be useful to have this simple illustration of the process in the mid-stream evolution of a very modest rule.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c) (limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

There is good reason to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all committees have reached their own conclusions. This question has come up late enough in the winter cycle that it has not been feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But the work will continue, subject only to the bare possibility that a technological solution may be found that will accomplish everything that might be accomplished by new rules.

1 **Rule 5.2. Privacy Protection for Filings Made with the Court**

2 * * * * *

3
4 **(i) Motion to Redact a Previously Filed Document.**

5 **(1) *Content of the Motion.*** Unless the court orders otherwise, a person¹ that seeks
6 to redact from a previously filed document information that is protected under

¹ Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

- 7 Rule 5.2(a)² must file a motion under seal. The motion must:
- 8 (A) include³ an identical⁴ copy of the original document showing the
9 proposed redactions;
- 10 (B) include the docket number of the original document; and
- 11 (C) be served on all parties⁵ and any person whose identifying information⁶
12 is to be redacted.
- 13 (2) ***Restricting Public Access to an Unredacted Document.*** The court must:
- 14 (A) [promptly]⁷ restrict [deny]⁸ public access to the motion and the

² The Bankruptcy draft is: “information that is subject to privacy protection under,” which seems longer than necessary.

³ The Bankruptcy Draft reads: “attach a copy.” That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: “The motion must * * *.” “Include” works with that formula. It may be argued that “attach” treats the copy of the paper as an exhibit, while “include” makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: “A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”

⁴ “[I]dential” is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the “identical” copy is identical to the unredacted document “except for the redaction.” The intended meaning is “identical to the unredacted document except for the redactions.” It seems better to delete “identical,” relying on the sense of “copy” to prevent surreptitious deletion of information beyond that protected—or at least arguably protected—by Rule 5.2(a).

⁵ The Bankruptcy Rule includes a long list of bankruptcy characters that do not fit the Civil Rules context.

⁶ The Bankruptcy Rule is: “any individual whose personal identifying information is to be redacted.” For the Civil Rule, “person” seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

⁷ The Bankruptcy Rule begins: “Upon receipt of the motion, the court shall promptly restrict public access.” The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Rendered in Civil Rules language, this approach would substitute “must” for “shall,” and “receiving” for “receipt of.” But “filed” may be better than “receiving”: “When the motion is filed, the court must promptly restrict public access * * *.”

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed “[promptly].”

⁸ “Deny” likely is better than restrict. No public access.

15 unredacted document:
16 (i) pending its ruling on the motion, and
17 (ii) if the motion is granted, until the court amends or vacates the
18 order; and
(B) restore public access if the motion is denied.⁹

Committee Note

1 Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy
2 Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from
3 the circumstances that may arise in bankruptcy filings.

4 Any person may file a motion to redact a filed document to delete information protected by
5 Rule 5.2(a).

6 The motion must include a copy that is identical to the filed document except for the
7 redactions. It must identify the location of the unredacted document in the docket.

8 A single motion may relate to one or more unredacted documents. But if the proposed
9 redactions involve different documents it may be better to file separate motions, particularly if
10 different types of protected information are involved.

11 The motion should request immediate action to deny public access to [the motion and]¹⁰ the
12 unredacted document pending the court's ruling on the motion. Because the motion itself may call
13 attention to the unredacted document, the court should act as promptly as possible to deny public
14 access pending its ruling. The movant may assist the court by invoking whatever means are
15 compatible with the court's electronic and paper filing procedures.

16 If the motion is granted, the redacted document should be placed on the docket, and public
17 access to [the motion and] the unredacted document should remain restricted. If the court denies the

⁹ The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia—that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful—if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

¹⁰ Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

18 motion, generally the restriction on public access to [the motion and] the document should be lifted.

19 This procedure does not affect any remedies that a person whose personal identifiers are
20 exposed may have against the person that filed the unredacted document.

2. RULE 30(b)(6): DEPOSING AN ENTITY

Rule 30(b)(6), which allows a party to name an entity as a deponent, was added in 1970. In rough terms, the purpose was to enable a party to discover “information known or reasonably available to the organization” more effectively than had proved possible through written interrogatories or an endless trek through named individual deponents who claim not to be the ones who know what the organization knows.

Implementation of Rule 30(b)(6) has encountered problems. In 2006, the Committee undertook an extensive study at the prompting of a submission by a committee of the New York State Bar Association. Genuine problems were identified, but it was not thought likely that effective solutions could be found in revised rule text. The question came back in 2013 in a set of proposals made by the New York City Bar. Consulting the efforts made seven years earlier, the Committee again decided to put the question aside.

Now those questions and others have been renewed in a proposal submitted by “members of the Council and Federal Task Force of the ABA Section of Litigation, in our individual capacities.” The submission repeats many of the challenges made by earlier submissions. It offers views on some of them, but not all. The broad request is that the Committee “undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.”

The Committee concluded that these questions should be taken up again. The reasons are expressed in a statement by one member quoted in the Draft Minutes: These problems arise “constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away.” It will be difficult to find rule text that will encourage reasonable practice. But the Committee should at least try.

A Rule 30(b)(6) Subcommittee has been appointed. Its work is just beginning. It does not seem likely that any proposed rule amendments can be developed in time for a recommendation to publish as early as August 2017.

3. RULE 81(c)(3)(A): JURY DEMAND ON REMOVAL

This submission to the Civil Rules Committee addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions, however.

This topic is presented now to seek advice on two questions. The first is whether the Style Project erred in changing “does” to “did,” as explained below, and whether the change should be undone if indeed it was unfortunate. The second is whether Rule 81(c)(3) strikes the right balance in protecting against forfeiture of the right to jury trial by assigning to the court and the party who removes a case from state court responsibility to initiate the Rule 38 demand process.

1 **RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS**

2 **(c) Removed Actions.**

3 **(1) *Applicability.*** These rules apply to a civil action after it is removed from a state court.

4 * * *

5 **(3) *Demand for a Jury Trial.***

6 **(A) *As Affected by State Law.*** A party who, before removal, expressly demanded a
7 jury trial in accordance with state law need not renew the demand after
8 removal. If the state law ~~does~~ did not require an express demand for a jury
9 trial, a party need not make one after removal unless the court orders the
10 parties to do so within a specified time. The court must so order at a party’s
11 request and may so order on its own. A party who fails to make a demand
12 when so ordered waives a jury trial.

13 **(B) *Under Rule 38.*** If all necessary pleadings have been served at the time of
14 removal, a party entitled to a jury trial under Rule 38 must be given one if the
15 party serves a demand within 14 days after:

- 16 (i) it files a notice of removal; or
17 (ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, “does,” and underlining the substitute, “did.”]

The specific suggestion focuses narrowly on the change from “does” to “did.” The suggestion is that the change has created a trap for the unwary. So long as the rule said “does,” it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying “did” may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says “does”; an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from “does” to “did” has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that “did” appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that “Joe Spaniol is right” that there is a gap in the rule, but suggesting that it cannot be fixed—if fixing is needed—in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was “expressly demanded * * * in accordance with state law” before removal. It makes sense to carry the demand forward after removal. Rule 81(c)(3)(A) does that.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal—a demand must be served, not “14 days after the last pleading directed to the issue is served,” (the Rule 38(b)(1) timing,) but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job—Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is “to avoid unintended waivers of jury trial.” But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that “a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.” Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule “under which the direction is to be given routinely.” But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone “would recreate the difficulty which the amendment seeks to meet.” These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. That would require a written demand no later than 14 days after the last pleading addressed to the issue is served. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that “a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial.”

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from “does” to “did” may create

some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: at the time of removal, it did not require an express demand at any point in the progress of the case to trial, but after removal it was changed to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. “Does” took on an apparently established and quite limited meaning. It is possible to read “did” in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts—no matter what may be the experience of particular lawyers—seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case—but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial late in the case only because the judge does not seem sufficiently sympathetic is reduced. And if there is some reason for excusing failure to make a timely demand, Rule 39(b) protects the opportunity to reclaim a jury trial.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

(3) Demand for a Jury Trial. Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one¹¹ if the party serves a demand within 14 days after:

- (A) it files a notice of removal, or
- (B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing or undertake a thorough

¹¹ This version simply tracks the current rule. It might be shortened: “If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *.”

reexamination of Rule 81(c). Matters can be resolved reasonably without changing “did” back to “does.” But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification. The Committee will consider this choice at its November 2016 meeting.

B. ISSUES RESOLVED

A number of suggestions for rules amendments have been removed from the agenda. Only brief identifications are provided here. Further discussion is provided in the Draft Minutes.

A judge suggested adoption of a rule that would enhance initial disclosure, reduce discovery, and limit motions for summary judgment. The suggestion advances specific approaches to questions that have been constantly on the agenda. It was put aside now because it overlaps in many ways with the proposed pilot projects on initial mandatory disclosure and expedited procedures.

Another judge noted frustration with the “separate document” requirement of Rule 58. The problem arises when a judge offers a brief explanation of reasons in a document that is intended to be the final judgment in the case. The precise line may waver a bit in application, but it is clear that anything more than a completely minimal explanation disqualifies the document as “separate.” The result under Rule 58(c)(2) is a 150-day delay before time limits start to run for post-judgment motions and appeal. These questions were explored extensively in the process of amending Rule 58 in 2002. The Appellate Rules Committee explored them again in 2008. Each time the conclusion was that the separate document requirement should be retained. It serves a valuable function in setting a clear line that begins the time for post-judgment motions and appeal. Compliance is easy. Only absent-mindedness gets in the way. The Committee concluded that renewed education, with particular attention to deputy courtroom clerks, is better than a rule amendment.

One submission offered four suggestions. The first relates to e-filing by pro se litigants; that subject is addressed in the proposed Rule 5 amendments discussed above. The other three were:

(1) To amend Rule 5.2 to forbid filing even the last four digits of a social security number. The Committee understands that the last four digits are important in bankruptcy practice and preferred to maintain uniformity with the Bankruptcy rule.

(2) To require sealing of affidavits stating the assets of a party seeking to proceed *in forma pauperis*. The Committee concluded that protection of financial privacy in this setting is outweighed by the value of public access to information about decisions to allow free filing and by the administrative burdens of sealing.

(3) To require counsel to provide a pro se party with copies of cases or other authorities cited by court or counsel “that are unpublished or reported exclusively on computerized data bases.” Some courts require this by local rule now. Although it may be a desirable practice, it seems better left to local practice than enshrined in a national rule.

Another submission suggested that the pleading standard articulated in Rule 8(a)(2) has, by virtue of Supreme Court reinterpretations, become “so misleading as to be plain error.” In recent years the Committee has deliberately deferred any project that would attempt to rearticulate, and perhaps to redefine, the pleading standards that have emerged in the wake of the *Twombly* and *Iqbal* decisions. The time has not yet come for such a project.

Still other suggestions deal with a wide range of issues:

(1) A potential confusion about adding additional time to respond when a time period starts from the day when a disclosure is “made,” rather than “served.” The Committee concluded the rules are clear on careful reading.

(2) The need for continued monitoring of the time when it may be desirable to consider mandatory disclosure of third-party litigation financing arrangements. The Committee retains this question in its agenda, but believes that present action would be premature because these arrangements are evolving rapidly.

(3) Finding means to facilitate personal service on United States employees as defendants. The Committee concluded a court rule probably cannot direct government agencies to reveal employee home addresses, and that service by leaving the summons and complaint at the employee’s office would not be desirable.

(4) Addressing “time stamps” and facilitating access to court resources by the visually impaired—a topic not appropriate for solution by a national rule of procedure, but deserving of attention by court administrators.

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EX. 1

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RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov,
Judge_Grimm@mdd.uscourts.gov

02/24/2016 11:31 AM

Edward Cooper, "coquille@law.harvard.edu"
Cc: "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov"
, "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>
To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>,
"Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>
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"Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,

History: This message has been forwarded.

1 attachment



Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse;
Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in their appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it at the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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EX. 2

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John Barkett’s Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

| Arizona Rule 26.1 | Comments During the Focus Group |
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| <p>The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.</p> | <p>It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made.</p> <p>If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.</p> |
| <p>The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.</p> | <p>Duty to supplement is also helpful because parties generally develop new claims in litigation.</p> |
| <p>The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.</p> | <p>If a good disclosure statement, it will help decide who to depose.</p> <p>The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given.</p> <p>A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say.</p> <p>Judge: problem is objection at trial comes very fast with jury sitting there. Was it “fairly described”? Will someone be prejudiced? These are inherent problems in a rule like this. “I don’t think it can be better drafted.”</p> <p>Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
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| | <p>disclosure statement. Or some add, “Mr. Smith will also testify on topics covered in his deposition.”</p> <p>Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.</p> |
| <p>The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.</p> | <p>The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given.</p> <p>Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.</p> |
| <p>The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.</p> | |
| <p>The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.</p> | <p>No one does this.</p> <p>It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.</p> |
| <p>A computation and the measure of damage alleged by the disclosing party and the documents or testimony on</p> | <p>This does not happen up front.</p> <p>It is okay to say this disclosure will be supplemented. By the time of final</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
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| <p>which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.</p> | <p>disclosure, you had better answer this but not needed initially.</p> <p>Judge: you want to be sure issues are raised fairly by the disclosure.</p> <p>One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.</p> |
| <p>The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.</p> | <p>A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left.</p> <p>If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.</p> |
| <p>A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents</p> | <p>Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences.</p> <p>In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1.</p> <p>One change proposed in Arizona is to eliminate "reasonably calculated" standard</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
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| <p>and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.</p> | <p>and leave it just as “relevance.”</p> <p>The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual’s cases in state court, he almost never issues interrogatories.</p> <p>One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement.</p> <p>Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. “Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied.” We get motions to exclude evidence based on non-disclosure. They become “gotchas” for some lawyers, who should have just picked up the phone and called to ask for a supplement.</p> <p>One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure.</p> <p>One plaintiff’s lawyer believes that the disclosure rule has affected plaintiff’s lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial.</p> <p>A plaintiff’s personal injury lawyer felt that Rule 26.1 adds a layer of discovery.</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
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| | <p>Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don’t intentionally versus accidentally.</p> <p>Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police.</p> <p>When supplemental disclosures are produced, new information is typically bolded or in italics.</p> <p>Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late.</p> <p>One lawyer said he could never remember seeing anything “startling” in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a \$25,000 or \$50,000 case, it adds expense.</p> <p>Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement.</p> <p>Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production.</p> <p>Conceptually, though, it is harder to explain to some clients that AZ’s rule</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
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| | <p>requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money.</p> <p>Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed.</p> <p>If there is a large amount of ESI, what is done? Disclosure would likely say: “we are negotiating an ESI protocol,” or “we have agreed on an ESI protocol and this is what will happen...” If no discussion occurs, it might say: “We will make disclosure in due course after review.”</p> <p>When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult.</p> <p>Judge: try to discuss with counsel and with the judge.</p> <p>One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process.</p> <p>Should disclose sources of ESI at a minimum.</p> <p>If a “data dump,” hard to argue something was not disclosed.</p> <p>Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply.</p> <p>Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.</p> |

| Arizona Rule 26.1 | Comments During the Focus Group |
|--------------------------|--|
| | <p>A plaintiffs’ lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules.</p> <p>A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery.</p> <p>A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases.</p> <p>A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach.</p> <p>A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen parties fairly prejudice when they failed to comply.</p> <p>A plaintiffs’ lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a “gotcha” tactic by arguing something obvious was not disclosed.</p> <p>A plaintiffs’ lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.</p> |

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EX. 3

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To: Judge Campbell
Cc: Rebecca Womeldorf
From: Amelia Yowell, Supreme Court Fellow
Date: December 13, 2015
RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.¹ If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

¹ You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

| | Scope of Disclosure | List or Summary re Individuals | Produce or Identify Docs, ESI, data compilations, tangible things | Damages | Insurance Agreements |
|--|--|---|---|---|-----------------------------|
| Federal Fed. R. Civ. P. 26(a)(1) | Helpful information (but not impeachment information) | Name, address, and telephone number <u>and</u> subject | A copy <u>or</u> description by category and location, limited to possession, custody, or control | A computation of each category <u>and</u> documents/material must be available for inspection or copying | Inspection and copying |
| New Hampshire N.H. Superior Court Civ. R. 22(a) | Helpful information (but not impeachment information) | Name, address, and telephone number <u>and</u> summary (unless the information is in a produced document) | A copy, limited to possession, custody, or control | A computation of each category <u>and</u> a copy of documents/materials | Inspection and copying |
| Nevada Nev. R. Civ. P. 16.1(a)(1), 26(b)(1) | Helpful <u>and</u> hurtful information, including impeachment <i>“Relevant to the subject matter”</i> | Name, address, and telephone number <u>and</u> subject | A copy <u>or</u> description by category and location, limited to possession, custody or control | A computation of any category <u>and</u> documents/materials must be available for inspection and copying | Inspection and copying |
| Alaska Alaska R. Civ. P. P. 26(a)(1) | The factual basis for each claim or defense Helpful <u>and</u> hurtful information | Name, address, and telephone number <u>and</u> subject | For relevant documents, a copy <u>or</u> a description by category <u>and</u> a copy of any un-privileged | List categories of damages <u>and</u> a computation of each category of special damages <u>and</u> | Produce a copy |

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|---|--|--|---|--|------------------------|
| | <i>“Relevant to disputed facts alleged with particularity in the pleadings”</i> | | statements <u>or</u> the name, address, and telephone number of the custodian of the statement <u>and</u> photos, diagrams, and videotapes | documents/materials must be available for inspection or copying | |
| Colorado Colo. R. Civ. P. 26(a)(1) | Helpful <u>and</u> hurtful information <i>Relevant to the claims and defenses of any party”</i> | Name, address, and telephone number <u>and</u> “brief description” | A listing <u>and</u> a copy <u>or</u> description by category and location, limited to possession, custody, or control <u>and</u> make available for inspection and copying | A description of the categories <u>and</u> a computation of economic damages <u>and</u> relevant documents/materials must be available for inspection or copying | Inspection and copying |
| Utah Utah R. Civ. P. 26(a)(1) | For individuals: helpful information (but not impeachment information) <u>and</u> each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings <u>and</u> any the party may offer in its case-in-chief (but not charts, summaries, | Name, address, and telephone number <u>and</u> subject <u>and</u> , if an expected fact witness, a summary | A copy, limited to possession or control of the party | A computation of any damages claimed <u>and</u> a copy of documents/materials | Produce a copy |

| | | | | | |
|---|--|--|--|---|--|
| | and demonstrative exhibits) | | | | |
| Arizona Ariz. R. Civ. P. 26.1(a) | <p>The factual basis <u>and</u> legal theory for each claim or defense</p> <p>For individuals: helpful <u>and</u> hurtful information (<i>knowledge or information relevant to the events, transactions, or occurrences</i>) <u>and</u> witnesses the party intends to call at trial <u>and</u> all persons who have given statements (written, recorded, signed, or unsigned) <u>and</u> anticipated expert witnesses</p> <p>For documents, etc.: any the party plans to use at trial <u>and</u> helpful <u>and</u> hurtful documents (<i>relevant to the subject matter</i>), <u>and</u> those reasonably calculated to lead to the discovery of admissible evidence</p> | <p>Names, address, and telephone number <u>and</u> nature <u>and</u>, for witnesses expected at trial, a fair description of the substance of the testimony <u>and</u>, for witnesses who have given a statement, the identity of the custodian of the copies <u>and</u>, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert’s qualification, and the name and address of the custodian of the expert’s reports</p> | <p>For documents expected to be used at trial, “the existence, location, custodian, and general description,” <u>and</u> for relevant documents, a list <u>or</u>, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) <u>and</u> unless good cause, a copy</p> | <p>A computation of damages <u>and</u> a copy of the documents/materials <u>and</u> the names, addresses, and telephone numbers of all damage witnesses</p> | <p>List existence, location, custodian, <u>and</u> general description</p> |

| | | | | | |
|---|--|--|--|---|---------------|
| <p>Texas</p> <p>Tex. R. Civ. P. 194.2</p> <p>(NOT MANDATORY)</p> | <p>Factual basis <u>and</u> legal theories for claims or defenses (but not all evidence that may be offered at trial)</p> <p>Helpful <u>and</u> hurtful information</p> <p><i>“Relevant facts”</i></p> | <p>Name, address, and telephone number <u>and</u> a brief statement of connection <u>and</u> for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)</p> | <p>A copy of any witness statements <u>and</u> for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert’s current resume and bibliography</p> | <p>The amount and method of calculating economic damages <u>and</u>, if physical or mental injury, all medical records and bills reasonably related <u>or</u> authorization permitting disclosure</p> | <p>A copy</p> |
|---|--|--|--|---|---------------|

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.**(1) Initial Disclosure.**

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under [Rule 34](#), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

- (ii) a forfeiture action in rem arising from a federal statute;
- (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
- (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
- (v) an action to enforce or quash an administrative summons or subpoena;
- (vi) an action by the United States to recover benefit payments;
- (vii) an action by the United States to collect on a student loan guaranteed by the United States;
- (viii) a proceeding ancillary to a proceeding in another court; and
- (ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [Federal Rule of Evidence 702, 703, or 705](#).

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under [Federal Rule of Evidence 702](#), [703](#), or [705](#); and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under [Rule 32\(a\)](#) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under [Federal Rule of Evidence 402](#) or [403](#)--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

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

(2) Limitations on Frequency and Extent.

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

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought 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.

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

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and [Rule 37\(a\)\(5\)](#) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in [Rule 35\(b\)](#); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
- (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party 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 to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

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

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) **Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) **Early Rule 34 Requests.**

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

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

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

(B) **When Considered Served.** The request is considered to have been served at the first Rule 26(f) conference.

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

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

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

(e) Supplementing Disclosures and Responses.

(1) **In General.** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) **Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under [Rule 16\(b\)](#).

(2) **Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

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

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

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under [Rule 16\(b\)](#) and (c).

(4) **Expedited Schedule.** If necessary to comply with its expedited schedule for [Rule 16\(b\)](#) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

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December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat. Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat. Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse*; when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md. Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St. Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat. Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat. Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat. Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St. Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat. Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

Ind.Stat. Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 557, 606(8); La. Code Pract. (Dart, 1932) arts. 347-356; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §§ 61 to 67; Mo. St. Ann. §§ 1753, 1759, pp. 4023, 4026; Neb. Comp. Stat. (1929) §§ 20-1246, 20-1247; 2 N.H. Pub. Laws (1926) ch. 337, § 1; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann. Civ. Stats. Tex. arts. 3738, 3753, 3769; [Wis. Stat. \(1935\) § 326.12](#); Ontario Consol. Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ. Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn. Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo. Rev. Stat. Ann. 1939, § 1917; 2 Burns' Ind. Stat. Ann. 1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, [C.C.A.2](#), 1943, [139 F.2d 469](#); *Mahler v. Pennsylvania R. Co.*, E.D.N.Y. 1945, 8 Fed. Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn. 1939, [27 F.Supp. 946](#); *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del. 1944, 8 Fed. Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y. 1945, 9 Fed. Rules Serv. 34.41, Case 1 (Rule 26 contemplates “examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial.”); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D. Wis. 1944, 8 Fed. Rules Serv. 34.41, Case 2 (“... the Rules . . . permit ‘fishing’ for evidence as they should.”); Note, 1945, 45 Col. L. Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word “relevant” in effect meant “material and competent under the rules of evidence”. *Poppino v. Jones Store Co.*, W.D. Mo. 1940, 1 F.R.D. 215, 3 Fed. Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y. 1939, [26 F.Supp. 424](#). Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md. 1940, 1 F.R.D. 213, 3 Fed. Rules Serv. 26b.211, Case 3; *Gitto v. “Italia,” Societa Anonima Di Navigazione*, E.D.N.Y. 1940, [31 F.Supp. 567](#); *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y. 1939, [29 F.Supp. 504](#); *Colpak*

v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.*, E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York*, S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman*, D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.*, supra; *Stevenson v. Melady*, S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.*, supra; *Application of Zenith Radio Corp.*, E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York*, S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.*, E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.*, S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.*, D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.*, supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.*, E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500*, N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer*, C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, [2A Barron & Holtzoff, *Federal Practice and Procedure*, § 651.2 \(Wright ed. 1961\)](#), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., [Wiesenberger v. W. E. Hutton & Co.](#), 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: [Cook v. Welty](#), 253 F.Supp. 875 (D.D.C.1966) (cases cited); [Johanek v. Aberle](#), 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules*, 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: [Bisserier v. Manning](#), 207 F.Supp. 476 (D.N.J.1962); [Cooper v. Stender](#), 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage*, 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits*, 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in [2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1](#), nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See [Bisserier v. Manning](#), *supra*. Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In [Clauss v. Danker](#), 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer “may be liable” on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons “carrying on an insurance business” and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the “good cause” requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of “good cause” and the other variously described in the *Hickman* case: “necessity or justification,” “denial * * * would unduly prejudice the preparation of petitioner's case,” or “cause hardship or injustice” 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether “good cause” is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the “good cause” required by Rule 34 and the “necessity or justification” of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of “good cause” for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate “good cause” to a showing that the documents are relevant to the subject matter of the action. *E.g.*, *Connecticut Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.*, 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of “good cause”, although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.*, *Lauer v. Tankrederi*, 39 F.R.D. 334 (E.D.Pa.1966).

As to trial-preparation materials, however, the courts are increasingly interpreting “good cause” as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate “good cause” with relevance, e.g., *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read “good cause” as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and “good cause”; the court declined to rule on whether the statements were work-products. The court's treatment of “good cause” is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with “good cause” do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of “good cause” from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of “good cause” whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a “good cause” requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the “good cause” requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. Cf. *Hauger v. Chicago, R.I.*

& *Pac. RR*, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham*, *supra* at 131-133; *Pickett v. L. R. Ryan, Inc.*, 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.*, 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder*, 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A *Barron & Holtzoff, Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. Cf. *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, e.g., *Safeway Stores, Inc. v. Reynolds*, 176

F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.*, 19 F.R.D. 144 (W.D.Pa.1956); with e.g., *New York Central R.R. v. Carr*, 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. E.g., *Smith v. Central Linen Service Co.*, 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.*, 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A *Barron & Holtzoff, Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery*, 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes*: Fla.Stat. Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat. Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat. Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules*: Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); cf. Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, e.g., *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts*, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy--and often fruitless--cross-examination

during trial,” and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, *Discovery in Eminent Domain Proceedings* 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres*, 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g.*, *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres*, 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio*, 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *Stan.L.Rev.* 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g.*, *American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay*, 372 F.2d 174, 176-177

(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of “unfairness”. See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g.*, *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The 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.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to “time” as well as to “place” or may not safeguard against “undue burden or expense.”

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g.*, *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g.*, *Kaepler v. James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A *Barron & Holtzoff, Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment*, 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim*, 46 *Corn.L.Q.* 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 *Yale L.J.* 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 *Fed.B.J.* 289, 296-297 (1951); *Developments in the Law-Discovery*, 74 *Harv.L.Rev.* 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 *Yale L.J.* 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.*, E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.*, 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g.*, *Chenault v. Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.*, 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 *Harv.L.Rev.* 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." *Fed.R.Civ.P.* 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt

to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, e.g., *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 *U.Pitt.L.Rev.* 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement [*sic*] or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See [Rule 411, Federal Rules of Evidence](#). Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the “substance” of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term “expert” to refer to those persons who will testify under [Rule 702 of the Federal Rules of Evidence](#) with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was “without substantial justification” and hence would not bar

an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under [Rules 402 and 403 of the Federal Rules of Evidence](#)). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. See D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques*, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. See T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal “standing” orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. “Use” includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--“the need arises.”

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to “claims and defenses,” and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials “warranted on the evidence,” and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of “proceedings” rather than categories of “actions” because some might not properly be labeled “actions.” Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

an “appeal” based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or “standing” orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to “opt out” of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be “inappropriate in the circumstances of the action.” Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is “first served or otherwise joined” after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed “promptly.”

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

“Shall” is replaced by “must” under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party “may use to support” its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the “subject matter” language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the “subject matter” language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the “reasonably calculated to lead to the discovery of admissible evidence” standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, “relevant” means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. See *8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. Cf. *Crawford-El v. Britton*, 118 S.Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly”).

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any “matter”—not “information”—relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of “relevant” in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but “standing” orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but “standing” orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). “Standing” orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a “conference” of the parties, rather than a “meeting.” There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but “standing” orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

“Shall” is replaced by “must,” “does,” or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court’s action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term “electronically stored information” has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term “data compilations” is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on “issues relating to disclosure or discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. See *Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. See Rule 26(b)(2) (B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. Cf. *Manual for Complex Litigation (4th)* § 11.422 (“A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called “clawback agreements” -- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including—for many experts—an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under [Evidence Rule 702](#), [703](#), or [705](#). Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B) (vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the

discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.” The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added “to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices.”

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: “[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as “limitations”, no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: “Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery.”

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and “the importance of the proposed discovery in resolving the issues.” Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...!

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): “All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)].” The Committee Note recognized that “[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1).” It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision ..." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

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

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

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under [Evidence Rule 502](#).

[Notes of Decisions \(1465\)](#)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

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Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions (Refs & Annos)
A. Civil Rules
V. Discovery

NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called “fast-track” section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce “gamesmanship” in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from [Rule 26\(a\)\(1\) of the Federal Rules of Civil Procedure](#). It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide “the subjects” of the discoverable information known to individuals likely to have such information, [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(i\)](#), and “a description by category and location” of the discoverable materials in the possession, custody or control of the disclosing party, [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(ii\)](#). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(iii\)](#), in that the rule eliminates reference to “privileged or protected from disclosure” information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal [Rule 26\(e\)](#) and [Rule 21\(g\)](#). It should be noted, however, that this rule differs from [Rule 21\(g\)](#). [Rule 21\(g\)](#) sets forth

the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references [Rule 21](#) and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22

The state court rules are current with amendments received through August 15, 2015.

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#).

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#); a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under [NRS 50.275](#), [50.285](#) and [50.305](#), which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under [NRS 48.025](#) and [48.035](#), shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to [Rule 26\(a\) of the federal rules](#), with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the “subject matter” standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See [Fed. R. Civ. P. 26\(a\) advisory committee note \(2000\)](#). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on [Rule 26\(f\) of the federal rules](#), but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of [Rule 26\(f\) of the federal rules](#) regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in [Rule 26\(f\) of the federal rules](#) and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

[Notes of Decisions \(22\)](#)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1

Current with amendments received through 11/15/15

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
V Depositions and Discovery

Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition after being sealed be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

- (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in [Rule 26\(a\) of the federal rules](#), as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. [NRCPC 16.1\(b\)](#)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by [Rule 16.1\(a\)](#). Paragraph (1) is amended to address when a party must supplement disclosures made under [Rule 16.1\(a\)](#) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under [Rule 16.1\(a\)\(2\)\(B\)](#). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in [Rules 16](#) and [16.1](#). To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by [Rule 16.1](#). Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with [Rules 37\(a\)\(4\)](#) and [37\(c\)\(1\)](#)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under [Rule 16](#) that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

[Notes of Decisions \(62\)](#)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Civil Procedure
Part V. Depositions and Discovery

Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under [Civil Rule 16\(g\)](#), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of [AS 09.17.080](#), and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [Evidence Rules 702, 703, or 705](#).

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under [Rule 32\(a\)](#) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with [Rule 5](#).

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under [Rule 30](#), and the number of requests under [Rule 36](#). The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought 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.

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [Rule 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in [Rule 35\(b\)](#) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of [Rule 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under [Rule 33\(a\)](#) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under [Civil Rule 30](#), a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under [Rule 4\(e\)](#) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under [Civil Rule 30\(a\)\(2\)\(C\)](#).

(B) For depositions upon written questions under [Civil Rule 31](#), a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under [Civil Rules 33, 34, and 36](#), discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or [Civil Rule 26.1\(b\)](#) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under [Rule 16\(b\)](#), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (c) or under [Rule 16\(b\) and \(c\)](#).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) [Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring. In a civil action for personal injury or property damage involving less than \$100,000 in claims, the parties shall limit discovery to that allowed under [District Court Civil Rule 1\(a\)\(1\)](#) and shall avail themselves of the expedited calendaring procedures allowed under [District Court Civil Rule 4](#).

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies “to all causes of action accruing on or after the effective date of this Act.” The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts [AS 09.17.020](#) concerning punitive damages. New [AS 09.17.020\(e\)](#) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new [AS 09.17.020\(e\)](#) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends [AS 09.19.050](#) to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 “by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners.”

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used “[e]xcept to the extent otherwise directed by order or rule,” and sets a timeline for disclosures “[u]nless otherwise directed by the court.” Civil Rule 26(f) also sets out a procedure to be used “except when otherwise ordered.” In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of [Administrative Rule 46](#), and is available on the court system's website at <http://www.courts.alaska.gov/orders-cr16-26.htm>.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26
Current with amendments received through October 15, 2015

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, [C.R.C.P. 120](#), or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to [C.R.C.P. 34](#);

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to [C.R.C.P. 34](#) the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to [C.R.C.P. 34](#); and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to [C.R.C.P. 34](#).

Disclosures shall be served within 28 days after the case is at issue as defined in [C.R.C.P. 16\(b\)\(1\)](#). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to [C.R.C.P. 16\(d\)](#).

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to [Rules 702, 703, or 705 of the Colorado Rules of Evidence](#) together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead [C.R.C.P. 16\(c\)](#).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to [C.R.C.P. 10](#), signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to [C.R.C.P. 34](#); physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) **Discovery Scope and Limits.** Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [C.R.C.P. 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b) (1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by [C.R.C.P. 35\(b\)](#) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a) (2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party 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 not review, 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 shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) **Protective Orders.** Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to [C.R.C.P. 16\(b\)\(18\)](#). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by [C.R.C.P. 26\(b\)\(2\)](#). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See [C.R.C.P. 16](#)].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with [C.R.C.P. 16](#), C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, [C.R.C.P. 120](#), or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and [C.R.C.P. 16](#) to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after [Fed.R.Civ.P. 26](#) as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in [C.R.C.P. 16](#), which is very different from its Federal Rule

counterpart. The interrelationship between C.R.C.P. 26 and [C.R.C.P. 16](#) is described in the Committee Comment to [C.R.C.P. 16](#).

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different ([C.R.C.P. 16\(b\)](#)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules ([C.R.C.P. 121](#) § 1-12) but not the Federal Rule ([Fed.R.Civ.P. 26\(c\)](#)); (7) presumptive limitations on discovery as contemplated by [C.R.C.P. 16\(b\)\(1\)\(VI\)](#) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule ([C.R.C.P. 16\(b\)\(1\)\(IV\)](#)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations ([C.R.C.P. 29](#)); and (10) pretrial endorsements governed by [Fed.R.Civ.P. 26\(a\)\(3\)](#) are part of Colorado's trial management system established by [C.R.C.P. 16\(c\)](#) and [C.R.C.P. 16\(d\)](#).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in [C.R.C.P. 16\(b\)](#) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in [C.R.C.P. 8](#) for a "short, plain statement" of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal "Committee Notes" to the December 1, 1993 and December 1, 2000 amendments of [Fed.R.Civ.P. 26](#) are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the [C.R.C.P. 16\(b\)](#) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed [Fed. R. Civ. P. 26\(b\)\(1\)](#). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules “shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.” [C.R.C.P. 1](#).

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information “whether or not supportive” of the disclosing party's case. This should not be a significant change from prior practice. In 2000, [Fed. R. Civ. P. 26\(a\)\(1\)](#) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of [Rule 26\(a\)\(1\)](#) require information related to claims for relief and defenses (consistent with the scope of discovery in [Rule 26\(b\)\(1\)](#)). Also the identification of persons with relevant information calls for a “brief *description* of the *specific* information that each individual is known or believed to possess.” Under the prior rule, disclosures of persons with discoverable information identifying “the subjects of information” tended to identify numerous persons with the identification of “X is expected to have information about and may testify relating to the facts of this case.” The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a “summary” of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. [Rule 26\(a\)\(2\)\(B\)\(I\)](#).

“Other” (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a “statement” must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. [Rule 26\(a\)\(2\)\(B\)\(II\)](#).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. [Rule 26\(b\)\(4\)\(A\)](#).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. [Rule 26\(e\)](#). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to [Rule 26](#), like the current and proposed version of [Fed. R. Civ. P. 26](#), emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." [C.R.C.P. 1. Rule 26\(a\)\(2\)](#) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

[Notes of Decisions \(393\)](#)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

West's **Utah** Code Annotated
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule **26**

RULE **26**. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under [Rule 702 of the Utah Rules of Evidence](#) and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under [Rule 702 of the Utah Rules of Evidence](#) from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under [Rules 402 and 403 of the Utah Rules of Evidence](#), objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the [Utah Health Care Malpractice Act](#) for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming \$50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

| Tier | Total | Rule 33 | Rule 34 | Rule 36 | Days |
|-----------|------------|-------------------|------------|-----------|-----------|
| | Fact | Interrogatories | Requests | Requests | to |
| Amount of | Deposition | including all | for | for | Complete |
| Damages | Hours | discrete subparts | Production | Admission | Standard |
| | | | | | Fact |
| | | | | | Discovery |

| | | | | | | |
|---|---|----|----|----|----|-----|
| 1 | \$50,000 or less | 3 | 0 | 5 | 5 | 120 |
| 2 | More than \$50,000 and less than \$300,000 or non-monetary relief | 15 | 10 | 10 | 10 | 180 |
| 3 | \$300,000 or more | 30 | 20 | 20 | 20 | 210 |

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in [Drew v. Lee, 2011 UT 15](#), wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce “satellite litigation” over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by “relevance” or the “likelihood to lead to discovery of admissible evidence.” These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that “the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” The Federal Rules of Civil Procedure contains a similar provision. See [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)](#). This method of limiting discovery, however, was rarely invoked either under the [Utah](#) rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of “standard” discovery has the burden of showing that the request is “relevant to the claim or defense of any party” and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The “one-size-fits-all” system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

rule itself. “Tier 1” describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger limits on standard discovery that are applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard discovery for actions involving damages in excess of \$300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26(c)** governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26(d)**. If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include [Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953](#). The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 (January/February, 2015).

Are medical records now off limits? An examination of *Sorenson v. Barbuto*. S. Grace Acosta, 22 **Utah** B.J. 17 (May/June, 2009).

Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 (1996).

Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 (1997).

AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 (2014).

How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 (Jan./Feb. 2001).

Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 (January/February 2007).

Talkin' 'bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 (2011).

UNITED STATES CODE ANNOTATED

In general, see [FRCP Rule 26 et seq.](#)

Relevant Notes of Decisions (163)

[View all 202](#)

Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

dismiss for failure to prosecute. *Velander v. LOL of Utah, LLC*, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error ☞ 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. *Warenski v. Advanced RV Supply*, 2011, 257 P.3d 1096, 685 *Utah Adv. Rep.* 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure ☞ 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. *Brown v. Glover*, 2000, 16 P.3d 540, 408 *Utah Adv. Rep.* 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client ☞ 112; Pretrial Procedure ☞ 11; Pretrial Procedure ☞ 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule 26 et seq. *Treutle v. District Court of Salt Lake County*, 1958, 7 *Utah* 2d 155, 320 P.2d 666. Divorce ☞ 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). *Blackham v. Snelgrove*, 1955, 3 *Utah* 2d 157, 280 P.2d 453. Pleading ☞ 1; Pretrial Procedure ☞ 16; Pretrial Procedure ☞ 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 *Utah* 2d 382, 412 P.2d 914. Pretrial Procedure ☞ 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 *Utah Adv. Rep.* 22, 2012 UT App 61. Pretrial Procedure ☞ 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. *Roundy v. Staley*, 1999, 984 P.2d 404, 374 *Utah Adv. Rep.* 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure ☞ 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), 26(b), 33. *Ellis v. Gilbert*, 1967, 19 *Utah* 2d 189, 429 P.2d 39. Pretrial Procedure ☞ 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 *Utah* 1, 245 P.2d 224. Pretrial Procedure ☞ 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

for discovery to assist the prosecution or defense of an action pending in a court at law arose. [Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 🔑 14.1](#)

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. [Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 🔑 21](#)

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 🔑 25](#)

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of [Civil Procedure, rules 1\(a\), 30\(b\), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 🔑 17.1; Pretrial Procedure 🔑 335](#)

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. [Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 🔑 17.1](#)

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. [Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 🔑 25](#)

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. [Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 Utah Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 🔑 45](#)

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🔑 961](#)

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🔑 961](#)

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. [PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 🔑 44.1](#)

Trial courts have broad discretion regarding discovery matters, including protective orders. [Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370](#), rehearing denied, certiorari denied 4 P.3d 1289. [Pretrial Procedure 19](#); [Pretrial Procedure 41](#)

Generally, trial court is granted broad latitude in handling discovery matters. [R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33](#), rehearing denied. [Pretrial Procedure 19](#)

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. [Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135](#). [Pretrial Procedure 19](#)

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. [Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135](#). [Pretrial Procedure 11](#)

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of [Civil Procedure, rule 34](#). [Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254](#). [Pretrial Procedure 336](#)

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. [Rules Civ.Proc., Rule 37](#). [Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89](#), on remand [2001 UT App 52, 2001 WL 298577](#). [Pretrial Procedure 24](#)

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. [R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850](#). [Pretrial Procedure 45](#)

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389](#), certiorari denied [275 P.3d 1019](#). [Pretrial Procedure 25](#)

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. [Harper v. Summit County, 1998, 963 P.2d 768, 348 Utah Adv. Rep. 7](#), certiorari granted [982 P.2d 87](#), affirmed in part, reversed in part [26 P.3d 193, 414 Utah Adv. Rep. 21, 2001 UT 10](#), rehearing denied. [Pretrial Procedure 25](#)

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. [Reece v. Board of Regents of State of Utah, 1987, 745 P.2d 457](#). [Pretrial Procedure 25](#)

Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. *Richards v. Brown*, 2009, 222 P.3d 69, 642 **Utah** Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 **Utah** Adv. Rep. 39, 2012 UT 14. *Pretrial Procedure* 🔑 41

“Rebuttal evidence,” which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) *Roundy v. Staley*, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. *Pretrial Procedure* 🔑 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of *Civil Procedure*, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. *Pretrial Procedure* 🔑 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of *Civil Procedure*, rules 1(a), 30(b), 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. *Pretrial Procedure* 🔑 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is “relevant” to lawsuit, within discovery rule. Rules of *Civil Procedure*, rule 26(b). *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. *Pretrial Procedure* 🔑 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. *Clayton v. Ford Motor Co.*, 2009, 214 P.3d 865, 632 **Utah** Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. *Evidence* 🔑 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of *Civil Procedure*, rule 26(b). *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. *Pretrial Procedure* 🔑 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. *Brussow v. Webster*, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. *Pretrial Procedure* 🔑 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. *Rules Civ.Proc., Rule 37(b)(2)*. *Rehn v. Rehn*, 1999, 974 P.2d 306, 363 **Utah** Adv. Rep. 8, 1999 UT App 41. *Pretrial Procedure* 🔑 40

Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. [Pretrial Procedure](#) 🔑 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. *State By and Through Road Commission v. Petty*, 1966, 17 **Utah** 2d 382, 412 P.2d 914. [Pretrial Procedure](#) 🔑 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 379

--- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule 26(b)(1); Rules of Evid., Rule 401. *Major v. Hills*, 1999, 980 P.2d 683, 369 **Utah** Adv. Rep. 24, 1999 UT 44. [Pretrial Procedure](#) 🔑 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule 26(b)(1). *Chatterton v. Walker*, 1997, 938 P.2d 255, 312 **Utah** Adv. Rep. 3, rehearing denied. [Pretrial Procedure](#) 🔑 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules 26(b), 33. *Young v. Barney*, 1967, 20 **Utah** 2d 108, 433 P.2d 846. [Pretrial Procedure](#) 🔑 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, 26(b), 33. *Ellis v. Gilbert*, 1967, 19 **Utah** 2d 189, 429 P.2d 39. [Pretrial Procedure](#) 🔑 180

Privileged matters--In general

Materials which are subject of protective order under **Utah** Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); **Utah** Rules Civ.Proc., Rule 26(c)(7). *Anderson v. Department of Health and Human Services*, 1990, 907 F.2d 936. Records 🔑 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. *Allred v. Saunders*, 2014, 2014 UT 43, 2014 WL 5334034. *Privileged Communications and Confidentiality* 🔑 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). *R & R Energies v. Mother Earth Industries, Inc.*, 1997, 936 P.2d 1068, 313 **Utah** Adv. Rep. 33, rehearing denied. *Pretrial Procedure* 🔑 41; *Privileged Communications And Confidentiality* 🔑 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). *Madsen v. United Television, Inc.*, 1990, 801 P.2d 912. *Privileged Communications And Confidentiality* 🔑 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. *Mower v. McCarthy*, 1952, 122 **Utah** 1, 245 P.2d 224. *Pretrial Procedure* 🔑 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. *Schroeder v. Utah Attorney General's Office*, 2015, 2015 UT 77, 794 **Utah** Adv. Rep. 109, 2015 WL 5037832. *Pretrial Procedure* 🔑 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. *Schroeder v. Utah Attorney General's Office*, 2015, 2015 UT 77, 794 **Utah** Adv. Rep. 109, 2015 WL 5037832. *Pretrial Procedure* 🔑 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. *Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology*, 2008, 200 P.3d 643, 620 **Utah** Adv. Rep. 8, 2008 UT 88. *Pretrial Procedure* 🔑 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. *Southern Utah Wilderness*

Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 **Utah** Adv. Rep. 8, 2008 UT 88. [Pretrial Procedure](#) 🔑 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. *Menzies v. Galetka*, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. [Criminal Law](#) 🔑 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. *Menzies v. Galetka*, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. [Criminal Law](#) 🔑 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule 26(b)(3). *Featherstone v. Schaerrer*, 2001, 34 P.3d 194, 432 **Utah** Adv. Rep. 6, 2001 UT 86, rehearing denied. [Pretrial Procedure](#) 🔑 359

“Peace letter” in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule 26(b)(3). *Green v. Louder*, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. [Pretrial Procedure](#) 🔑 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). *Smith v. Smith*, 1999, 995 P.2d 14, 384 **Utah** Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. [Divorce](#) 🔑 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule 26(b)(1). *Roundy v. Staley*, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. [Pretrial Procedure](#) 🔑 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule 26(b)(3). *Salt Lake Legal Defender Ass'n v. Uno*, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. [Criminal Law](#) 🔑 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, “at issue” exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. *U.S.C.A. Const.Amend. 6*; Rules Civ.Proc., Rule 26(b)(3). *Salt Lake Legal Defender Ass'n v. Uno*, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. [Criminal Law](#) 🔑 1590

Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 🔑 381](#)


Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). [Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 🔑 381](#)


Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as "opinion work product." Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)


Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)


Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 🔑 359](#)


Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to


assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  359



Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  373


Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  373


Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  35; [Pretrial Procedure](#)  359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure](#)  373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet “prepared in anticipation of litigation or for trial” element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure](#)  359

There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp.](#), 1990, 801 P.2d 909. [Pretrial Procedure](#) 35; [Pretrial Procedure](#) 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule 26(b)(3). [Gold Standard, Inc. v. American Barrick Resources Corp.](#), 1990, 801 P.2d 909. [Pretrial Procedure](#) 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), 26(b)(4)(A); Const. art. 1, § 22. [Utah Dept. of Transp. v. Rayco Corp.](#), 1979, 599 P.2d 481. [Eminent Domain](#) 262(5); [Pretrial Procedure](#) 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." [Jackson v. Kennecott Copper Corp.](#), 1972, 27 [Utah](#) 2d 310, 495 P.2d 1254. [Pretrial Procedure](#) 359; [Privileged Communications And Confidentiality](#) 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules 26(b), 30(b), 34. [Mower v. McCarthy](#), 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. [Mower v. McCarthy](#), 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule 26(e). [American Interstate Mortg. Corp. v. Edwards](#), 2002, 41 P.3d 1142, 439 [Utah](#) Adv. Rep. 20, 2002 UT App 16. [Pretrial Procedure](#) 403; [Pretrial Procedure](#) 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule 26(e). [American Interstate Mortg. Corp. v. Edwards](#), 2002, 41 P.3d 1142, 439 [Utah](#) Adv. Rep. 20, 2002 UT App 16. [Pretrial Procedure](#) 403; [Pretrial Procedure](#) 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

existed, she was required to state so in written response. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). *Hales v. Oldroyd*, 2000, 999 P.2d 588, 391 [Utah Adv. Rep. 6](#), 2000 UT App 75, certiorari denied 4 P.3d 1289. [Pretrial Procedure](#) 403

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of [Civil Procedure, rule 34](#). *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah 2d 310](#), 495 P.2d 1254. [Pretrial Procedure](#) 405

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of [Civil Procedure, rule 34](#). *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah 2d 310](#), 495 P.2d 1254. [Pretrial Procedure](#) 404.1

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of [Civil Procedure, rule 34](#). *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah 2d 310](#), 495 P.2d 1254. [Pretrial Procedure](#) 405

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of [Civil Procedure, rule 34](#). *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah 2d 310](#), 495 P.2d 1254. [Privileged Communications And Confidentiality](#) 173

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of [Civil Procedure, rules 26\(b\), 30\(b\), 34](#). *Mower v. McCarthy*, 1952, 122 [Utah 1](#), 245 P.2d 224. [Pretrial Procedure](#) 404.1

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of [Civil Procedure, rules 26\(b\), 30\(b\), 34](#). *Mower v. McCarthy*, 1952, 122 [Utah 1](#), 245 P.2d 224. [Pretrial Procedure](#) 404.1

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah Adv. Rep. 22](#), 2012 UT App 61. [Courts](#) 99(6)

When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule 26(c); U.C.A.1953, 78-24-8. *Madsen v. United Television, Inc.*, 1990, 801 P.2d 912. [Privileged Communications And Confidentiality](#) 🔑 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. *Jackson v. Kennecott Copper Corp.*, 1972, 27 [Utah](#) 2d 310, 495 P.2d 1254. [Pretrial Procedure](#) 🔑 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34. *Mower v. McCarthy*, 1952, 122 [Utah](#) 1, 245 P.2d 224. [Pretrial Procedure](#) 🔑 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. *Turner v. University of Utah Hosp.*, 2011, 271 P.3d 156, 698 [Utah](#) Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 [Utah](#) Adv. Rep. 51, 2013 UT 52. [Pretrial Procedure](#) 🔑 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 [Utah](#) Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 [Utah](#) Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. [Pretrial Procedure](#) 🔑 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. *In re Discipline of Pendleton*, 2000, 11 P.3d 284, 405 [Utah](#) Adv. Rep. 3, 2000 UT 77. [Pretrial Procedure](#) 🔑 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules 26(c), 34(b). *Hales v. Oldroyd*, 2000, 999 P.2d 588, 391 [Utah](#) Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. [Pretrial Procedure](#) 🔑 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule 26(c)(4). *Smith v. Smith*, 1999, 995 P.2d 14, 384 [Utah](#) Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. [Divorce](#) 🔑 86

Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 26, 26(c), Const. Art. 8, § 4. *Carter v. Utah Power & Light Co.*, 1990, 800 P.2d 1095. Records 32; Records 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are “judicial records” and thus “public writing” subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 5(d), 26(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. *Carter v. Utah Power & Light Co.*, 1990, 800 P.2d 1095. Records 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. *Johnson v. Gold's Gym*, 2009, 206 P.3d 302, 626 Utah Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules 26(f), 37(b)(2). *Berrett v. Denver and Rio Grande Western R. Co., Inc.*, 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 44.1

--- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). *Hales v. Oldroyd*, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 46; Pretrial Procedure 435

---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such as secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. [Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 Utah Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45](#)

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. [Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 Utah Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434](#)

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules [26, 37\(b\)\(2\)](#). [Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 Utah Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312](#)

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules [26, 37\(b\)\(2\)](#). [Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 Utah Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312](#)

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. [Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39](#)

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40](#)

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40](#)

Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure](#) 🔑 40

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. [Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure](#) 🔑 45

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. [R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure](#) 🔑 587

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error](#) 🔑 961

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus "opening the door" to the very kind of expert testimony of which OPC complained on appeal. [In re Discipline of Corey, 2012, 274 P.3d 972, 705 Utah Adv. Rep. 40, 2012 UT 21. Attorney And Client](#) 🔑 57

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. [Liston v. Liston, 2011, 269 P.3d 169, 698 Utah Adv. Rep. 24, 2011 UT App 433. Divorce](#) 🔑 85

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. [Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure](#) 🔑 44.1

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. [Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure](#) 🔑 40

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Appeal and Error](#) 🔑 842(2); Costs 🔑 208

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs](#) 🔑 187

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. [Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs](#) 🔑 187

Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. [Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 Utah Adv. Rep. 8, 2009 UT 66](#), rehearing denied. [Pretrial Procedure](#) 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707](#). [Pretrial Procedure](#) 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be "largely identical" to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. [Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707](#). [Pretrial Procedure](#) 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a "retained or specially employed" expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. [Drew v. Lee, 2011, 250 P.3d 48, 678 Utah Adv. Rep. 4, 2011 UT 15](#). [Pretrial Procedure](#) 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) [Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 Utah Adv. Rep. 7, 2000 UT 64](#). [Courts](#) 39; [Pretrial Procedure](#) 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. [Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193](#), certiorari denied 268 P.3d 192. [Pretrial Procedure](#) 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. [Pretrial Procedure](#) 🔑 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of **Civil Procedure**, rules 31, 33, 37, 56(c). *Transamerica Title Ins. Co. v. United Resources, Inc.*, 1970, 24 **Utah** 2d 346, 471 P.2d 165. [Judgment](#) 🔑 178; [Pretrial Procedure](#) 🔑 14.1; [Pretrial Procedure](#) 🔑 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had "sprinted" across the road, and since the "surprise" claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of Civil Procedure, rules 26 et seq., 59, 59(a)(3). *Anderson v. Bradley*, 1979, 590 P.2d 339. [New Trial](#) 🔑 90; [New Trial](#) 🔑 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added "which I imagine, would be pertinent to address here." Rules of Civil Procedure, rules 26(e)(1), 59(a)(3). *Jensen v. Thomas*, 1977, 570 P.2d 695. [New Trial](#) 🔑 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were "reasonable and necessary" was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154; [Costs](#) 🔑 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. [Costs](#) 🔑 154

Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 🗝️ 154

Witness fee of \$1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. U.C.A.1953, 21-5-4; *Rules Civ.Proc.*, Rule 30(a). *Young v. State*, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 🗝️ 187

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 🗝️ 961

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. *Christiansen v. Farmers Ins. Exchange*, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error 🗝️ 840(4); Appeal And Error 🗝️ 961

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. *Thurston v. Workers Compensation Fund of Utah*, 2003, 83 P.3d 391, 490 **Utah** Adv. Rep. 9, 2003 UT App 438. Appeal And Error 🗝️ 961; Pretrial Procedure 🗝️ 19

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. *Rules Civ.Proc.*, Rule 26. *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error 🗝️ 949; Appeal And Error 🗝️ 961

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. *Rules Civ.Proc.*, Rule 26(e). *American Interstate Mortg. Corp. v. Edwards*, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Appeal And Error 🗝️ 199

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. *Green v. Louder*, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Appeal And Error 🗝️ 961; Pretrial Procedure 🗝️ 19

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) *Rules Civ.Proc.*, Rule 26(b)(1). *Roundy v. Staley*, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error 🗝️ 1043(6)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. *Rules Civ.Proc.*, Rule 26(b)

(3). *Askew v. Hardman*, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. [Appeal And Error](#) 1043(6); [Pretrial Procedure](#) 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules [26](#)(e)(1), [61](#); U.C.A.1953, [41-6-46\(1\)\(1981\)](#). *Onyeabor v. Pro Roofing, Inc.*, 1990, 787 P.2d 525. [Appeal And Error](#) 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, [77-7-1](#), [77-7-2](#), [77-7-11](#); Rules of [Civil Procedure](#), [rules 1](#), [61](#), [81](#). *State v. Geurts*, 1961, 11 [Utah](#) 2d 345, 359 P.2d 12. [Appeal And Error](#) 1170.6; [Pretrial Procedure](#) 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah](#) Adv. Rep. 22, 2012 UT App 61. [Appeal and Error](#) 840(4); [Appeal and Error](#) 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012, 273 P.3d 396, 703 [Utah](#) Adv. Rep. 22, 2012 UT App 61. [Appeal and Error](#) 1024.3

Rules [Civ. Proc.](#), Rule [26](#), UT R RCP Rule [26](#)
current with amendments received through December 1, 2015.

Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

- (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
- (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
- (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.
- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.
- (5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.
- (6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.
- (7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.
- (8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.
- (9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) **Signed Disclosure.** Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) **Claims of Privilege or Protection of Trial Preparation Materials.**

(1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party 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 made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE

2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

that is asserted after production was waived by the production.” Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, “with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.”>

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

[Notes of Decisions \(90\)](#)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1

Arizona State court rules are current with amendments received through 10/15/15

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 194. Requests for Disclosure (Refs & Annos)

TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- (f) for any testifying expert:
 - (1) the expert's name, address, and telephone number;
 - (2) the subject matter on which the expert will testify;
 - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (B) the expert's current resume and bibliography;
- (g) any indemnity and insuring agreements described in [Rule 192.3\(f\)](#);
- (h) any settlement agreements described in [Rule 192.3\(g\)](#);

(i) any witness statements described in [Rule 192.3\(h\)](#);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

[Notes of Decisions \(50\)](#)

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

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EX. 4

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A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

May 2015

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

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Introduction

This report summarizes the Federal Judicial Center’s research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.¹ The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.² The present report is a full and final report to the Committee on the Center’s development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the “most congested courts”);
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee’s Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the “expedited courts”); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center’s development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the “most congested courts” (“MCCs”). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee’s efforts, it became clear that membership on the list of MCCs changed little and that the Committee’s letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee’s Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.³

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.⁴ In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1⁵). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.⁶

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.⁷ In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.⁸ Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.⁹

6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and “other” contract cases. Prisoner civil rights, foreclosure, and “other” statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.¹⁰

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.¹¹ Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or “most expeditious”—districts in addition to the delayed—or “most congested”—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate “best practices,” the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

| | |
|--------------------------------|--------------------------------|
| Central District of California | Northern District of Texas |
| Southern District of Florida | Western District of Washington |
| District of Maine | Eastern District of Wisconsin |
| Western District of Missouri | |

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.¹²

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts’ perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, “the lawyers can do their work”; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and overtime have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two-week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated “Model Agreement Regarding Discovery of Electronically Stored Information.” The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for “Best Practices for Electronic Discovery in Criminal Cases,” which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a pre-filing conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the “Fast Track Summary Judgment” (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court’s panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases.

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled “most congested,” even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee’s inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee’s interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, “This is a really healthy thing to do. Whether we’re doing well or poorly in a couple of years, call us so we can go through this review again.” More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee’s Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more resources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a “dunning” letter from the Committee.

Given that the Committee’s assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

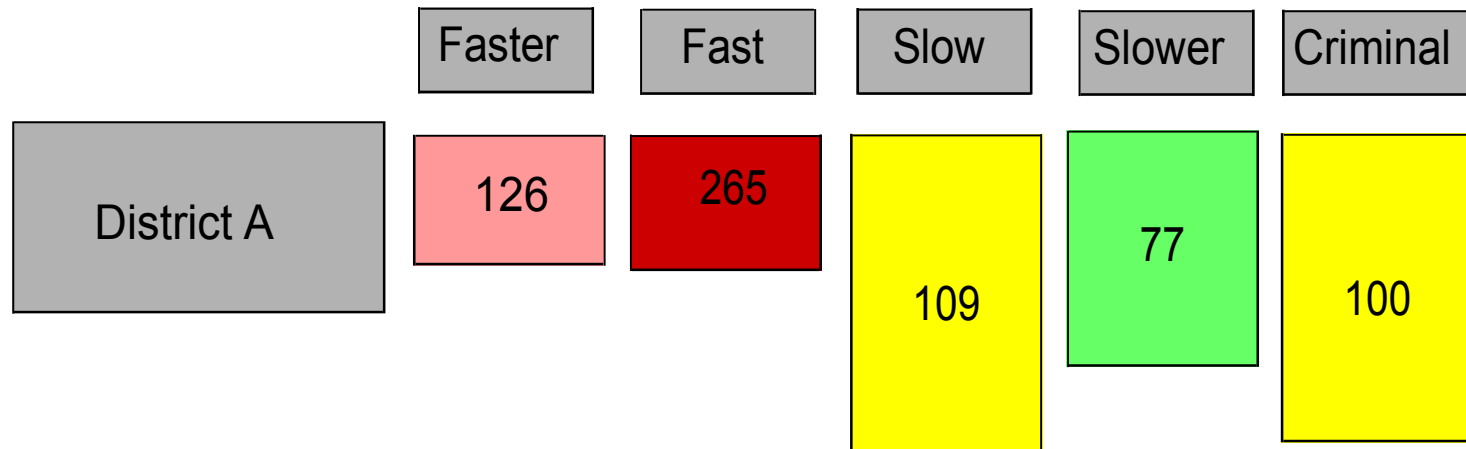
Attachment 1

Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

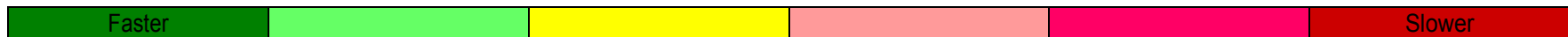
Average Disposition Time for the District Relative to the Average Disposition Time Nationwide
For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*



* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

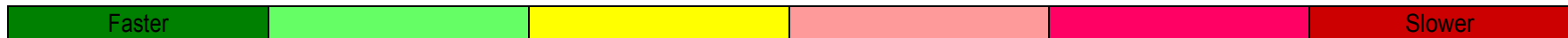
| Nature of Suit | Avg. Days to Termination | Number of Cases in District | Time Relative to National Average | Percentage of Cases in Quartile | Percentage of Cases in Docket |
|---|--------------------------|-----------------------------|-----------------------------------|---------------------------------|-------------------------------|
| BANKS AND BANKING | 2.00 | 1 | 1 | 0.61 | 0.10 |
| PRISONER - PRISON CONDITION | 7.00 | 1 | 3 | 0.61 | 0.10 |
| CONSUMER CREDIT | 87.50 | 2 | 51 | 1.21 | 0.20 |
| BANKRUPTCY APPEALS RULE 28 USC 158 | 132.92 | 13 | 66 | 7.88 | 1.31 |
| CONTRACT FRANCHISE | 196.00 | 1 | 68 | 0.61 | 0.10 |
| TRADEMARK | 198.33 | 6 | 72 | 3.64 | 0.61 |
| PRISONER - CIVIL RIGHTS | 235.38 | 29 | 83 | 17.58 | 2.93 |
| CIVIL RIGHTS ADA OTHER | 237.00 | 3 | 88 | 1.82 | 0.30 |
| COPYRIGHT | 299.11 | 9 | 98 | 5.45 | 0.91 |
| NATURALIZATION APPLICATION | 200.00 | 2 | 120 | 1.21 | 0.20 |
| EMPLOYEE RETIREMENT INCOME SECURITY ACT | 318.95 | 41 | 120 | 24.85 | 4.14 |
| LABOR/MANAGEMENT RELATIONS ACT | 291.20 | 5 | 122 | 3.03 | 0.50 |
| MARINE CONTRACT ACTIONS | 414.15 | 33 | 137 | 20.00 | 3.33 |
| INTERSTATE COMMERCE | 427.00 | 1 | 146 | 0.61 | 0.10 |
| FORECLOSURE | 294.60 | 5 | 159 | 3.03 | 0.50 |
| RENT, LEASE, EJECTMENT | 350.50 | 2 | 257 | 1.21 | 0.20 |
| AIRLINE REGULATIONS | 387.00 | 1 | 271 | 0.61 | 0.10 |
| RECOVERY OF DEFAULTED STUDENT LOANS | 568.00 | 10 | 399 | 6.06 | 1.01 |
| TOTAL | 258.15 | 165 | 126 | | |



*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

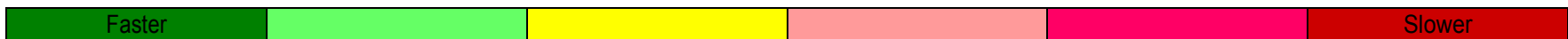
District A: 2010–2012
Fast Quartile Cases
Ranked by Time

| Nature of Suit | Avg. Days to Termination | Number of Cases in District | Time Relative to National Average | Percentage of Cases in Quartile | Percentage of Cases in Docket |
|--|--------------------------|-----------------------------|-----------------------------------|---------------------------------|-------------------------------|
| PRISONER PETITIONS - VACATE SENTENCE | 239.85 | 61 | 75 | 26.29 | 6.16 |
| CIVIL RIGHTS ACCOMMODATIONS | 308.00 | 4 | 94 | 1.72 | 0.40 |
| CONSTITUTIONALITY OF STATE STATUTES | 287.00 | 1 | 99 | 0.43 | 0.10 |
| PRISONER PETITIONS - HABEAS CORPUS | 414.89 | 70 | 124 | 30.17 | 7.06 |
| OTHER PERSONAL PROPERTY DAMAGE | 576.17 | 6 | 142 | 2.59 | 0.61 |
| DRUG RELATED SEIZURE OF PROPERTY | 468.76 | 21 | 150 | 9.05 | 2.12 |
| ASSAULT, LIBEL, AND SLANDER | 523.00 | 5 | 178 | 2.16 | 0.50 |
| OTHER REAL PROPERTY ACTIONS | 477.18 | 11 | 189 | 4.74 | 1.11 |
| OTHER STATUTORY ACTIONS | 691.20 | 49 | 227 | 21.12 | 4.94 |
| FAIR LABOR STANDARDS ACT | 1278.67 | 3 | 358 | 1.29 | 0.30 |
| ASBESTOS PERSONAL INJURY - PROD. LIAB. | 4116.00 | 1 | 1280 | 0.43 | 0.10 |
| TOTAL | 852.79 | 232 | 265 | | |



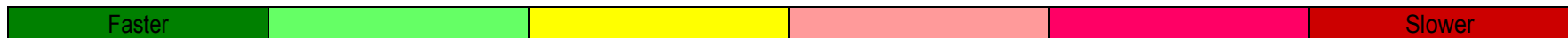
District A: 2010–2012
Slow Quartile Cases
Ranked by Time

| Nature of Suit | Avg. Days to Termination | Number of Cases in District | Time Relative to National Average | Percentage of Cases in Quartile | Percentage of Cases in Docket |
|------------------------------------|--------------------------|-----------------------------|-----------------------------------|---------------------------------|-------------------------------|
| OTHER FORFEITURE AND PENALTY SUITS | 197.53 | 15 | 59 | 5.15 | 1.51 |
| D.I.W.C./D.I.W.W. | 258.93 | 40 | 71 | 13.75 | 4.04 |
| CIVIL RIGHTS VOTING | 195.50 | 6 | 77 | 2.06 | 0.61 |
| CIVIL RIGHTS ADA EMPLOYMENT | 277.60 | 5 | 78 | 1.72 | 0.50 |
| S.S.I.D. | 281.08 | 25 | 80 | 8.59 | 2.52 |
| MILLER ACT | 287.79 | 14 | 100 | 4.81 | 1.41 |
| OTHER LABOR LITIGATION | 342.38 | 8 | 101 | 2.75 | 0.81 |
| MARINE PERSONAL INJURY | 400.00 | 23 | 104 | 7.90 | 2.32 |
| INSURANCE | 372.77 | 53 | 116 | 18.21 | 5.35 |
| MOTOR VEHICLE PERSONAL INJURY | 417.96 | 23 | 118 | 7.90 | 2.32 |
| OTHER FRAUD | 432.25 | 4 | 193 | 1.37 | 0.40 |
| OTHER CONTRACT ACTIONS | 663.42 | 66 | 212 | 22.68 | 6.66 |
| TAX SUITS | 754.67 | 9 | 109 | 3.09 | 0.91 |
| TOTAL | 375.53 | 291 | | | |



District A: 2010–2012
Slower Quartile Cases
Ranked by Time

| Nature of Suit | Avg. Days to Termination | Number of Cases in District | Time Relative to National Average | Percentage of Cases in Quartile | Percentage of Cases in Docket |
|-------------------------------------|--------------------------|-----------------------------|-----------------------------------|---------------------------------|-------------------------------|
| CIVIL (RICO) | 9.33 | 3 | 2 | 0.99 | 0.30 |
| SECURITIES, COMMODITIES, EXCHANGE | 56.00 | 1 | 7 | 0.33 | 0.10 |
| PERSONAL INJURY - PRODUCT LIABILITY | 284.09 | 23 | 34 | 7.59 | 2.32 |
| PATENT | 153.00 | 1 | 58 | 0.33 | 0.10 |
| OTHER PERSONAL INJURY | 417.06 | 66 | 58 | 21.78 | 6.66 |
| PROPERTY DAMAGE -PRODUCT LIABILITY | 252.67 | 6 | 63 | 1.98 | 0.61 |
| ENVIRONMENTAL MATTERS | 328.79 | 29 | 64 | 9.57 | 2.93 |
| AIRPLANE PERSONAL INJURY | 296.75 | 4 | 64 | 1.32 | 0.40 |
| OTHER CIVIL RIGHTS | 235.45 | 88 | 81 | 29.04 | 8.88 |
| OVERPAYMENTS UNDER THE MEDICARE ACT | 303.00 | 2 | 92 | 0.66 | 0.20 |
| LAND CONDEMNATION | 618.50 | 2 | | 0.66 | 0.20 |
| FEDERAL EMPLOYERS' LIABILITY | 425.00 | 1 | 94 | 0.33 | 0.10 |
| CIVIL RIGHTS JOBS | 403.33 | 21 | 151 | 6.93 | 2.12 |
| TORTS TO LAND | 673.25 | 4 | 158 | 1.32 | 0.40 |
| MEDICAL MALPRACTICE | 658.71 | 49 | 159 | 16.17 | 4.94 |
| BANKRUPTCY WITHDRAWAL 28 USC 157 | 441.33 | 3 | 77 | 0.99 | 0.30 |
| TOTAL | 347.27 | 303 | | | |



Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

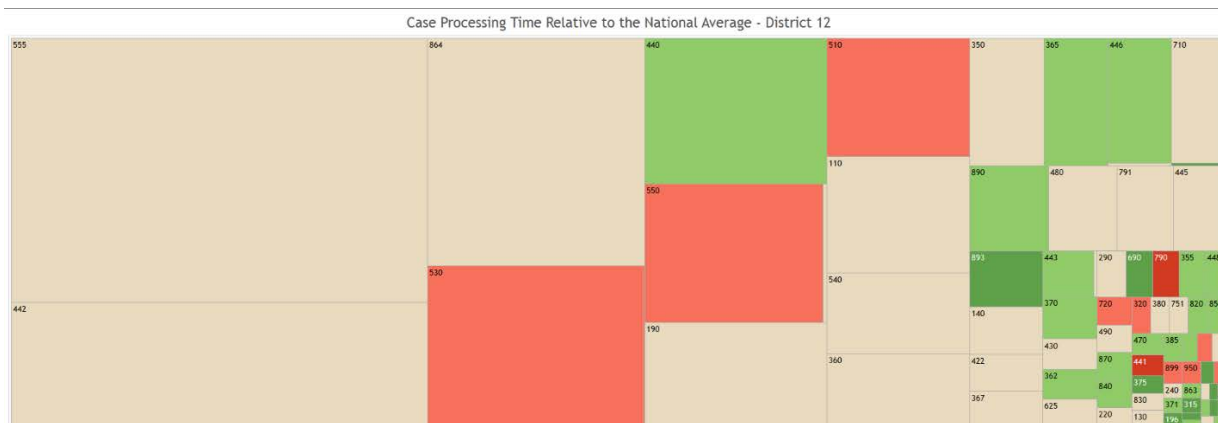
Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

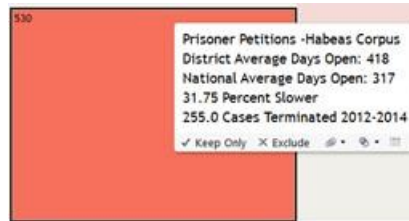
Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court’s terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).



As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court’s average case disposition time, the national average disposition time, the court’s overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

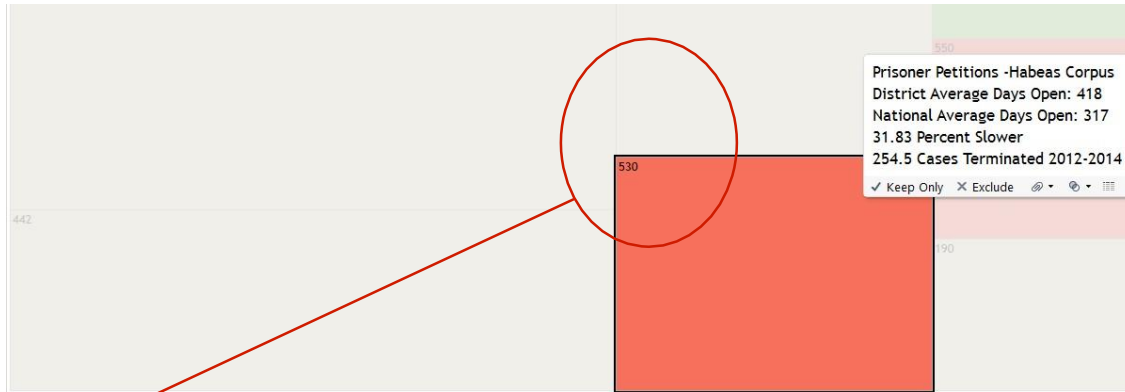


At the bottom of the dashboard, the user can see the cases used to calculate the district’s average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

| NOS Code | Nature of suit | Docket | Plaintiff | Defendant | Days | F |
|----------|----------------|----------|--------------------|--------------------------------|------|---|
| 110 | Insurance | 05-00831 | SMITH | SMITH | 66 | |
| | | 08-00019 | MAPP | GEORGIA DEPARTMENT OF C, ET AL | 760 | |
| | | 09-00169 | CULVER, ET AL | UNITED STATES OF AMERICA | 94 | |
| | | 09-00375 | HOLTCAMP | GLOBAL MEDICAL SAFETY DIVISION | 822 | |
| | | 09-00574 | NINO | MACY'S RETAIL HOLDINGS, INC. | 383 | |
| | | 09-00713 | BATISTE | LAWRENCE | 380 | |
| | | 09-00780 | ELLIS | JACKSON NATIONAL LIFE I, ET AL | 324 | |
| | | 09-01055 | BROOKS FARMS, INC. | AGRICOMMODITIES, INC., ET AL | 564 | |
| | | 10-00222 | JOHNSON | KEITH, ET AL | 167 | |
| | | 10-00242 | FRAZIER | HAYNES | 748 | |
| | | 10-00502 | GOMEZ | COLVIN | 153 | |
| | | 10-00531 | PERRY | FORT WAYNE CITY OF, IN, ET AL | 70 | |
| | | 10-00611 | BELL | MCCANN, ET AL | 55 | |
| | | 10-00842 | SHAKIR | DONAHOE, ET AL | 64 | |
| | | 10-00858 | SELLERS | SOCIAL SECURITY ADMINISTRATION | 322 | |
| | | 10-00969 | BAILEY | WALGREEN CO., ET AL | 166 | |

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.



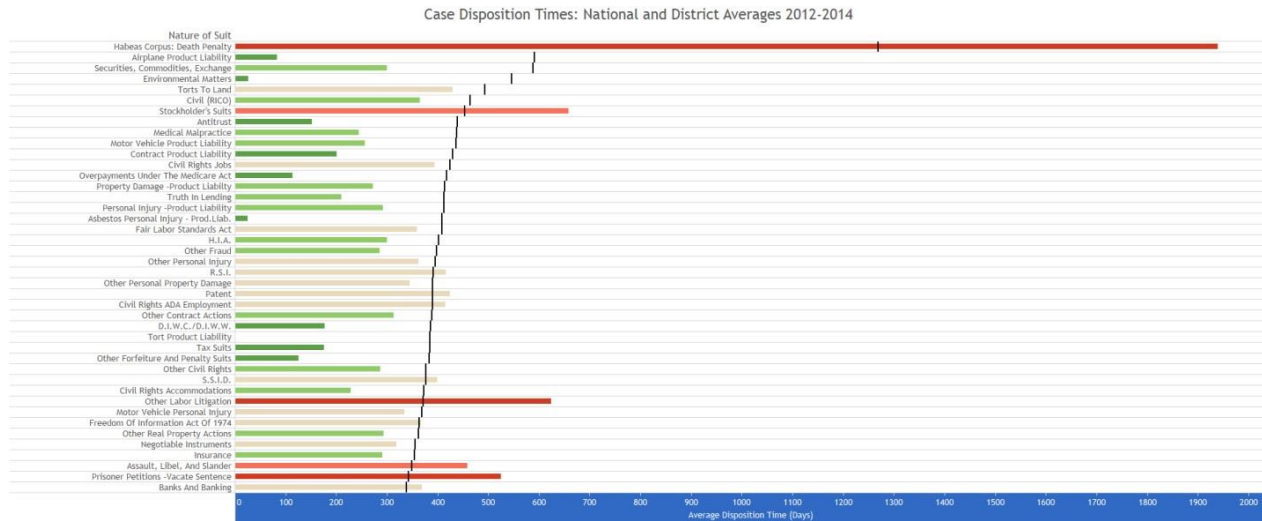
Cases Terminated 2012-2014

| NOS Code | Nature of Suit | Docket | Plaintiff | Defendant | Days |
|----------|------------------------------------|----------|--------------------------------|--------------------------------|------|
| 530 | Prisoner Petitions - Habeas Corpus | 08-00745 | UNITED STATES OF AMERICA | EXXONMOBIL PIPELINE COMPANY | 270 |
| | | 09-00121 | DARBY | HENDRICKS | 246 |
| | | 09-00429 | BAUER | COMMISSIONER OF SOCIAL SECURIT | 116 |
| | | 09-00448 | SANDERS | CENTER, INC | 131 |
| | | 09-00479 | SEARS | BRADLEY, ET AL | 23 |
| | | 09-00551 | THE INDEPENDENCE PROJEC, ET AL | SANDS BETHWORKS GAMING LLC | 409 |
| | | 09-00577 | SANDERS | THE OFFICE OF CHILDREN , ET AL | 118 |
| | | 09-00998 | HICKS | SMITH | 92 |
| | | 10-00065 | GATHERS | PEOPLE OF THE STATE OF NEW YOR | 123 |
| | | 10-00066 | LANE | FEATHERS | 1049 |
| | | 10-00072 | LITERAL | WARDEN TOLEDO CORRECTIONAL INS | 490 |
| | | 10-00102 | FINN | COLVIN | 899 |
| | | 10-00147 | CHANCE | PHARIS, ET AL | 0 |
| | | 10-00210 | RIVAS | UNITED STATES OF AMERICA | 117 |

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district’s average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district’s average disposition time, and the black dash is the national average disposition time.



If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

**Example Email Sent to Chief Judge and Clerk of Court in “Most Congested”
Districts in Preparation for Telephone Interview**

From: Donna Stienstra/DCA/FJC/USCOURTS
 To: Chief Judge _____
 Cc: Clerk of Court _____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
 Date: _____
 Subject: Preparation for conference call

Dear Chief Judge.:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on _____ about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

| | | | |
|-----------------|---------------------|------------------------------------|------------------------------------|
| Faster Quartile | Consumer Credit | 895 cases, 213 days to disposition | 23% longer than the national ave. |
| | Foreclosure | 114 cases, 264 days to disposition | 43% longer than the national ave. |
| | ERISA | 132 cases, 575 days to disposition | 117% longer than the national ave. |
| Fast Quartile | Other Stat. Actions | 162 cases, 400 days to disposition | 31% longer than the national ave. |
| | FSLA | 47 cases, 1029 days to disposition | 188% longer than the national ave. |
| Slow Quartile | Insurance | 66 cases, 518 days to disposition | 58% longer than the national ave. |
| | Oth. Contr.Actions | 200 cases, 574 days to disposition | 67% longer than the national ave. |
| | Motor Vehicle PI | 84 cases, 625 days to disposition | 74% longer than the national ave. |
| Slower Quartile | Civil Rights Jobs | 387 cases, 694 days to disposition | 77% longer than the national ave. |
| | Other Civil Right | 393 cases, 715 days to disposition | 94% longer than the national ave. |

During our conversation on _____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times -- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

**Example Email Sent to Chief Judge and Clerk of Court in “Expedited” Districts in
Preparation for Telephone Interview**

From: Donna Stienstra/DCA/FJC/USCOURTS
 To: Chief Judge _____
 Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
 Date: _____
 Subject: Preparation for conference call

Dear Chief Judge.:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name} next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for _____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?
2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?
3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: "Civil Caseload Analysis, [district name].pdf"

TAB 4C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

1 The Civil Rules Advisory Committee met at the Tideline Hotel
2 in Palm Beach, Florida, on April 14, 2016. (The meeting was
3 scheduled to carry over to April 15, but all business was concluded
4 by the end of the day on April 14.) Participants included Judge
5 John D. Bates, Committee Chair, and Committee members John M.
6 Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow,
7 Jr.; Judge Joan M. Ericksen; Parker C. Folse, Esq. (by telephone);
8 Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon.
9 Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.;
10 Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig
11 B. Shaffer. Former Committee Chair Judge David G. Campbell and
12 former member Judge Paul W. Grimm also participated by telephone.
13 Professor Edward H. Cooper participated as Reporter, and Professor
14 Richard L. Marcus participated as Associate Reporter. Judge Jeffrey
15 S. Sutton, Chair, Judge Neil M. Gorsuch, liaison (by telephone),
16 and Professor Daniel R. Coquillette, Reporter, represented the
17 Standing Committee. Judge Arthur I. Harris participated as liaison
18 from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the
19 court-clerk representative, also participated. The Department of
20 Justice was further represented by Joshua Gardner, Esq.. Rebecca A.
21 Womeldorf, Esq., Derek Webb, Esq., and Julie Wilson, Esq.,
22 represented the Administrative Office. Judge Jeremy Fogel and Emery
23 G. Lee, Esq., attended for the Federal Judicial Center. Observers
24 included Henry D. Fellows, Jr. (American College of Trial Lawyers);
25 Joseph D. Garrison, Esq. (National Employment Lawyers Association);
26 Alex Dahl, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.
27 (Duke Center for Judicial Studies); Natalia Sorgente (American
28 Association for Justice); John Vail, Esq.; Valerie M. Nannery,
29 Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

30 Judge Bates opened the meeting by welcoming everyone. He noted
31 that Judge Pratter and Elizabeth Cabraser have completed serving
32 their second terms and are due to rotate off the Committee. "We
33 will miss you, but hope to see you frequently in the future." Judge
34 Sutton also is completing his term as Chair of the Standing
35 Committee, and Judge Harris is concluding his term with the
36 Bankruptcy Rules Committee. They too will be missed.

37 Benjamin Mizer introduced Joshua Gardner, who will succeed Ted
38 Hirt as a Department of Justice representative to the Committee.
39 Gardner is a highly valued member of the Department, and makes time
40 to teach civil procedure classes as an adjunct professor.

41 Judge Bates noted that the proposed amendments to Civil Rules
42 4, 6, and 82 remain pending in the Supreme Court. On this front,
43 "no news is good news." The Minutes for the January meeting of the
44 Standing Committee are in the agenda book for this meeting. The
45 package of six proposed amendments to Rule 23 that had advanced at

46 the November meeting of this Committee was discussed. The Rule 23
47 discussion also described the decision to defer action on the
48 growing number of decisions grappling with "ascertainability" as a
49 criterion for class certification and with the questions raised by
50 different forms of "pick-off" strategies that defendants use in
51 attempts to moot individual class representatives and thus defeat
52 class certification. The Rule 62 stay-of-execution proposal also
53 was discussed. Apart from specific rules proposals, the ongoing
54 efforts to educate bench and bar on the December 1, 2015 package of
55 amendments were described. These efforts are "important,
56 essential." Discussion also included the continuing efforts to
57 develop pilot projects to test reforms that do not yet seem ready
58 to be adopted as national rules.

59 *November 2015 Minutes*

60 The draft minutes of the November 2015 Committee meeting were
61 approved without dissent, subject to correction of typographical
62 and similar errors.

63 *Legislative Report*

64 Rebecca Womeldorf reported that, apart from the bills noted at
65 the November meeting, there appear to be no new legislative
66 activities the Committee should be tracking.

67 *Rule 5*

68 The history of the Committee's work on the e-filing and e-
69 service provisions of Rule 5 was recounted. A year ago the
70 Committee voted to recommend publication of amendments to reflect
71 the growing maturity of electronic filing and service. Moving in
72 parallel, the Criminal Rules Committee began a more ambitious
73 project. Criminal Rule 49 has invoked the Civil Rules provisions
74 for filing and service. The Criminal Rules Committee began to
75 consider the possibility of adopting a complete and independent
76 rule of their own. This development counseled delay in the Civil
77 Rules proposals. The e-filing and e-service provisions in the
78 Appellate, Bankruptcy, Civil, and Criminal Rules were developed
79 together. The value of adopting identical provisions in each set of
80 rules is particularly high with respect to filing and service,
81 although it is recognized that differences in the rules may be
82 justified by differences in the characteristics of the cases
83 covered by each set of rules. The plan to recommend publication in
84 2015 was deferred.

85 The Criminal Rules Committee developed an independent Rule 49.
86 The Subcommittee that developed the rule welcomed participation in
87 their work and conference calls by representatives of the Civil
88 Rules Committee. The Civil Rules provisions proposed now were
89 substantially improved as a result of these discussions. The

90 differences from the proposals developed a year ago are discussed
91 with the description of the current proposals.

92 Although filing is covered by Rule 5(d), which comes after the
93 service provisions of Rule 5(b) in the sequence of subdivisions, it
94 is easier to begin discussion with filing, which is the act that
95 leads to service.

96 Present Rule 5(d)(3) allows e-filing when allowed by local
97 rule, and also provides that a local rule may require e-filing
98 "only if reasonable exceptions are allowed." Almost all districts
99 have responded to the great advantages of e-filing by making it
100 mandatory by requiring consent in registering as a user of the
101 court's system. Reflecting this reality and wisdom, proposed Rule
102 5(d)(3) makes e-filing mandatory, except for filings "made by a
103 person proceeding without an attorney."

104 Pro se litigants have presented more difficulty. Last year's
105 draft also required e-filing by persons proceeding without an
106 attorney, but directed that exceptions must be allowed for good
107 cause and could be made by local rule. Work with the Criminal Rules
108 Subcommittee led to a revision. The underlying concern is that many
109 pro se litigants, particularly criminal defendants, may find it
110 difficult or impossible to work successfully with the court's
111 system. The current proposal allows e-filing by a person proceeding
112 without an attorney "only if allowed by court order or by local
113 rule." A further question is whether a pro se party may be required
114 to engage in e-filing. Some courts have developed successful
115 programs that require e-filing by prisoners. The programs work
116 because staff at the prison convert the prisoners' papers into
117 proper form and actually accomplish the filing. This provides real
118 benefits to all parties, including the prisoners. The Criminal
119 Rules Subcommittee, however, has been concerned that permitting a
120 court to require e-filing might at times have the effect of denying
121 access to court. Their concern with the potential provisions for
122 Rule 5 arises from application of Rule 5 in proceedings governed by
123 the Rules for habeas corpus and for § 2255 proceedings. Discussion
124 of these issues led to agreement on a provision in proposed Rule
125 5(b)(3)(B) that would allow the court to require e-filing by a pro
126 se litigant only by order, "or by a local rule that allows
127 reasonable exceptions."

128 e-Service is governed by present Rule 5(b)(2)(E) and (3).
129 (b)(2)(E) allows service by electronic means "that the person
130 consented to in writing." (b)(3) allows a party to "use" the
131 court's electronic facilities if authorized by local rule. Most
132 courts now exact consent as part of registering to use the court's
133 system. Proposed Rule 5(b)(2)(E) reflects this practice by
134 eliminating the requirement for consent as to service through the
135 court's facilities. One of the benefits of consulting with the
136 Criminal Rules Subcommittee has been to change the reference to

137 "use" of the court's system. The filing party does not take any
138 further steps to accomplish service – the system does that on its
139 own. So the rule now provides for serving a paper by sending to a
140 registered user "by filing it with the court's electronic filing
141 system." Other means of e-service continue to require consent of
142 the person to be served. The proposal advanced last year eliminated
143 the requirement that the consent be in writing. The idea was that
144 consent often is given, appropriately enough, by electronic
145 communications. The Criminal Rules Subcommittee was uncomfortable
146 with this relaxation. The current proposal carries forward the
147 requirement that consent to e-service be in writing for all
148 circumstances other than service by filing with the court.

149 The direct provision for service by e-filing with the court in
150 proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous.
151 The national rule will obviate any need for local rules authorizing
152 service through the court's system. The proposals include
153 abrogation of Rule 5(b)(3).

154 Finally, the recommendations carry forward the proposal to
155 allow a Notice of Electronic Filing to serve as a certificate of
156 service. Present Rule 5(d)(1) would be carried forward as
157 subparagraph (A), which would direct filing without the present
158 "together with a certificate of service." A new subparagraph (B)
159 would require a certificate of service, but also provide that a
160 Notice of Electronic Filing constitutes a certificate of service on
161 any person served by filing with the court's electronic-filing
162 system. It does not seem necessary to add to this provision a
163 provision that would defeat reliance on a Notice of Electronic
164 Filing if the serving party learns that the paper did not reach the
165 person to be served. If it did not reach the person, there is no
166 service to be covered by a certificate of service.

167 Discussion noted the continuing uncertainties about amending
168 the provisions for e-filing and e-service without addressing the
169 many parallel provisions that call for acts that are not filing or
170 service. Many rules call for such as acts as mailing, or
171 delivering, or sending, or notifying. Similar words that appear
172 less frequently include made, provide, transmit[ted] return,
173 sequester, destroy, supplement, correct, and furnish. Rules also
174 refer to things written or to writing, affidavit, declaration,
175 document, deposit, application, and publication (together with
176 newspaper). On reflection, it appears that the question of
177 refitting these various provisions for the electronic era need not
178 be confronted in conjunction with the Rule 5 proposals. Rule 5
179 provides a general directive for the many rules provisions that
180 speak to serving and filing. It can safely be amended without
181 interfering with the rules that govern acts that are similar but do
182 not of themselves involve serving or filing.

183 It was noted that the parallel consideration of e-filing and

184 e-service rules in the several advisory committees means that some
185 work remains to be done in achieving as nearly identical drafting
186 as possible, consistent with the differences in context that may
187 justify some variations in substance. What appear to be style
188 differences may in fact be differences in substance. It was agreed
189 that the Committee Chair has authority to approve wording changes
190 that resolve style differences as the several committees work to
191 generate proposals to present to the Standing Committee in June. If
192 some changes in substance seem called for, they likely will be of
193 a sort that can be resolved by e-mail vote.

194 *Rule 62: Stays of Execution*

195 Judge Bates introduced the Rule 62 proposals by noting that
196 this project has been developed as a joint effort with the
197 Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge
198 Matheson has developed earlier versions and the current proposal.

199 Judge Matheson noted that earlier Rule 62 proposals were
200 discussed at the April 2015 and November 2015 meetings. The
201 Subcommittee worked to revise and simplify the proposal in response
202 to the concerns expressed at the November meeting. The Subcommittee
203 reached consensus on the three changes that provided the initial
204 impetus for taking on Rule 62. The proposal: (1) extends the
205 automatic stay from 14 days to 30 days, and eliminates the "gap"
206 between expiration of the stay on the 14th day and the express
207 authority in Rule 62(b) to order a stay pending disposition of Rule
208 50, 52, 56, or 60 motions made as late as 28 days after judgment is
209 entered; (2) expressly recognizes that a single security can be
210 posted to cover the period between expiration of the automatic stay
211 and completion of all proceedings on appeal; and (3) expressly
212 recognizes forms of security other than a bond.

213 Discussion in the Standing Committee in January focused on
214 only one question: why is the automatic stay extended to 30 days
215 rather than 28? The answer seemed to be accepted – it may be 28
216 days before the parties know whether a motion that suspends appeal
217 time will be made, and if appeal time is not suspended 30 days
218 allows a brief interval to arrange security before expiration of
219 the 30-day appeal time that governs most cases.

220 After the Standing Committee meeting, the Subcommittee made
221 one change in the proposed rule text, eliminating these words from
222 proposed (b)(1): " * * * a stay that remains in effect until a
223 designated time[, which may be as late as issuance of the mandate
224 on appeal,] * * *." The Subcommittee concluded that it may be
225 desirable to continue the stay beyond issuance of the mandate.
226 There may be a petition for rehearing, or a petition for
227 certiorari, or post-mandate proceedings in the court of appeals.
228 And the Committee Note was shortened by nearly forty percent.

229 Discussion began with a question about proposed Rule 62(b)(1):
230 "The court may at any time order a stay that remains in effect
231 until a designated time, and may set appropriate terms for security
232 or deny security." Present Rule 62 "does not mention a stay without
233 a bond. It happens, but ordinarily only in extraordinary
234 circumstances." If there is no intent to change present practice,
235 something should be said to indicate that a stay without security
236 is disfavored. And it might help to transpose proposed paragraph
237 (2) with (1), so that the nearly automatic right to a stay on
238 posting bond comes first. That would emphasize the importance of
239 security.

240 Judge Matheson noted that earlier drafts had expressly
241 recognized the court's authority to deny a stay for good cause, and
242 to dissolve a previously issued stay. Those provisions were
243 deleted, but that was because they would have enabled the court to
244 defeat what has been seen as a nearly automatic right to obtain a
245 stay on posting security. Proposed (b)(1) is all that remains. In
246 a sense it carries over from the Committee's first recent
247 encounter with Rule 62. Before the Time Project, the automatic stay
248 lasted for 10 days and the post-judgment motions that may suspend
249 appeal time had to be made within 10 days. The Time Project created
250 the "gap" in present Rule 62 by extending the automatic stay only
251 to 14 days, while extending the time for motions under Rules 50,
252 52, and 59 to 28 days. A judge asked the Committee whether the
253 court can order a stay after 14 days but before a post-judgment
254 motion is made. The Committee concluded at the time that the court
255 always has inherent power to control its own judgment, including
256 authority to enter a stay during the "gap" without concern about
257 any negative implications from the express authority to enter a
258 stay pending disposition of a motion once the motion is actually
259 made. The Subcommittee thought that proposed (b)(1) is a useful
260 reflection of abiding inherent authority.

261 This observation was met by a counter-observation: Is the
262 proposed rule simply an attempt to codify existing practice? If so,
263 should it recognize the cases that say that only extraordinary
264 circumstances justify a stay without security? The need to be clear
265 about the relationship with present practice was pointed out from
266 a different perspective. The Committee Note says that proposed
267 subdivisions (c) and (d) consolidate the present provisions for
268 stays in actions for an injunction or receivership, and for a
269 judgment or order that directs an accounting in an action for
270 patent infringement. Does that imply that some changes in present
271 practice are embodied in proposed subdivision (b), as they are in
272 proposed subdivision (a)? The response was that proposed
273 subdivision (b)(2) clearly incorporates several changes over
274 practice under the supersedeas bond provisions of present Rule
275 62(d). Under the proposed rule, a party may obtain a stay by bond
276 at any time after judgment enters, without waiting for an appeal to
277 be taken. The new rule would expressly recognize a single security

278 for the duration of post-judgment proceedings in the district court
279 and all proceedings on appeal. It would expressly recognize forms
280 of security other than a bond. So too, the automatic stay is
281 extended, and the court is given express power to "order
282 otherwise." The decision not to change the meaning of the present
283 provisions that would be consolidated in proposed Rule 62(c) and
284 (d) does not carry any implications, either way, as to proposed
285 Rule 62(b)(1).

286 Judge Matheson asked whether, if a standard for denying a stay
287 is to be written into rule text, it should be "good cause" or
288 "extraordinary circumstances." Some uncertainty was expressed about
289 what standard might be written in. "Extraordinary circumstances"
290 may be too narrow.

291 A Committee member asked what experience the district-judge
292 members have with these questions. The answers were that judges
293 seldom encounter questions about stays of execution. One judge
294 suggested that because questions seldom arise, judges will read the
295 rule text carefully when a question does arise. It is important
296 that the rule text say exactly what the rule means. A similar
297 suggestion was that it would be better to resist any temptation to
298 supplement rule text with more focused advice in the Committee
299 Note. The Committee should decide on the proper approach and embody
300 it in the rule text.

301 Proposed Rule 62(b)(1) will be further considered by the
302 Subcommittee, consulting with Judge Gorsuch as liaison from the
303 Standing Committee, with the purpose of reaching consensus on a
304 proposal that can be advanced to the Standing Committee in June as
305 a recommendation for publication. If changes are made that require
306 approval by this Committee, Committee approval will be sought by
307 electronic discussion and vote.

308 *Rule 23*

309 Judge Dow introduced the Rule 23 Subcommittee report. The
310 Subcommittee continued to work hard on the package of six proposals
311 that was presented for consideration at the November Committee
312 meeting. Much of the work focused on the approach to objectors, and
313 particularly on paying objectors to forgo or abandon appeals.
314 Working in consultation with representatives of the Appellate Rules
315 Committee, the drafts that would have included amendments of
316 Appellate Rule 42 have been abandoned. The current proposal would
317 amend only Civil Rule 23(e). In addition, a seventh proposal has
318 been added. This proposal would revise the Rule 23(f) amendment to
319 include a 45-day period to seek permission for an interlocutory
320 appeal when the United States is a party. It was developed with the
321 Department of Justice, and had not advanced far enough to be
322 presented at the November meeting.

323 The rule texts shown in the agenda materials, pp. 96-99,
324 have been reviewed by the style consultants. Only a few differences
325 of opinion remain.

326 Notice. Two of the proposed amendments involve Rule 23(c)(2)(B).
327 The first reflects a common practice that, without the amendment,
328 may seem to be unauthorized. When a class has not yet been
329 certified, it has become routine to address a proposal to certify
330 a class and approve a settlement by giving "preliminary"
331 certification and sending out a notice that, in a (b)(3) class,
332 includes a deadline for requesting exclusion, as well as notice of
333 the right to appear and to object. The so-called preliminary
334 certification is not really certification. Certification occurs
335 only on final approval of the settlement and the class covered by
336 the settlement. This amendment would expand the notice provision to
337 include an order "ordering notice under Rule 23(e)(1) to a class
338 proposed to be certified for purposes of settlement under Rule
339 23(b)(3)." That makes it clear that an opt-out deadline is properly
340 set by this notice. Generally, settlement agreements call for an
341 opt-out period that expires before actual certification with final
342 approval of the settlement.

343 The second change in Rule 23(b)(2)(B) is to address the means
344 of notice. The Subcommittee worked diligently in negotiating the
345 words and sequence of words. The Note explains that the choice of
346 means of notice is a holistic, flexible concept. Different sorts of
347 class members may react differently to different media. A rough
348 illustration is provided by the quip that a class of people who are
349 of an age to need hearing aids respond by reading first-class mail,
350 and trashing e-mail. A class of younger people who wear ear buds,
351 not hearing aids, trash postal mail and read e-mail. The Note
352 emphasizes that no one form of notice is given primacy over other
353 forms. The Note further emphasizes the need for care in developing
354 the form and content of the notice.

355 Discussion began by expressing discomfort with the direction
356 that notice "must" include individual notice to all members who can
357 be identified through reasonable effort. **[does anyone recall the**
358 **specific example Judge Ericksen gave? I did not hear it.]** The
359 proposal carries forward the language of the present rule, but
360 there is a continuing tension between "must" and the softer
361 requirement that notice only be the best that is practicable under
362 the circumstances. A determination of practicability entails a
363 measure of discretion. Part of the tension arises from the
364 insistence of the style consultants that the single sentence
365 drafted by the Subcommittee was too long: "the best notice that is
366 practicable under the circumstances, – by United States mail,
367 electronic means, or other appropriate means – including individual
368 notice to all members who can be identified through reasonable
369 effort."

370 Further discussion reflected widespread agreement that "the
371 best notice that is practicable under the circumstances" and
372 "reasonable effort" establish a measure of discretion that may be
373 thwarted by the two-sentence structure that, in a second stand-
374 alone sentence, says that "the notice must include individual
375 notice to all members who can be identified through reasonable
376 effort." The style change seems to approach a substantive change.
377 It will be better to draft with only one "must," so as to emphasize
378 what is the best practicable notice. That approach will avoid any
379 unintended intrusion on the process by which courts elaborate on
380 the meaning of "practicable" and "reasonable."

381 One suggested remedy was to delete from rule text the
382 references to examples of means - "United States mail, electronic
383 means, or other appropriate means." The examples could be left to
384 the Committee Note. But that would strain the practice that bars
385 Note advice that is not supported by a change in rule text.

386 As to the choice of means, it was noted that some comments
387 have suggested that careful analysis of actual responses in many
388 cases show that postal mail usually works better than electronic
389 notice. The Committee Note may benefit from some revision. But e-
390 mail notice is happening now, and it may help to provide official
391 authority for it.

392 The drafting question was resolved by adopting this
393 suggestion:

394 * * * the court must direct to class members the best
395 notice that is practicable under the circumstances,
396 including individual notice to all members who can be
397 identified through reasonable effort. The notice may be
398 by United States mail, electronic means[,] or other
399 appropriate means.

400 As revised, the Committee approved recommendation of this
401 proposal for Standing Committee approval to publish this summer.

402 Frontloading. Proposed Rule 23(e)(1)(A) focuses on ensuring that
403 the court is provided ample information to support the
404 determination whether to send out notice of a proposed settlement
405 to a proposed class. The underlying concern is that the parties to
406 a proposed settlement may join in seeking what has been
407 inaccurately called preliminary certification and notice without
408 providing the court much of the information that bears on final
409 review and approval of the settlement. If important information
410 comes to light only after the notice stage and at the final-
411 approval stage, there is a risk that the settlement will not
412 withstand close scrutiny. The results are costly, including a
413 second round of notice to a perhaps disillusioned class if the
414 action persists through a second attempt to settle and certify.

415 Early drafting efforts included a long list of categories of
416 information the proponents of settlement must provide to the court.
417 The list has been shortened to more general comments in the
418 Committee Note. The rule text also has been changed to clarify that
419 it is not the court's responsibility to elicit the required
420 information from the parties, rather it is the parties that have
421 the duty to provide the information to the court.

422 The idea is transparency and efficiency. The information,
423 initially required to support the court's determination whether to
424 send notice, also supports the functions of the notice itself. It
425 enables members to make better-informed decisions whether to opt
426 out, and whether to object. Good information may show there is no
427 reason to object. Or it may show that there is reason to object,
428 and provide the support necessary to make a cogent objection.

429 The Subcommittee discussed at length the question whether the
430 rule text should direct the parties to submit all information that
431 will bear on the ultimate decision whether to certify the class
432 proposed by the settlement and approve the settlement. The
433 difficulty is that the objection process may identify a need for
434 more information. And in any event, the parties may not appreciate
435 the potential value of some of the information they have. It would
436 be too rigid to prohibit submission at the final-approval stage of
437 any information the parties had at the time of seeking approval of
438 notice to the class. But at the same time, it is important that the
439 parties not hold back useful information that they have. Alan
440 Morrison has suggested that the Note should say something like
441 this: "Ordinarily, the proponents of the settlement should provide
442 the court with all the available supporting materials they intend
443 to submit at the time they seek notice to the class, which would
444 make this information available to class members." The Committee
445 agreed that the Subcommittee should consider this suggestion and,
446 if it is adopted, determine the final wording.

447 An important difference remains between the Subcommittee and
448 the style consultants. The information required by (e)(1)(A) is to
449 support a determination, not findings, that notice should be given
450 to the class. The Subcommittee draft requires "sufficient"
451 information to enable these determinations. The style consultants
452 prefer "enough" information. If they are right that "enough" and
453 "sufficient" carry exactly the same meaning, why worry about the
454 choice? But, it was quipped, "we think 'enough' is insufficient."

455 "Sufficient" found broad support. A quick Google search found
456 British authority for different meanings for "enough" and
457 "sufficient." It was suggested that "sufficient" is qualitative,
458 while "enough" is quantitative. "Sufficiency," moreover, is a
459 concept used widely in the law, particularly in addressing such
460 matters as the sufficiency of evidence.

461 The outcome was to transpose the two words: "~~sufficient~~
462 information sufficient to enable" the court's determination whether
463 to send notice. This form better underscores the link between
464 information and determination, and creates a structure that will
465 not work with "enough." The Committee believes that this question
466 goes to the substance of the provision, not style alone.

467 A different question was raised. Proposed Rule 23 (e)(1)(B)
468 speaks of showing that the court will likely be able to approve the
469 proposed settlement "under Rule 23(e)(2)," and "certify the class
470 for purposes of judgment on the proposal." (e)(2) does not say
471 anything about certification beyond the beginning: "If the proposal
472 would bind class members * * *." That might be read to authorize
473 creation of a settlement class that does not meet the tests of
474 subdivision (b)(1), (2), or (3). The proposed Committee Note, at p.
475 102, line 131, repeats the focus on the likelihood the court will
476 be able to certify a class, but does not pin it down.

477 The Subcommittee agreed that, having discussed the possibility
478 of recommending a new "(b)(4)" category of class action, it had
479 decided not to pursue that possibility. One possibility would be to
480 amend the Committee Note to amplify the reference to certifying a
481 class: "likely will be able, after the final hearing, to certify
482 the class under the standards of Rule 23(a) and (b)." That leaves
483 the question whether this approach relies on the Note to clarify
484 something that should be expressed in rule text. Perhaps something
485 could be done in (e)(1)(B)(ii), though it is not clear what -
486 "certify the class under Rule 23(a) and (b) for purposes of
487 judgment on the proposal" might do it.

488 It was pointed out that the provision for notice of a proposed
489 settlement applies not only when a class has not yet been certified
490 but also when a class has been certified before a settlement
491 proposal is submitted. This dual character is reflected in
492 (e)(1)(B)(ii)'s reference to the likely prospect that the court
493 will, at the end of the notice and objection period, be able to
494 certify a class not yet certified. The purpose of the proposal is
495 to ensure the legitimacy of the common practice of sending out
496 notice before a class is certified. There are two steps. Settlement
497 cannot happen without certifying a class. But the common habit has
498 been to refer to the act that launches notice and, in a (b)(3)
499 class, the opt-out period, as preliminary certification. That led
500 to attempts to win permission for interlocutory appeal under Rule
501 23(f), most prominently seen in the NFL concussion litigation.
502 Perhaps the Committee Note should say something, but there is no
503 apparent problem in the rule language.

504 One possible remedy might be to expand the tag line for Rule
505 23(e)(2): "Approval of the proposal and certification of the class
506 [for settlement purposes]." But that might be misleading, since
507 (e)(2) does not refer to certification criteria.

508 It was observed again that when a class has not already been
509 certified, the court does not certify a class in approving notice
510 under (e)(1). Certification comes only as part of approving the
511 settlement after considering the criteria established by (e)(2).
512 Certification of the class and approval of the settlement are
513 interdependent. The settlement defines the class. The court
514 approves both or neither; it cannot redefine the class and then
515 approve a settlement developed for a different class. Not, at
516 least, without acceptance by the proponents and repeating the
517 notice process for the newly defined class.

518 A resolution was proposed: Add a reference to Rule 23(c)(3) to
519 (e)(2): "If the proposal would bind class members under Rule
520 23(c)(3), the court may approve it only * * *." This was approved,
521 with "latitude to adjust" if the Subcommittee finds adjustment
522 advisable. Corresponding language in the Committee Note might read
523 something like this, adding on p. 103, somewhere around line 122:
524 "Approval under Rule 23(e)(2) is required only when class members
525 would be bound under Rule 23(c)(3). Accordingly, in addition to
526 evaluating the proposal itself, the court must determine whether
527 the class may be certified under the standards of Rule 23(a) and
528 (b)."

529 The proposed Rule 23(e)(2) criteria for approving a proposed
530 settlement were discussed briefly. They are essentially the same as
531 the draft discussed at the November meeting. They seek to distill
532 the many factors expressed in varying terms by the circuits, often
533 carrying forward with lists established thirty years ago, or even
534 earlier. Tag lines have been added for the paragraphs at the
535 suggestion of the style consultants.

536 The Committee approved a recommendation that the Standing
537 Committee approve proposed Rule 23(e)(1) and (2) for publication
538 this summer.

539 Objectors. In all the many encounters with bar groups and at the
540 miniconference last fall, there was virtually unanimous agreement
541 that something should be done to address the problem of "bad"
542 objectors. The problem is posed by the objector who files an open-
543 ended objection, often copied verbatim from routine objections
544 filed in other cases, then "lies low," saying almost nothing, and
545 - after the objection is denied - files a notice of appeal. The
546 business model is to create, at low cost, an opportunity to seek
547 advantage, commonly payment, by exploiting the cost and delay
548 generated by an appeal.

549 Part of the Rule 23(e)(5) proposal addresses the problem of
550 routine objections by requiring that the objection state whether it
551 applies only to the objector, to a specific subset of the class, or
552 to the entire class. It also directs that the objection state with
553 specificity the grounds for the objection. The Committee Note says

554 that failure to meet these requirements supports denial of the
555 objection.

556 Another part of the proposal deletes the requirement in
557 present Rule 23(e)(5) that the court approve withdrawal of an
558 objection. There are many good-faith withdrawals. Objections often
559 are made without a full understanding of the terms of the
560 settlement, much less the conflicting pressures that drove the
561 parties to their proposed agreement. Requiring court approval in
562 such common circumstances is unnecessary.

563 At the same time, proposed Rule 23(e)(5)(B) deals with payment
564 "in connection with" forgoing or withdrawing an objection, or
565 forgoing, dismissing, or abandoning an appeal from a judgment
566 approving the proposed settlement. No payment or other
567 consideration may be provided unless the court approves. The
568 expectation is that this approach will destroy the "business model"
569 of making unsupported objections, followed by a threat to appeal
570 the inevitable denial. A court is not likely to approve payment
571 simply for forgoing or withdrawing an appeal. Imagine a request to
572 be paid to withdraw an appeal because it is frivolous and risks
573 sanctions for a frivolous appeal. Or a contrasting request to
574 approve payment to the objector, not to the class, for withdrawing
575 a forceful objection that has a strong prospect of winning reversal
576 for the class or a subclass. Approval will be warranted only for
577 other reasons that connect to withdrawal of the objection. An
578 agreement with the proponents of the settlement and judgment to
579 modify the settlement for the benefit of the class, for example,
580 will require court approval of the new settlement and judgment and
581 may well justify payment to the now successful objector. Or an
582 objector or objector's counsel may, as the Committee Note observes,
583 deserve payment for even an unsuccessful objection that illuminates
584 the competing concerns that bear on the settlement and makes the
585 court confident in its judgment that the settlement can be
586 approved.

587 The requirement that the district court approve any payment or
588 compensation for forgoing, dismissing, or abandoning an appeal
589 raises obvious questions about the allocation of authority between
590 district court and court of appeals if an appeal is actually taken.
591 Before a notice of appeal is filed, the district court has clear
592 jurisdiction to consider and rule on a motion for approval. If it
593 rules before an appeal is taken, its ruling can be reviewed as part
594 of a single appeal. The Subcommittee has decided not to attempt to
595 resolve the question whether a pre-appeal motion suspends the time
596 to appeal. Something may well turn on the nature of the motion. If
597 it is framed as a motion for attorney fees, it fits into a well-
598 established model. If it is for payment to the objector, matters
599 may be more uncertain - it may be something as simple as an
600 argument that the objector should be fit into one subclass rather
601 than another, or that the objector's proofs of injury have been

602 dealt with improperly.

603 After the agenda materials were prepared, the Subcommittee
604 continued to work on the relationship between the district court
605 and the court of appeals. It continued to put aside the question of
606 appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to
607 address the potential for overlapping jurisdiction when a motion to
608 approve payment is not made, or is made but not resolved, before an
609 appeal is docketed. The proposal is designed to be self-contained,
610 operating without any need to amend the dismissal provisions in
611 Appellate Rule 42. "The question is who has the case." The
612 proposal, as it evolved in the Subcommittee, reads:

613 (C) Procedure for Approval After Appeal. If approval
614 under Rule 23(e)(5)(B) has not been obtained before
615 an appeal is docketed in the court of appeals, the
616 procedure of Rule 62.1 applies while the appeal
617 remains pending.

618 Invoking the indicative ruling procedure of Rule 62.1 facilitates
619 communication between the courts. The district court retains
620 authority to deny the motion without seeking a remand. It is
621 expected that very few motions will be made simply "for" approval
622 of payment, and that denial will be the almost inevitable fate of
623 any motion actually made. But if the motion raises grounds that
624 would lead the district court either to grant the motion or to want
625 more time to consider the motion if that fits with the progress of
626 the case on appeal, the court of appeals has authority to remand
627 for that purpose.

628 Representatives of the Appellate Rules Committee have endorsed
629 this approach in preference to the more elaborate earlier drafts
630 that would amend Appellate Rule 42.

631 The first comment was that it is extraordinary that it took so
632 long to reach such a sensible resolution.

633 The next reaction asked how this proposal relates to waiver.
634 If an objector fails to make an objection with the specificity
635 required by proposed Rule 23(e)(5)(A), for example, can the appeal
636 request permission to amend the objection? Isn't this governed by
637 the usual rule that you must stand by the record made in the
638 district court? And to be characterized as procedural forfeiture,
639 not intentional waiver? The purpose of (e)(5)(A) is to get a useful
640 objection; an objection without explanation does not help the
641 court's evaluation of the proposed settlement. Pro se objectors
642 often fail to make helpful objections. So a simple objection that
643 the settlement "is not fair" is little help if it does not explain
644 the unfairness. At the same time, the proposed Committee Note
645 recognizes the need to understand that an objector proceeding
646 without counsel cannot be expected to adhere to technical legal

647 standards. The Note also states something that was considered for
648 rule text, but withdrawn as not necessary: failure to state an
649 objection with specificity can be a basis for denying the
650 objection. That, and forfeiture of the opportunity to supply
651 specificity on appeal, is a standard consequence of failure to
652 comply with a "must" procedural requirement. The courts of appeals
653 can work through these questions as they routinely do with
654 procedural forfeiture. Forfeiture, after all, can be forgiven, most
655 likely for clear error. It is not the same as intentional waiver.

656 The Committee approved a recommendation that the Standing
657 Committee approve publication of proposed Rule 23(e)(5) this
658 summer.

659 Interlocutory appeals. The proposals would amend Rule 23(f) in two
660 ways.

661 The first amendment adds language making it clear that a court
662 of appeals may not permit appeal "from an order under Rule
663 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1)
664 provisions regulating notice to the class of a proposed settlement
665 and class certification are only that - approval, or refusal to
666 approve, notice to the class. Despite the common practice that has
667 called this notice procedure preliminary certification, it is not
668 certification. There is no sufficient reason to allow even
669 discretionary appeal at this point.

670 The Committee accepted this feature without further
671 discussion.

672 The second amendment of Rule 23(f) extends the time to file a
673 petition for permission to appeal to 45 days "if any party is the
674 United States" or variously described agencies or officers or
675 employees. The expanded appeal time is available to all parties,
676 not only the United States. This provision was suggested by the
677 Department of Justice. As with other provisions in the rules that
678 allow the United States more time to act than other parties are
679 allowed, this provision recognizes the painstaking process that the
680 Department follows in deciding whether to appeal, a process that
681 includes consultation with other government agencies that often
682 have their own elaborate internal review procedures.

683 Justice Nahmias reacted to this proposal by a message to Judge
684 Dow asking whether state governments should be accorded the same
685 favorable treatment. Often state attorneys general follow similarly
686 elaborate procedures in deciding whether to appeal. A participant
687 noted that he had been a state solicitor general, and that indeed
688 his state has elaborate internal procedures. At the same time, he
689 noted that the state procedures were not as time-consuming as the
690 Department of Justice procedures.

691 This question prompted the suggestion that perhaps states
692 should receive the same advantages as the United States. But this
693 question arises at several points in the rules, often in provisions
694 allowing extra time for action by the United States. The appeal
695 time provisions in Appellate Rule 4 are a familiar example, as well
696 as the added time to answer in Rule 12. And at least on occasion,
697 the states are accorded the same favorable treatment as the United
698 States. Appellate Rule 29 allows both the United States and a state
699 to file an amicus brief without first winning permission. It may be
700 that these questions of parity deserve consideration as a separate
701 project. There might be some issues of line drawing. If states get
702 favorable treatment, what of state subdivisions? Actions against
703 state or local officials asserting individual liability? Should
704 large private organizations be allowed to claim equally complex
705 internal procedures – and if so, how large?

706 The concluding observation was that extending favorable
707 treatment to the United States will leave states where they are
708 now. The amendment will not disadvantage them; it only fails to
709 provide a new advantage. Nor need it be decided whether the time
710 set by a court rule, such as Rule 23(f), is subject to extension in
711 a way that a statute-based time period cannot be.

712 A separate question was framed by a sentence appearing in
713 brackets in the draft Committee Note at p. 107, lines 408-409 of
714 the agenda book. This sentence suggested that the 45-day time
715 should apply as well in "an action involving a United States
716 corporation." There are not many "United States corporation[s]."
717 Brief comments for the Department of Justice led to the conclusion
718 that this sentence should be deleted.

719 The Class Action Fairness Act came into the discussion with a
720 question whether any of the Rule 23 proposals might run afoul of
721 statutory requirements. CAFA provides an independent set of rules
722 that must be satisfied. It has provisions relating to settlement,
723 including notice to state officials of proposed settlements. But
724 nothing in the proposed amendments is incompatible with CAFA.
725 Courts can fully comply with statutory requirements in implementing
726 Rule 23.

727 The Committee voted to recommend proposed Rule 23(f) to the
728 Standing Committee to approve for publication this summer.

729 Ongoing Questions. The Subcommittee has put aside for the time
730 being some of the proposals it has studied, often at length.

731 "Pick-off" offers raise one set of questions, addressed by a
732 number of drafts that illustrate different possible approaches. The
733 questions arise as defendants seek to defeat class certification by
734 acting to moot the claims of individual would-be representatives.
735 The problem commonly arises before class certification, and often

736 before a motion for certification. One reason for deferring action
737 was anticipation of the Supreme Court's decision in the Campbell-
738 Ewald case. The decision has been made, and the Subcommittee has
739 been tracking early reactions in the courts. It is more difficult
740 to track responses by defendants. One recent district-court opinion
741 deals with an effort to moot a class representative by attempting
742 to make a Rule 67 deposit in court of full individual relief. The
743 attempt was rejected as outside the purposes of Rule 67. Other
744 attempts are being made to bring mooted money into court,
745 responding to the part of the Campbell-Ewald opinion that left this
746 question open, and to the separate opinions suggesting that
747 mootness might be manufactured in this way. The question whether to
748 propose Rule 23 amendments remains under consideration.

749 Consideration of offers that seek to moot individual
750 representatives has led also to discussion of the possibility that
751 Rule 23 should be amended by adopting explicit provisions for
752 substituting new representatives when the original representatives
753 fail. The rule could be narrow. One example of a narrow rule would
754 be one that addresses only the effects of involuntary mooted by
755 defense acts that afford complete relief. A broad rule could reach
756 all circumstances in which loss of one or more representatives make
757 it desirable or necessary to find replacements.

758 Discussion of substitute representatives began with the
759 observation that it can be prejudicial to the defendant when class
760 representatives pull out late in the game. An illustration was
761 offered of a case in which a former employee sought injunctive
762 relief on behalf of a class. He retired. He could not benefit from
763 injunctive relief that would benefit only current employees. The
764 plaintiffs sought to amend the complaint to substitute a new
765 representative. But they acted after expiration of the time for
766 amendments allowed by the scheduling order. And they had not been
767 diligent, since the impending retirement was well known. "It would
768 have been different if the representative had been hit by a bus,"
769 an unforeseeable event that could justify amending the scheduling
770 order.

771 A different anecdote was offered by a judge who asked about
772 the size of a proposed payment for services by the representative
773 plaintiff. The response was that the representative deserved extra
774 because he had rejected a pick-off offer.

775 It was asked whether judges understand now that they have
776 authority to allow substitution of representatives. An observer
777 suggested that it would be good to adopt an explicit substitution
778 rule. A representative seeks to assume a trust duty to act on
779 behalf of others. And after a class is certified, a set of trust
780 beneficiaries is established. It would help to have an affirmative
781 statement in the rule that recognizes substitution of trustees.

782 The Committee agreed that the Subcommittee should continue to
783 consider the advantages of adopting an express rule to confirm, and
784 perhaps regularize, existing practices for substituting
785 representatives.

786 Finally, the Subcommittee continues to consider the questions
787 raised by the growing number of decisions that grapple with the
788 question whether "ascertainability" is a useful concept in deciding
789 whether to certify a class. The decisions remain in some disarray.
790 But the question is being actively developed by the courts.
791 Continuing development may show either that the courts have reached
792 something like consensus, or that problems remain that can be
793 profitably addressed by new rule provisions.

794 The Committee thanked the Subcommittee for its long, devoted,
795 and successful work.

796 *Pilot Projects*

797 Judge Bates introduced the work on pilot projects by noting
798 that the work is being advanced by a Subcommittee that includes
799 both present and former members of this Committee and the Standing
800 Committee. Judge Campbell, former chair of this Committee, chairs
801 the Subcommittee. Other members include Judge Sutton, Judge Bates,
802 Judge Grimm (a former member of this Committee), Judge Gorsuch,
803 Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and
804 Edward Cooper. Judge Martinez has joined the Subcommittee work as
805 liaison from the Committee on Court Administration and Case
806 Management.

807 Judge Campbell began presenting the Subcommittee's work by
808 noting that the purpose of pilot projects is to advance
809 improvements in civil litigation by testing proposals that, without
810 successful implementation in actual practice, seem too
811 adventuresome to adopt all at once in the national rules.

812 The Subcommittee has held a number of conference calls since
813 this Committee discussed pilot projects last November. Two projects
814 have come to occupy the Subcommittee: Expanded initial disclosures
815 in the form of mandatory early discovery requests, and expedited
816 procedures.

817 Mandatory Initial Discovery. The mandatory early discovery project
818 draws support from many sources, including innovative federal
819 courts and pilot projects in ten states. The Subcommittee held
820 focus-group discussions by telephone with groups of lawyers and
821 judges from Arizona and Colorado, states that have developed
822 enhanced initial disclosures. Another conference call was held with
823 lawyers from Ontario and British Columbia to learn about initial
824 disclosures in Canada. "People who work under these disclosure
825 systems like them better than the Federal Rules of Civil

826 Procedure."

827 The draft presented in the agenda materials has been
828 considered by the Case Management Subcommittee of the Committee on
829 Court Administration and Case Management. They have reflected on
830 the draft in a thoughtful letter that will be considered as the
831 work goes forward.

832 Judge Grimm took the lead in drafting the initial discovery
833 rule.

834 Mandatory initial discovery would be implemented by standing
835 order in a participating court. The order would make participation
836 mandatory, excepting for cases exempted from initial disclosures by
837 Rule 26(a)(1)(B), patent cases governed by local rule, and
838 multidistrict litigation cases. Because the initial discovery
839 requests defined by the order include all the information covered
840 by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not
841 required.

842 The Standing Order includes Instructions to the Parties.
843 Responses are required within the times set by the order, even if
844 a party has not fully investigated the case. But reasonable inquiry
845 is required, the party itself must sign the responses under oath,
846 and the attorney must sign under Rule 26(g).

847 The discovery responses must include facts relevant to the
848 parties' claims or defenses, whether favorable or unfavorable. This
849 goes well beyond initial disclosures under Rule 26(a)(1), which go
850 only to witnesses and documents a party "may use." The Committee on
851 Court Administration and Case Management may raise the question
852 whether the requirement to respond with unfavorable information
853 will discourage lawyers from making careful inquiries. Experience
854 in Arizona, Colorado, and Canada suggests lawyers will not be
855 discouraged.

856 The time for filing answers, counterclaims, crossclaims, and
857 replies is not tolled by a pending motion to dismiss or other
858 preliminary motion. This provision provoked extensive discussion
859 within the Subcommittee. An answer is needed to frame the issues.
860 Suspending the time to answer would either defer the time to
861 respond to the discovery requests or lead to responses that might
862 be too narrow, broader than needed for the case, or both. The
863 Subcommittee will consider whether to add a provision that allows
864 the court to suspend the time to respond, whether for "good cause"
865 or on a more focused basis.

866 The times to respond are subject to two exceptions. If the
867 parties agree that no party will undertake any discovery, no
868 initial discovery responses need be filed. And initial responses
869 may be deferred, one time, for 30 days if the parties certify that

870 they are seeking to settle and have a good-faith belief that the
871 dispute will be resolved within 30 days of the due date for their
872 responses.

873 Responses, and supplemental responses, must be filed with the
874 court. The purpose of this requirement is to enable the court to
875 review the responses before the initial conference.

876 The initial requests impose a continuing duty to supplement
877 the initial responses in a timely manner, with a final deadline.
878 The draft sets the time at 90 days before trial. The Court
879 Administration and Case Management Committee has suggested that it
880 may be better to tie the deadline to the final pretrial conference.
881 Later discussion recognized that the final pretrial conference may
882 indeed be the better time to choose.

883 The parties are directed to discuss the mandatory initial
884 discovery responses at the Rule 26(f) conference, to seek to
885 resolve any limitations they have made or will make, to report to
886 the court, and to include in the report the resolution of
887 limitations invoked by either party and unresolved limitations or
888 other discovery issues.

889 As a safeguard, the instructions provide that responses do not
890 constitute an admission that information is relevant, authentic, or
891 admissible.

892 Rule 37(c)(1) sanctions are invoked.

893 The mandatory initial discovery requests themselves follow
894 these instructions in the Standing Order.

895 The first category describes all persons who have discoverable
896 information, and a fair description of the nature of the
897 information.

898 The second category describes all persons who have given
899 written or recorded statements, attaching a copy of the statement
900 when possible, but recognizing that production is not required if
901 the party asserts privilege or work-product protection.

902 The third category requires a list of documents, ESI, and
903 tangible things or land, "whether or not in your possession,
904 custody, or control, that you believe may be relevant to any
905 party's claims or defenses." If the volume of materials makes
906 individual listing impracticable, similar documents or ESI may be
907 grouped into specific categories that are described with
908 particularity. A responding party "may" produce the documents, or
909 make them available for inspection, instead of listing them.

910 The fourth category requires a statement of the facts relevant

911 to each of the responding party's claims or defenses, and of the
912 legal theories on which each claim or defense is based.

913 The fifth category requires a computation of each category of
914 damages, and a description or production of underlying documents or
915 other evidentiary material.

916 The sixth category requires a description of "any insurance or
917 other agreement under which an insurance business or other person
918 or entity may be liable to satisfy all or part of a possible
919 judgment in the action or to indemnify or reimburse a party."

920 The seventh provision authorizes a party who believes that
921 responses in categories three, five, or six are deficient to
922 request more detailed or thorough responses.

923 The Standing Order has separate provisions governing the means
924 of providing hard-copy documents and ESI.

925 Hard-copy documents must be produced as they are kept in the
926 ordinary course of business.

927 When ESI comes into play, the parties must promptly confer and
928 attempt to agree on such matters as requirements and limits on
929 production, disclosure, and production; appropriate searches,
930 including custodians and search terms "or other use of technology
931 assisted review"; and the form for production. Disputes must be
932 presented to the court in a single joint motion, or, if the court
933 directs, a conference call with the court. The motion must include
934 the parties' positions and separate certifications by counsel under
935 Rule 26(g). Absent agreement of the parties or court order, ESI
936 identified in the initial discovery responses must be produced
937 within 40 days after serving the response. Absent agreement,
938 production must be in the form requested by the receiving party; if
939 no form is requested, production may be in a reasonably usable form
940 that will enable the receiving party to have the same ability as
941 the producing party to access, search, and display the ESI.

942 Finally, the Subcommittee has begun work on a User's Manual to
943 help pilot judges implement the project. It will cover such
944 familiar practices as early initial case-management conferences,
945 reluctance to extend the times for initial discovery responses, and
946 prompt resolution of discovery disputes.

947 Judge Grimm added that the Subcommittee also had considered an
948 extensive amount of information about experience with initial
949 disclosures under the Civil Justice Reform Act. It also reviewed
950 experience with the initial disclosure requirement first adopted in
951 1993, a more extensive form than the watered-down version adopted
952 in 2000. Further help was found in the 1997 conference at Boston
953 College Law School with lawyers, judges, and professors. In

954 addition to Arizona and Colorado, a number of other state
955 disclosure provisions were studied. "This was a comprehensive
956 approach to what can be found."

957 Judge Sutton asked what the Standing Committee will be asked
958 to approve. This proposal is more developed than the proposals for
959 earlier pilot projects have been. But there will have to be
960 refinements along the way to implementation. That is the ordinary
961 course of development. The goal will be to ask the Standing
962 Committee to approve the pilot conceptually, while presenting as
963 many of the details as can be managed. Judge Bates agreed that
964 "refinements are inevitable."

965 Discussion began with a practicing lawyer's observation that
966 he had been skeptical about the ability of lawyers to find ways to
967 avoid the requirement in the 1993 rule that unfavorable information
968 be disclosed. But this pilot is worth doing. "Let's 'go big' with
969 something that has a potential to make major changes in the speed
970 and efficiency of federal litigation." The discussions with the
971 groups in Arizona and Colorado, and the lawyers in Canada, provided
972 persuasive evidence that this can work. "They live and work with
973 many of these ideas. And they find the ideas not only workable, but
974 welcome." The proposal results from intense effort to learn from
975 actual experience. The effort will continue through the time of
976 seeking approval from the Judicial Conference in September, and on
977 to the stage of actual implementation.

978 This view was seconded by "a veteran of 1993." The 1993 rule
979 failed because the Committee did not work closely enough with the
980 bar, and was not able to provide persuasive evidence that the
981 required disclosures could work. A pilot will provide the data to
982 support broader disclosure innovations.

983 An initial question observed that much of the conversation
984 refers to this project as involving initial disclosure. But the
985 standing order refers to "requests": does the duty to respond
986 depend on having a party promulgate actual discovery requests? The
987 answer is that the pilot's standing order adopts a set of mandatory
988 initial discovery requests. The requests are addressed to all
989 parties, and must be responded to in the same way as ordinary
990 discovery requests under Rules 33 and 34.

991 Thinking about implementation of the pilot project has assumed
992 that it should be adopted only in districts that can ensure
993 participation by all judges in the district. That may make it
994 impossible to launch the project in any large district, but it
995 seems important to involve a large district or two. Discussion of
996 this question began with the observation that the pilot project
997 embodies great ideas, but that it will be easier to "sell" them if
998 they can be tested in large districts. At the same time, it is not
999 realistic to expect that all judges in a large district will be

1000 willing to sign on, even in the face of significant peer pressure
1001 from other judges. A separate question asked whether there might be
1002 some advantage of being able to compare outcomes in cases assigned
1003 to participating and nonparticipating judges in the ordinary
1004 random-assignment practices of the district. Emery Lee responded
1005 that there could be an advantage, but that the balance between
1006 advantage and disadvantage would depend on the judges in the two
1007 pools. This prompted the observation that there is reason to be
1008 concerned about self-selection into or out of pilot projects. A
1009 judge suggested that participation in the pilot "should not be
1010 terribly onerous." It may be better to leave the program as one
1011 that expects unanimity, understanding that a pilot district might
1012 allow a judge to opt out for individual reasons. Another judge
1013 thought that his court could achieve near-unanimity: "Judges on my
1014 court take pride in what they do." Several members agreed that the
1015 project should not be changed by, for example, adopting an explicit
1016 80% threshold. Perhaps it is better to leave it as a preference for
1017 districts in which all judges participate in the pilot, recognizing
1018 that the need to enlist one or more large districts may lead to
1019 negotiation. One approach would be to design the project to say
1020 that all judges "should," not "must" participate. A judge noted
1021 that success will depend on willingness and eagerness to
1022 participate. In his relatively small district, "our senior judges
1023 are not eager."

1024 A more difficult question is raised by recognition of the
1025 possibility that some sort of exception should be adopted that
1026 allows a court to suspend the time to answer when there is a motion
1027 to dismiss. "In my district we get many well-considered motions to
1028 dismiss." They can pretty much be identified on filing. A lot of
1029 them are government cases. Another big set involve "200-page" pro
1030 se complaints that will require much work to answer. This
1031 observation was supported by the Department of Justice. The goal of
1032 speedy development of the case is important, but many motions to
1033 dismiss address cases that should not be in court at all. If the
1034 case is subject to dismissal on sovereign-immunity grounds, for
1035 instance, the government should be spared the work of answering and
1036 disclosing. In other cases, the claim may challenge a statute on
1037 its face, pretermittting any occasion for disclosure or discovery –
1038 why not invoke the ordinary rule that suspends the time to answer?
1039 A judge offered a different example: "Many cases have meritorious
1040 but flexible motions to dismiss." A diversity complaint, for
1041 example, may allege only the principal place of business of an LLC
1042 party. The citizenship of the LLC members needs to be identified to
1043 determine whether there is diversity jurisdiction. Further time is
1044 needed to decide the motion. Yet another judge observed that
1045 setting the time to respond to the initial mandatory requests at 30
1046 days after the answer can enable action on the motion to dismiss.

1047 A further suggestion was that there are solid arguments on
1048 both sides of the question whether a pleading answer should be

1049 required before the court acts on a motion to dismiss. "The
1050 usefulness of responses turns to a significant degree on the
1051 parties' ability to understand the issues." But if the time to
1052 answer is deferred pending disposition of a motion to dismiss, it
1053 may be difficult to devise a suitable trigger for the duty to
1054 respond to the initial mandatory requests. And if the duty to
1055 respond is always deferred until after a ruling on a motion to
1056 dismiss, the result may be to encourage motions to dismiss.

1057 A judge agreed that further thought is needed, particularly
1058 for jurisdictional motions and cases in which the government is a
1059 party. But he noted that he has conferences that focus both on
1060 motions and the merits. "If there is too much possibility of
1061 deferring the time to answer, we may suffer."

1062 A lawyer member suggested that the line could be drawn at
1063 motions arguing that the defendant cannot be called on to respond
1064 in this court. These motions would go to questions like personal
1065 jurisdiction and subject-matter jurisdiction. They would not
1066 include motions that go to the substance of the claim.

1067 Another troubling example was offered: a claim of official
1068 immunity may be raised by motion to dismiss. Elaborate practices
1069 have grown up from the perception that one function of the immunity
1070 is to protect the individual defendant from the burdens of
1071 discovery as well as the burden of trial.

1072 An analogy was suggested in the variable practices that have
1073 grown up around the question whether discovery should be allowed to
1074 proceed while a motion to dismiss remains under consideration.

1075 A judge offered "total support" for the project, recognizing
1076 that further refinements are inevitable. One part of the issues
1077 raised by motions to dismiss might be addressed through the timing
1078 of ESI production, which may be the most onerous part of the
1079 initial mandatory discovery responses. The draft recognizes that
1080 ESI production can be deferred by the court or party agreement.

1081 Judge Campbell agreed that this question deserves further
1082 thought.

1083 Model orders provided another subject for discussion. A judge
1084 suggested that some judges, including open-minded innovators, would
1085 resist model orders because they think their own procedures work
1086 better. They may hesitate to buy into a full set of model orders.
1087 But Emery Lee said that model orders will be needed for research
1088 purposes. And Judge Campbell thought that the good idea of
1089 developing model orders could be pursued by looking for standard
1090 practices in Arizona and other states with expansive pretrial
1091 disclosures.

1092 The Committee approved a motion to carry the initial mandatory
1093 discovery pilot project program forward to the Standing Committee
1094 for approval for submission to the Judicial Conference in
1095 September. The Committee recognizes that the Subcommittee will
1096 continue its deliberations and make further refinements in its
1097 recommendations.

1098 Expedited Procedures. Judge Campbell introduced the expedited
1099 procedures pilot project by observing that it rests on principles
1100 that have been proved in many courts, by many judges, and in many
1101 cases. The project is designed not to test new procedures, but to
1102 change judicial culture.

1103 The project has three parts: The procedural components; means
1104 of measuring progress in pilot courts; and training.

1105 These practices provide the components of the pilot: (1)
1106 prompt case-management conferences in every case; (2) firm caps on
1107 the time allocated for discovery, to be set by the court at the
1108 conference and to be extended no more than once, and only for good
1109 cause and on a showing of diligence by the parties; (3) prompt
1110 resolution of discovery disputes by telephone conferences; (4)
1111 decisions on all dispositive motions within 60 days after the reply
1112 brief is filed; and (5) setting and holding firm trial dates.

1113 The metrics to be measured are these: (1) if it can be
1114 measured, the level of compliance with the practices embodied in
1115 the pilot; (2) trial dates in 90% of civil cases set within 14
1116 months of case filing, and within 18 months in the remaining 10% of
1117 cases; and (3) a 25% reduction in the number of categories of cases
1118 in the district "dashboard" that are decided slower than the
1119 national average, bringing the court closer to the norm. (The
1120 "dashboard" is a tool developed for use by the Committee on Court
1121 Administration and Case Management. It measures disposition times
1122 in all 94 districts across many different categories of cases. Each
1123 district's experience in each category is compared to the national
1124 average. The dashboard is described in the article by Donna
1125 Stienstra set out as an exhibit to the Pilot Projects report. The
1126 chief judge of each district got a copy of that district's
1127 dashboard last September.)

1128 Training and collaboration will have these components: (1) an
1129 initial one-day training session by the FJC, followed by additional
1130 FJC training every six months, or possibly every year; (2)
1131 quarterly meetings by judges in the pilot district to discuss best
1132 practices, what is working and what is not working, leading to
1133 refinements of case-processing methods to meet the pilot goals; (3)
1134 making judges from outside the district available as resources
1135 during the quarterly district conferences; (4) at least one bench-
1136 bar conference a year to talk with lawyers about how well the pilot
1137 is working; and (5) a 3-year period for the pilot.

1138 This pilot "has a lot of moving parts, but not as many as the
1139 mandatory initial disclosure pilot."

1140 Judge Fogel and Emery Lee responded to a question about the
1141 likely reaction of pilot-district judges to exploring individual
1142 disposition times. They answered that in many settings researchers
1143 are wary of compiling individual-judge statistics because many
1144 judges are sensitive to these matters. But the problem is reduced
1145 in a pilot project because the districts volunteer. They also
1146 pointed out that it will be necessary to compile a lot of pre-pilot
1147 data to compare to experience under the pilot. "The CACM-FJC model
1148 helps." At the same, the question whether individual judges'
1149 "dashboards" would become part of the public data must be
1150 approached with caution and sensitivity.

1151 Judge Fogel also noted that it is important to avoid the
1152 problem of eager volunteers. The FJC has a very positive reaction
1153 to the pilot. It will be useful to engage in a project designed to
1154 see what happens with a training program.

1155 It was noted that Judge Walton, writing for the CACM Case
1156 Management Subcommittee, raised questions regarding the deadline
1157 for decisions on dispositive motions. "[T]here are some practical
1158 considerations that may make compliance" difficult. Individual
1159 calendar and trial schedules may interfere. Supplemental briefing
1160 may be required after the reply brief. And added time may be
1161 required in cases that deserve extensive written decisions because
1162 of novel or unsettled issues of law or extensive summary-judgment
1163 records. The deadline might be extended to 90 days. Or it could be
1164 framed as a target time for disposing of a designated fraction of
1165 dispositive motions in all cases. Or it could be framed in
1166 aspirational terms, as "should" rather than "must."

1167 The trial-date target also was questioned. Perhaps it is not
1168 ambitious enough – even today, a large proportion of all cases are
1169 resolved in 14 months or less.

1170 The Committee adopted a recommendation that the Standing
1171 Committee approve the Expedited Procedures pilot project for
1172 submission to the Judicial Conference in September. As with the
1173 initial mandatory discovery pilot, it will be recognized that
1174 approval of the concept will entail further work by the
1175 Subcommittee, at times in conjunction with the FJC, the Committee
1176 on Court Administration and Case Management, and perhaps others.

1177 *Other Proposals*

1178 Several other proposals are presented by the agenda materials.
1179 Some have carried over from earlier meetings. Others respond to new
1180 suggestions for study. Each came on for discussion.

1181 RULE 5.2: REDACTING PROTECTED INFORMATION

1182 Rule 5.2 requires redaction from paper and electronic filings
1183 of specified items of private information. It was initially adopted
1184 in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037,
1185 and Criminal Rule 49.1. It has seemed important to achieve as much
1186 uniformity among these four rules as proves compatible with the
1187 different settings in which each operates.

1188 The Committee on Court Administration and Case Management
1189 referred to the Bankruptcy Rules Committee a problem that seems to
1190 arise with special frequency in bankruptcy filings. Bankruptcy
1191 courts are receiving creditors' requests to redact previously filed
1192 documents that include material that the privacy rules forbid.
1193 These requests may involve thousands of documents filed in numerous
1194 courts. The immediate question was whether Bankruptcy Rule 9037
1195 should be amended to include an express procedure for moving to
1196 redact previously filed documents. The prospect that different
1197 bankruptcy courts may become involved with the same questions
1198 arising from simultaneous filings suggests a particular need for a
1199 nationally uniform procedure, even if satisfactory but variable
1200 procedures might be crafted by each court acting alone.

1201 The Bankruptcy Rules Committee has responded by creating a
1202 draft Rule 9037(h) that would establish a specific procedure for a
1203 motion to redact. The central feature of the procedure is a copy of
1204 the filing that is identical to the paper on file with the court
1205 except that it redacts the protected information. The court would
1206 be required to "promptly" restrict public access both to the motion
1207 and the paper on file. The restriction would last until the ruling
1208 on the motion, and beyond if the motion is granted. Public access
1209 would be restored if the motion is denied.

1210 Judge Harris explained that bankruptcy courts receive hundreds
1211 of thousands of proofs of claim. "The volume is great." Redaction
1212 of information filed in violation of the rules is not as good as
1213 initial compliance. But there is good reason to have a uniform
1214 redaction procedure. If the court cannot restrict access until
1215 redaction is actually accomplished, the motion to redact may itself
1216 draw searches for the private information. The proposed Rule
1217 9037(h) relies on the assumption that the CM/ECF system can
1218 immediately restrict access when a motion to redact is filed. If
1219 not, the motion just makes things worse.

1220 Judge Sutton asked whether the Bankruptcy Rules Committee "is
1221 in a rush to publish." Judge Harris answered that the Committee is
1222 ready to wait so that all advisory committees can come together on
1223 uniform language.

1224 Clerk-liaison Briggs noted that "we get a lot of improper
1225 failures to comply with Rule 5.2. We have an established procedure

1226 that immediately denies access."

1227 Further discussion confirmed the wisdom of the Bankruptcy
1228 Rules Committee's willingness to defer publication of their draft
1229 Rule 9037(h) pending work in the other committees. "One train is
1230 pretty far ahead of the others." Waiting for parallel development
1231 and publication will provide a better opportunity for uniformity.

1232 One possible outcome might be that the Administrative Office
1233 and other bodies could develop procedures that automatically
1234 respond to the filing of a motion to redact by closing off public
1235 access to the paper addressed by the motion. If that could be done,
1236 there might be no need for a new set of rules provisions. But the
1237 work should continue, recognizing that this happy outcome may not
1238 come to pass.

1239 RULE 30(b)(6): 16-CV-A

1240 Members of the council and Federal Practice Task Force of the
1241 ABA Section of Litigation, acting in their individual capacities,
1242 submitted a lengthy examination of problems encountered in practice
1243 under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an
1244 entity, whether a party or not a party, on topics designated in the
1245 notice. The entity is required to designate one or more witnesses
1246 to testify on its behalf, providing "information known or
1247 reasonably available to the organization."

1248 The idea that there are problems in implementing Rule 30(b)(6)
1249 is not new to the Committee. Extensive work was done in 2006 in
1250 response to proposals made by a Committee of the New York State Bar
1251 Association. The topic was considered again in 2013 in response to
1252 proposals made by the New York City Bar. Each time, the Committee
1253 concluded that there is little opportunity to adopt new rule text
1254 that would provide effective remedies for problems that are often
1255 case-specific and that often reflect deliberate efforts to subvert
1256 or misuse the Rule 30(b)(6) process.

1257 Many of the present proposals involve issues that were
1258 considered in the earlier work. One example is that Rule 30(b)(6)
1259 does not require the entity to designate as a witness the "most
1260 knowledgeable person." Another example is questions that go beyond
1261 the topics listed in the notice. Questions addressing a party's
1262 contentions in the litigation are yet another example.

1263 The question is whether the Committee should take up these
1264 questions in response to this third expression of anguish from a
1265 third respected bar group. The request, rather than urge specific
1266 answers, is that the Committee "undertake a review of the Rule and
1267 the case law developed under it with the goal of resolving
1268 conflicts among the courts, reducing litigation on its
1269 requirements, and improving practice * * *." It is clear that Rule

1270 30(b)(6) "continues to be a source of unhappiness." On the other
1271 hand, to paraphrase Justice Jackson, there is a risk that pulling
1272 one misshapen stone out of the grotesque structure may disrupt a
1273 careful balance. So "many litigants find Rule 30(b)(6) an extremely
1274 important tool to discover important information. Others find it an
1275 enormous pain."

1276 Discussion began by noting that three important groups have
1277 now suggested the need to attempt improvements.

1278 Committee members could not, on the spot, identify any clear
1279 circuit splits on the meaning or administration of Rule 30(b)(6).
1280 It may be helpful to explore this question.

1281 It was noted that it is difficult to impose sanctions for not
1282 providing the most knowledgeable person.

1283 It also was noted that there is an acute problem of producing
1284 witnesses who are not prepared.

1285 So it was observed that the rule should be enforceable, and
1286 adding complications will make enforcement more difficult.

1287 A lawyer member said that he confronts problems with Rule
1288 30(b)(6) "constantly, all over the country, and even in sister
1289 cases. The Rule is constantly a source of controversy. Proper
1290 preparation issues will never go away." The recurring issues of
1291 interpretation and application show that as hard as it may be to
1292 make the Rule better, we should feel an obligation to address these
1293 issues. The problems are not going away. Another look would be
1294 useful.

1295 Full agreement was expressed with this view.

1296 A judge observed that the 2015 discovery amendments raise the
1297 prospect that proportionality may become a factor in administering
1298 Rule 30(b)(6). It might help to confront this integration head-on
1299 as part of a Rule 30(b)(6) project.

1300 It was agreed that Rule 30(b)(6) should move to the active
1301 agenda. Judge Bates will appoint a subcommittee to deal with the
1302 problems.

1303 RULE 81(c)(3): 15-CV-A

1304 This item was carried forward from the agenda for the November
1305 2015 meeting.

1306 The question was framed by 15-CV-A as a potential misstep in
1307 the 2007 Style Project. The question is best understood in the full
1308 frame of Rule 81(c).

1309 Rule 81(c) begins with (c)(1): "These rules apply to a civil
1310 action after it is removed from a state court." Applying the rules
1311 is important – a federal court could not function well with state
1312 procedure, it would be awkward to attempt to blend state procedure
1313 with federal procedure, and the very purpose of removal may be to
1314 seek application of federal procedure.

1315 Rule 81(c)(3) provides special treatment for the procedure for
1316 demanding jury trial. It begins with a clear proposition in (3)(A):
1317 a party who expressly demanded a jury trial before removal in
1318 accordance with state procedure need not renew the demand after
1319 removal.

1320 A second clear step is provided by Rule 81(c)(3)(B): if all
1321 necessary pleadings have been served at the time of removal, a jury
1322 trial demand must be served within 14 days, measured for the
1323 removing party from the time of filing the notice of removal and
1324 measured for any other party from the time it is served with a
1325 notice of removal. This provision avoids the problem that otherwise
1326 would arise in applying the requirement of Rule 38(b)(1) that a
1327 jury demand be served no later than 14 days after serving the last
1328 pleading directed to the issue.

1329 The third obvious circumstance departs from the premise of
1330 Rule 81(c)(3)(B): All necessary pleadings have not been served at
1331 the time of removal. Subject to the remaining two variations, it
1332 seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

1333 The fourth circumstance arises when state law does not require
1334 a demand for jury trial at any time. Up to the time of the Style
1335 Project, this circumstance was clearly addressed by Rule
1336 81(c)(3)(A): "If the state law **does** not require an express demand
1337 for jury trial, a party need not make one after removal unless the
1338 court orders the parties to do so within a specified time. The
1339 court must so order at a party's request and may so order on its
1340 own." The direction was clear. The underlying policy is to balance
1341 competing interests. There is a fear that a party may rely after
1342 removal on familiar state procedure – absent this excuse, the right
1343 to jury trial could be lost for failure to file a timely demand
1344 under Rule 38 after removal. At the same time, the importance of
1345 establishing whether the case is to be set for jury trial reflected
1346 in Rule 38 is recognized by providing that the court can protect
1347 itself by an order setting a time to demand a jury trial, and by
1348 further providing that a party can protect its interest by a
1349 request that the court must honor by setting a time for a demand.

1350 The Style Project changed "does," the word highlighted above,
1351 to "did." That change opens the possibility of a new meaning for
1352 this fifth circumstance: "[D]id not require an express demand"
1353 could be read to excuse any need to demand a jury trial when state
1354 law does require an express demand, but sets the time for the

1355 demand at a point after the time the case was removed. The question
1356 was raised by a lawyer in a case that was removed from a court in
1357 a state that allows a demand to be made not later than entry of the
1358 order first setting the case for trial. The court ruled, in keeping
1359 with the Style Project direction, that the change from "does" to
1360 "did" was intended to be purely stylistic. The exception that
1361 excuses any demand applies only if state law does not require an
1362 express demand for jury trial at any point.

1363 The question put by 15-CV-A can be stated in narrow terms:
1364 Should the Style Project change be undone, changing "did" back to
1365 "does"? That would avoid the risk that "did" will be read by others
1366 to mean that a jury demand is not required after removal if,
1367 although state procedure does require an express demand, the time
1368 set for the demand in state court occurs at a point after removal.
1369 There is at least some ground to expect that the ambiguous "did"
1370 may cause some other lawyers to misunderstand what apparently was
1371 intended to be a mere style improvement.

1372 A broader question is whether a party should be excused from
1373 making a jury demand if, although a demand is required both by Rule
1374 38 and by state procedure, state procedure sets the time for making
1375 the demand after the time the case is removed. It is difficult to
1376 find persuasive reasons for dispensing with the demand in such
1377 circumstances. And there is much to be said for applying Rule 38 in
1378 the federal court rather than invoking state practice.

1379 A still broader question is whether it is time to reconsider
1380 the provision that excuses the need for any jury demand when a case
1381 is removed from a state that does not require a demand. Both the
1382 court and the other parties find it important to know early in the
1383 case whether it is to be tried to a jury. Present Rule 81(c)(3)(A)
1384 recognizes this value in the provision that allows the court to
1385 require a demand, and that directs that the court must require a
1386 demand if a party asks it to do so. In effect this rule transfers
1387 the burden of establishing whether the case is to be tried to a
1388 jury from a party who wants jury trial to the court and the other
1389 parties. The evident purpose is to protect against loss of jury
1390 trial by a party who does not familiarize itself with federal
1391 procedure even after a case is removed to federal court. It may be
1392 that the time has come to insist on compliance with Rule 38 after
1393 removal, just as the other rules apply after removal.

1394 Discussion began with the question whether it would be useful
1395 to change "did" back to "does" now, holding open for later work the
1396 question whether to reconsider this provision. Two judges responded
1397 that it is important to know, as early as possible, whether a case
1398 is to be tried to a jury. Rather than approach the question in two
1399 phases, it will better to consider it all at once.

1400 The Committee agreed to study the sketch of a simplified Rule

1401 81(c)(3) presented in the agenda materials:

1402 (3) *Demand for a Jury Trial*. Rule 38(b) governs a demand for
1403 jury trial unless, before removal, a party expressly
1404 demanded a jury trial in accordance with state law. If
1405 all necessary pleadings have been served at the time of
1406 removal, a party entitled to a jury trial under Rule 38
1407 must be given one¹ if the party serves a demand within 14
1408 days after:

1409 (A) it files a notice of removal, or

1410 (B) it is served with a notice of removal filed by
1411 another party.

1412 ¹ This version simply tracks the current rule. It might
1413 be shortened: "If all necessary pleadings have been
1414 served at the time of removal, a demand must be
1415 served within 14 days after the party * * *."

1416 If there is some discomfort with the 14-day deadline, it could
1417 be set at 21 days.

1418 15-CV-EE: FOUR SUGGESTIONS

1419 Social Security Numbers: Rule 5.2 allows a filing to include the
1420 last four digits of a social security number. The suggestion is
1421 that the last four digits can be used to reconstruct a full number
1422 for any number issued before the last few years. This risk was
1423 known at the time Rule 5.2 and the parallel provisions in other
1424 rules were adopted. The decision to allow the last four digits to
1425 be filed was made deliberately in response to the special need to
1426 have the last four digits in bankruptcy filings and the desire to
1427 have parallel provisions in all the rules. The Committee concluded
1428 that Rule 5.2 should not be amended unless another advisory
1429 committee believes the question should be studied further.

1430 Forma pauperis affidavits: This suggestion is that an affidavit
1431 stating a person's assets filed to support an application to
1432 proceed in forma pauperis should be protected by requiring filing
1433 under seal and ex parte review. Other parties could be allowed
1434 access for good cause and subject to a protective order. Unsealing
1435 could be allowed in redacted form. The purpose is to protect
1436 privacy. Committee discussion recognized the privacy interest, but
1437 concluded that the proposal should be put aside. Ex parte
1438 consideration would make difficult problems for institutional
1439 defendants that confront a party who frequently files forma
1440 pauperis actions. Requiring long-term preservation of sealed papers
1441 is not desirable. Sealing is itself a nuisance. Recognizing forma
1442 pauperis status expends a public resource, conferring a public
1443 benefit. And the interest in privacy concern may be lessened by the
1444 experience that "no one has any interest" in most i.f.p. filings.
1445 The Committee voted to close consideration of this suggestion.

1446 Copies of Unpublished Authorities: This proposal is drawn verbatim
1447 from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail,
1448 requires a lawyer to provide a pro se party with a copy of cases
1449 and other authorities cited by the lawyer or by the court if the
1450 authority is unpublished or is reported exclusively on computerized
1451 databases. Discussion reflected agreement that this practice can be
1452 a good thing. Some judges do it without benefit of a local rule.
1453 But not all do, and it cannot be assumed that all lawyers do it. A
1454 lawyer will supply the court with a truly inaccessible authority,
1455 and that may entail providing it to other parties. And even large
1456 institutions may not have ready access to everything that is out
1457 there. The committee agreed that although this local rule is an
1458 attractive idea, it is not an idea that should be embodied in a
1459 national rule. The practice might prove worthy of a place on the
1460 agendas of judicial training programs.

1461 Pro se e-filing: This suggestion is addressed by the proposals for
1462 e-filing and e-service discussed earlier in the meeting.

1463 PLEADING STANDARDS: 15-CV-GG

1464 This suggestion is that Rule 8(a)(2) and the appendix of forms
1465 that was abrogated on December 1, 2015 "are so misleading as to be
1466 plain error." The underlying proposition is that although the
1467 Supreme Court wrote its Twombly and Iqbal opinions as
1468 interpretations of Rule 8(a)(2), anyone who relies on the rule text
1469 will be grievously misled as to contemporary federal pleading
1470 standards. The question thus is whether the time has come to take
1471 on a project to consider whether the pleading standards that have
1472 evolved in the last nine years should be addressed by more explicit
1473 rule language. The project would attempt to discern whether there
1474 is any standard that can be articulated in rule language, and make
1475 one of at least three broad choices: confirm present practice;
1476 heighten pleading standards beyond what courts have developed in
1477 response to the Supreme Court's opinions; or reduce pleading
1478 standards to establish some more forgiving form of "notice
1479 pleading." The Committee has considered this question repeatedly.
1480 Brief discussion concluded that it is not yet time to undertake a
1481 project on general pleading standards.

1482 RULE 6(d) AND "MAKING" DISCLOSURES

1483 This suggestion arises from the need to read carefully through
1484 the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation
1485 to Rule 6(d). Rule 6(d) provides an additional three days to act
1486 after service is made by specified means when the time to act is
1487 set "after service" ["after being served" as the rule may soon be
1488 amended]. The provisions in Rule 26 direct that disclosure of a
1489 rebuttal expert be "made" within 30 days after the other party's
1490 disclosure, and that objections to pretrial disclosures be made
1491 within 14 days after the disclosures "are made." The concern is

1492 that although these provisions set times that run from the time a
1493 disclosure is "made," not the time it is served, some unwary
1494 readers may overlook the distinction and rely on Rule 6(d). The
1495 Committee concluded that this suggestion should be closed.

1496 15-CV-JJ: PRO SE E-FILING

1497 This suggestion urges that pro se litigants be allowed to use
1498 e-filing. As with 15-CV-EE, noted above, this topic is addressed by
1499 the pending proposals to amend Rule 5.

1500 THIRD-PARTY LITIGATION FINANCING: 15-CV-KK

1501 This suggestion follows up an earlier submission that the
1502 Committee should act to require disclosure of third-party financing
1503 arrangements. It provides additional information about developments
1504 in this area, including materials reflecting interest in Congress.
1505 But it does not urge immediate action. Instead, it urges the
1506 Committee "to take steps soon to achieve greater transparency about
1507 the growing use of TPLF in federal court litigation." Discussion
1508 noted that "this is a hot topic in the MDL world." It was noted
1509 that third-party funding raises difficult questions of professional
1510 responsibility. The Committee decided, as it had earlier, that this
1511 topic should remain open on the agenda without seeking to develop
1512 any proposed rules now.

1513 RULE 4: SERVICE ON INDIVIDUAL FEDERAL EMPLOYEES: 15-CV-LL

1514 This suggestion says that it can prove difficult to effect
1515 service on a federal employee who is made an individual defendant.
1516 Locating a home address can be hard, particularly as to those whose
1517 permanent address is outside the District of Columbia. It is not
1518 clear whether service can be made by leaving a copy of the summons
1519 and complaint at the defendant's place of federal work, in the
1520 manner authorized by Rule 5(b)(2)(B)(i) for service of papers after
1521 the summons and complaint. Two amendments are suggested:
1522 authorizing service by leaving the summons and complaint at the
1523 defendant's place of work, or requiring the agency that employs the
1524 defendant to disclose a residence address. Discussion began by
1525 observing that the Enabling Act may not authorize a rule directing
1526 a federal agency to disclose an employee's address. It also was
1527 noted that similar problems can arise in attempting to serve state
1528 and local government employees. The Department of Justice thinks
1529 that service by leaving at the defendant's place of work is a bad
1530 idea. The Committee concluded that although there may be real
1531 problems in making service in some circumstances, they cannot be
1532 profitably addressed by amending Rule 4. This suggestion is closed.

1533 15-CV-NN: MINIDISCOVERY AND PROMPT TRIAL

1534 This suggestion by Judge Michael Baylson, a former Committee

1535 member, proposes a new rule for "Mini Discovery and Prompt Trial."
1536 The rule would expand initial disclosure of documents, require
1537 responses to interrogatories within 14 days, limit depositions
1538 among the parties to 4 per side at no more than 4 hours each, allow
1539 third-party discovery only on showing good cause, allow no more
1540 than 10 requests for admissions, and set the period for discovery
1541 (including expert reports) at 90 days. Motions for summary judgment
1542 would be permitted only for good cause, defined as potentially
1543 meritorious legal issues, and not for insufficiency of the
1544 evidence. Discussion noted that a rule amendment would be required
1545 to authorize a court to forbid filing a motion for summary
1546 judgment, although a court can require a pre-motion conference to
1547 discuss the matter. Judge Pratter observed that Judge Baylson is a
1548 persuasive advocate for this proposal. It was suggested that judges
1549 should be encouraged to experiment along these lines. But it was
1550 concluded that it would be premature to consider rulemaking now.
1551 There is a big overlap between this proposal and the practices that
1552 will be explored in the two pilot projects approved by the
1553 Committee in earlier actions.

1554 15-CV-00: TIME STAMPS, SEALS, ACCESS FOR VISUALLY IMPAIRED

1555 This set of suggestions addresses several issues that do not
1556 lend themselves to resolution by court rule. The concern that
1557 improvements are needed in access to courts for the visually
1558 impaired is particularly sympathetic. Emery Lee will investigate
1559 whether PACER is accessible.

1560 RULE 58: SEPARATE DOCUMENT

1561 Judge Pratter brought to the Committee's attention a Third
1562 Circuit decision that found an appeal timely only because judgment
1563 had not been entered on a separate document. The catch was that the
1564 dismissal order included a footnote that set out the district
1565 court's "opinion." The ruling that the appeal was timely reflects
1566 many other applications of Rule 58. The separate document
1567 requirement was added to Rule 58 to establish a bright-line point
1568 to start the running of appeal time. It has been interpreted to
1569 deny separate-document status to very brief orders that provide
1570 even minimal explanation in addition to a direction for judgment.
1571 For many years the result was that appeal time – and the time for
1572 post-judgment motions – never began to run in cases that were
1573 finally resolved without entry of judgment on an appropriately
1574 "separate" document. This problem was resolved by amendments made
1575 to Rule 58 in 2002. Rule 58(c) now provides that when entry of
1576 judgment on a separate document is required, judgment is entered on
1577 the later of two events: when it is set out in a separate document,
1578 or 150 days after it is entered in the civil docket.

1579 Judge Pratter said that judges on her court have the desirable
1580 practice of providing brief explanations for judgments that do not

1581 warrant formal opinions. But that means that if a judge
1582 inadvertently fails to enter a still briefer separate document,
1583 appeal time expands from 30 days to 180 days (150 days plus 30
1584 days). Is this desirable? The summary of the work done in 2002, and
1585 repeated by the Appellate Rules Committee in 2008, shows deliberate
1586 choices carefully made in creating and maintaining the present
1587 structure. Rather than reconsider these choices now, perhaps the
1588 Committee can find a mechanism that will foster compliance with the
1589 separate-document requirement.

1590 Discussion suggested that the problem is not in the rule. "We
1591 simply need to do it better." The courtroom deputy clerk should be
1592 educated in the responsibility to ensure entry of judgment on a
1593 separate document whenever the court intends a final judgment. Some
1594 circuits have managed educational efforts that have been
1595 successful, at least in immediate effect.

1596 This agenda item was closed.

Respectfully Submitted

Edward H. Cooper
Reporter

TAB 5

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Inter-Committee Work

Item 5 will be an oral report.

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TAB 6

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TAB 6A

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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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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 14, 2016

I. Introduction

The Advisory Committee on Criminal Rules met on April 18, 2016, in Washington, D.C. Draft minutes from the meeting are attached.

This report presents three action items. The Committee unanimously recommends publication of the following proposed amendments for public comment:

- (1) Rule 49 (filing and service);
- (2) Rule 45(c) (conforming amendment); and
- (3) Rule 12.4 (government disclosure of organizational victims).

The report also briefly discusses several information items. The Committee will study further the following proposed amendments and has appointed subcommittees for each:

- (1) Procedural protections for cooperating defendants (CACM recommendations);
- (2) Rule 5(d) of the Rules Governing 2255 Actions (right to file a reply); and

(3) Rule 16 (discovery in complex cases).

Finally, as noted below, the Committee decided that it will not, at this time, pursue several other suggested amendments.

II. Action Item: Rule 49

The Criminal Rules Committee submits proposed amendments to Rule 49 governing service and filing in criminal cases, with the recommendation that the amendments be published for public comment. Parallel amendments are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees.

A. Background

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. A subcommittee composed of representatives from each of the advisory committees concluded that the rules governing the procedure in civil, criminal, bankruptcy, and appellate cases should be amended to require, rather than allow, electronic filing and service, with appropriate exceptions. The Standing Committee endorsed that recommendation and charged the advisory committees to work closely together and coordinate the parallel amendments on e-filing and service.

Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. At its September 2015 meeting, the Criminal Rules Committee unanimously approved a motion instructing the Rule 49 Subcommittee to prepare a stand-alone rule. Members emphasized the different interests and policies at stake in civil and criminal litigation: criminal cases and proceedings under § 2255 involve heightened due process concerns that should be reflected in the Criminal Rules governing filing and service. Extending the Civil Rule's new presumptive e-filing requirements to pro se defendants and prisoners in criminal cases, the Committee concluded, would be particularly problematic. Members also noted that prosecutors, defense lawyers, and pro se defendants would benefit from having the rules on filing and service included in the Federal Rules of Criminal Procedure, rather than having to consult two different sets of procedural rules.

However, in drafting the new stand-alone rule, the Committee recognized that the proposed language should replicate that used in the Civil Rule when possible to avoid raising questions about the meaning or scope of the existing language in the Civil Rules. Differences in language must be rooted in differences between civil and criminal cases or differences in existing Rules of Civil and Criminal Procedure. To ensure that the proposed Rule 49 replicated the revised provisions in the Civil Rules as closely as possible, the Criminal Rules Committee worked with representatives of the Civil Rules Committee throughout the process. Members of

the Civil Rules Committee and Reporters from the Civil, Appellate, and Bankruptcy Committees participated in deliberations, and the style consultants worked diligently to harmonize the phrasing and structure of the proposals. Moreover, the Committee approved the amendment at its April 2016 meeting with the understanding that the chair and reporters might need to make additional minor changes to ensure uniformity with proposals from the other committees before submission to the Standing Committee (and, as always, to incorporate any changes made on the recommendation of the style consultants).¹

B. Selected Features of Proposed Criminal Rule 49

Because most of the provisions on service and filing in proposed Criminal Rule 49 are identical to the provisions on service and filing in proposed Civil Rule 5, this report will focus on the differences. Generally, the proposed Criminal Rule departs from the proposed amendment to Rule 5 only where the Committee was persuaded that a departure was warranted by a difference between civil and criminal cases, or a difference between the criminal and civil rules themselves.

1. Organization and Structure.

In both Civil Rule 5 and Criminal Rule 49, the provisions on service precede those dealing with filing. Within those subsections, however, the proposed amendments to Rules 5 and 49 differ on the order in which they address electronic and nonelectronic means of filing and service. The proposed amendments to Rule 49 address electronic means first. Because most filing and service in criminal cases is through CM/ECF, the Criminal Rules Committee concluded that a new stand-alone rule providing instructions for filing and service should lead with instructions on electronic filing and service. Also, addressing electronic means in (a)(3) first provides needed context for the term “nonelectronic,” which follows in the caption to (a)(4). And, importantly, placing the subsection on electronic means of service first highlights the specific restriction on use of CM/ECF by unrepresented parties. For unrepresented persons using the rule, the placement of electronic before nonelectronic service makes it crystal clear that

¹ A number of such minor changes were made to the proposal after the April meeting of the Criminal Rules Committee, each approved by the Chair, Subcommittee Chair, and reporters:

- (1) conforming (a)(3)(A) & (B) to the civil rule phrasing (“learns that it did not reach the person”);
- (2) changing the caption of 49(a)(1) from “When Required” to “What is Required”;
- (3) changing the phrase “unrepresented party” to “party not represented by an attorney” in several locations;
- (4) changing “using the court’s electronic filing system” to “filing it with the court’s ...”;
- (5) rephrasing the cross references in subsections (c) and (d) to read “as required by” Rule 49(a);
- (6) relocating the phrase “on each party” in subsection (d) to earlier in the sentence; and
- (7) changing phrasing in (b)(3)(A) to “the court must allow nonelectronic filing for good cause.”

unrepresented parties must follow different rules when it comes to CM/ECF. Because the Criminal Rules Committee was writing on a clean slate, the proposed amendment did not require reordering of preexisting numbering or lettering of these provisions, which can pose difficulties for researching applications of its provisions.

In contrast, the drafters of the Civil Rules were not writing on a clean slate. Civil Rule 5 now begins with the traditional means of nonelectronic filing. Electronic filing, which is a relatively recent phenomenon, was added at the end of the list of means of filing. Putting electronic filing first would have required relettering the provisions of Rule 5(d), and the Civil Rules Committee concluded that the reasons for placing electronic provisions first did not outweigh the potential downsides of renumbering and relettering Rule 5.

The consensus view of the Committees, Reporters, and Style Consultants was that each Committee had valid reasons for the difference in structure and the different order in which the forms of service were listed posed no problem. In contrast to the use of different terminology, which might raise interpretative questions, a different order of the subsections would cause no mischief.

The Criminal Rule also incorporates in a single paragraph—(b)(1)—the language from existing Civil Rule 5 regarding the timing of filing and certificate of service. The proposed Civil Rule breaks the current single paragraph into two separate subdivisions. The consensus of the Committees, Reporters, and Style Consultants was that on this point a difference between the civil and criminal rule is appropriate. Because the single paragraph in the proposed Criminal Rule is shorter than the corresponding portion of the Civil Rule, which also addresses the filing of discovery under Civil Rule 26, subdividing the single paragraph in Rule 49 was unnecessary and indeed was opposed by the Style Consultants.

Unlike Civil Rule 5(b)(2)(E), proposed new Criminal Rule 49 contains separate provisions for service through the court's electronic filing system and electronic service by other means with written consent. The structure of the Criminal Rule differs because the substantive rule regarding electronic filing by an unrepresented party differs, as explained below.

And, unlike Civil Rule 5, proposed Criminal Rule 49 distinguishes structurally (as well as substantively) between parties (the prosecution and defense) and nonparties. This is reflected structurally in (c), "Service and Filing By Nonparties," which has no counterpart in Rule 5. The various substantive differences are discussed below in sections 2(a) and (b).

Finally, the proposed Criminal Rule contains two other provisions, not found in Civil Rule 5, that incorporate provisions found elsewhere in the Rules of Civil Procedure. These provisions will be needed when the link between the Civil and Criminal Rules is severed. They are described below in section 2(c).

2. *Substantive Differences*

a. *Filing and Service by Unrepresented Parties*

The first major substantive difference from the Civil Rule is that under the proposed Criminal Rule an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. In contrast, under the proposed amendment to Civil Rule 5, an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. The need for different approaches to electronic filing by unrepresented parties was the main reason the Criminal Rules Committee decided that a stand-alone criminal rule was required.

As noted during the Criminal Rules Committee’s report to the Standing Committee at its January 2016 meeting, electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.²

b. *Filing and Service by Nonparties*

The second substantive difference from the Civil Rule concerns filing and service by nonparties. Media representatives and crime victims are probably the most frequent nonparty filers, but there are others, including nonparty motions for the return of property under Rule 41(g), material witnesses who are detained under 18 U.S.C. § 3144, persons seeking disclosure of grand jury material under Rule 6, records custodians moving to quash subpoenas, amici filing at the district court level, and bail sureties.

The Committee concluded that good reasons support requiring all nonparties, represented or not, to file and serve nonelectronically in the absence of a court order or local rule to the contrary. First, the architecture of the current CM/ECF system allows only the prosecution and defendant(s) to file in a criminal case. Moreover, nonparties generally have a distinctive interest only in certain aspects of a criminal case, and it may not be desirable for them to be served with pleadings and filings that are unrelated to those aspects of the case. Some nonparties may prefer a default rule of nonelectronic filing. Some, particularly victims, provide information to the court that they may not wish to have shared with the parties. A default of nonelectronic filing helps protect those interests. If a district decides that it would prefer to adopt procedures that would

² For this reason, the Committee also expressed some concern about the application in § 2254 cases of language allowing local rules to require unrepresented parties to file electronically. Such language was added to Civil Rule 5 in order to provide authority for some existing local rules that require inmates in certain prisons to submit their petitions to staff in the prison library, who then scan the papers and file them electronically. In response to the Committee’s concerns, the proposed amendment to Rule 5 was revised to state that local rules requiring pro se parties to file must allow reasonable exceptions.

allow all represented media, victim, or other filers to use its electronic filing system, that would remain an option by local rule.

This policy choice is reflected in subsection (c), “Service and Filing By Nonparties,” which has no counterpart in the Civil Rules. Subsection (c) also serves another important function. The introductory clause—“A nonparty may serve and file a paper only if doing so is required or permitted by law”—makes it clear that the provisions describing how nonparties must file or serve do not expand the right of nonparties to participate in criminal prosecutions.

c. Provisions Imported from Other Civil Rules

Proposed Rule 49 contains two provisions that do not appear in Civil Rule 5, but were imported from other Civil Rules. The first comes from Civil Rule 11. The Criminal Rules Committee concluded severing the link to the Civil Rules without adding the signature provision of Civil Rule 11(a) to Rule 49 would either create³ or maintain an existing gap in the Criminal Rules. Nothing else in the Criminal Rules requires that the contact information specified in Civil Rule 11(a) be included as part of a filing. Proposed Rule 49(b)(4) fills this gap by replicating the language presently found in Civil Rule 11(a). That language has been restyled, and the word “party” changed to “person” in order to accommodate filings by nonparties.

Proposed Rule 49(c) also substitutes the language from Civil Rule 77(d)(1), governing the clerk’s duty to serve notice of orders, for the command in the existing Rule that the clerk serve notice “in a manner provided for in a civil action.”⁴

d. Other Differences

The Committee also noted a few other minor differences between the proposed amendments to Rule 49 and Civil Rule 5, which it concluded were justified and unlikely to give rise to any interpretative questions or difficulties.

- i.* The language describing what must be served was retained from existing Rule 49(a). The current language—which is familiar to and well understood by practitioners and judges—now varies from the language of Civil Rule 5(a)(1). The Civil Rule refers to types of papers that are not filed in criminal cases. There was no intention to change the scope of the service requirement in criminal cases,

³ A few courts have assumed Civil Rule 11(a) may be applicable in criminal cases, presumably as part of the “manner” of filing referenced in Rule 49(d).

⁴ Proposed Rule 49(c) omits the phrase “who is not in default for failing to appear,” which does not apply in criminal cases, and substitutes “Rule 49(a)” for Rule 77’s reference to “Rule 5(b).”

and the Committee was concerned that revising the wording might generate uncertainty or work an unintended change.

- ii. The language concerning service on the attorney of a represented party is retained from existing Rule 49(b). It too differs slightly from that in Civil Rule 5. Unlike the criminal provision under which service on the attorney is required whenever service is required by “these” (i.e. criminal) “rules or a court order,” the civil provision is restricted to service under “this rule,” (i.e., Rule 5). The Note to the 2001 Amendments to Civil Rule 5 suggests that the provision on serving attorneys in the Civil Rule was restricted so that it would apply only to service made under Rules 5(a) and 77(d) and not to service under Civil Rules 4, 4.1, 45(b), and 71A(d)(3). Absent some evidence that the present scope of Criminal Rule 49(b) is presenting difficulties in criminal practice, there appears to be no basis for restricting it in the same way that the provision in the Civil Rule has been restricted.
- iii. Rule 49(e)’s phrasing (“A paper filed electronically in compliance with a local rule is written or in writing under these rules”) has always been slightly different than Civil Rule 5(d) (“A paper filed electronically is a written paper for purposes of these rules.”). The words “or in writing,” were retained because they appear in so many Rules of Criminal Procedure, including Rules 47(b), 11(a)(2), 23(b), and other rules that require the defendant to waive other important procedural rights “in writing.”

e. Provisions in Civil Rules that Were Not Included.

To ensure that every deviation in the proposed amendment from the Civil Rules provisions on filing and service was identified and justified as necessary to accommodate criminal cases, the Committee examined each aspect of Civil Rule 5. The Committee also reviewed all of the other Civil Rules that might be thought to govern the “manner” of filing or service and thus fall within the rules incorporated by Criminal Rule 49(b) or (d).

Language that the Committee decided was not pertinent to criminal cases was not included in the proposed amendment to Rule 49. For example, the language in Civil Rule 5(a)(2) was not imported because there are no default judgments in criminal prosecutions or § 2255 cases. The language in Civil Rule 5(a)(3) was not imported because criminal actions are not “begun by seizing property.” (Criminal forfeiture proceedings are governed by Criminal Rule

32.2.) Also the language about serving numerous defendants in Civil Rule 5(c) was not imported because it does not apply. In a criminal prosecution, even when there are many defendants, each requires notice and must be served.

Where there were detailed provisions in the current Criminal Rules addressing matters also covered in the Civil Rules, the Committee concluded those detailed provisions rebutted any possible implication that the Civil Rule currently governs in criminal cases. For example, Civil Rule 65.1 governs service of motions to enforce a surety's liability. Criminal Rule 46(f)(3)(C) covers the same ground and rebuts any implication that Rule 49 incorporates Rule 65.1.

III. Action Item: Conforming Amendment to Rule 45

The Committee also recommends publication of a conforming amendment to Rule 45(c) in order to revise cross references that would be made obsolete by the proposed amendment of Rule 49. Although technical and conforming amendments do not require publication, in this case the Committee recommends simultaneous publication of the proposed amendments to Rule 49 and the conforming amendment to Rule 45(c).

Criminal Rule 45(c)—which governs time computation and closely matches the Civil, Bankruptcy, and Appellate Rules—now provides for additional time to take action after service by certain means authorized by Civil Rule 5. In tandem with parallel changes in the other rules, an amendment to Rule 45(c) eliminating extra time after service by electronic means is now pending before Congress. The pending amendment also incorporates cross references to the sections of Civil Rule 5 listing certain authorized modes of service.

The proposed amendment to Rule 49 imports the service rules now referenced in Rule 45(c) into Rule 49(a), rendering the existing cross references to Civil Rule 5 obsolete. The conforming amendment would replace the obsolete references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

The Committee recommends publication of this amendment when the proposed amendments to Rule 49 are published. Publishing the proposed amendments together will foreclose public comments suggesting that such a correction will be required.

IV. Action Item: Rule 12.4

The Criminal Rules Committee recommends publication of an amendment to Rule 12.4, which governs the parties' disclosure statements. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Rule 12.4 was a new rule added in 2002. The Committee Note states that “[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a ‘financial interest in the subject matter in controversy.’ Code of Judicial Conduct, Canon 3C(1)(c) (1972).” Prior to 2009, the Code of Judicial Conduct treated any

victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest “that could be substantially affected by the outcome of the proceedings.”

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer program. But each victim would suffer only a very minor harm from a price increase that might be pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “substantially affected by the outcome of the proceedings.”

The requirement that the government show “good cause” is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4. Although the style consultants expressed concern that the phrase “good cause” was vague, that phrase is used throughout the Criminal Rules where exceptions to general requirements are permitted, and it is well understood by judges and litigants. Moreover, “good cause” allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, taking into account all of the relevant factors. It also allows the court to take a broad view of the scope of recusal and the information required in particular cases.

The proposed amendment to Rule 12.4(b) makes two changes. It specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements. The Committee concluded that adding these details while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment.

The Appellate Rules Committee has a parallel amendment under consideration, and its reporter participated in the development of the Committee’s proposed amendment. However, because the Appellate Rules proposal is part of a more comprehensive revision, it is on a slower

timeline. Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject.⁵

V. Cooperators

At its January 2016 meeting, the Standing Committee referred to the Criminal Rules Committee a report and recommendations from the Committee on Court Administration and Case Management (CACM). After lengthy consideration, including a study by the Federal Judicial Center, CACM made a series of findings leading to recommendations that would require significant changes in the Rules of Criminal Procedure. It unanimously concluded:

- There is “a pervasive nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.”
- The problem has been “exacerbated by widespread use of PACER and other systems that provide ready access to case information, including documents containing cooperator information and criminal dockets indicating whether cooperation did or did not occur in a case.”
- “Uniform nationwide measures regarding access to particular court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term.”

CACM’s central recommendation is that all plea agreements as well as the transcript of every guilty plea proceeding and sentencing must contain a sealed portion that would include either the defendant’s cooperation or a statement that there was no cooperation. Thus every case would appear identical, and no inspection of the transcript or the documents on PACER would reveal whether any individual had cooperated. Rule 35 motions would also be sealed.

A subcommittee has been appointed to consider these recommendations. Because of the nature of the issues to be considered, the subcommittee includes representatives from CACM and the Sentencing Commission, as well as members of the Criminal Rules Committee and representatives of the Standing Committee. The members of the subcommittee are:

Judge Lewis Kaplan (chair)
Judge James Dever
Judge Terry Kemp
Ms. Carol Brook
Mr. John Siffert
Ms. Michelle Morales (Department of Justice)

⁵ If that occurs, one of the issues will be the proposal that the Appellate Rule include disclosures not only for corporations, but also other “publicly held entities.”

Judge Charles Breyer (U.S. Sentencing Commission)
Judge Philip Martinez (CACM)
Judge Amy St. Eve (Ex Officio, Standing Committee representative to CACM)

The reporters prepared an introductory memorandum for the Subcommittee, which (1) provided a more detailed description of CACM's report and recommendations, (2) identified the Rules of Criminal Procedure that may be affected by CACM's recommendations, and (3) provided a brief overview of the issues raised by CACM's proposals. The Subcommittee has held one telephone conference to discuss members' initial reactions to the CACM recommendations and to determine how best to proceed.

Part of the discussion focused on how widespread the problems were and whether they warranted across-the-board changes in the Rules of Criminal Procedure. Members noted that roughly 10,000 individuals receive sentence reductions under 5K1.1 for cooperation each year, but the FJC study upon which CACM relied found only a few hundred incidents of threats or harm. Members requested more information about the prevalence of threats and harm, as well as their distribution. For example, did the incidents reported to the FCJ occur primarily in certain districts or geographic areas? Were they limited to certain offenses?

Members also expressed multiple concerns about the impact of the proposed changes on the defense. First, defense counsel presently research other sentences and agreements in order to advocate for their clients at sentencing. This would be impossible if CACM's proposals were adopted. Second, to achieve CACM's objectives, even more sealing might be required, since good advocacy weaves cooperation in throughout the motion and sentencing presentation. Indeed, it might lead to sealing of many more documents and procedures, since people learn of cooperation from other judicial documents and in open court at other procedural stages. And finally, although CACM's recommendations state that the government must continue to honor its *Brady* obligations, CACM's recommendations would greatly hamper the defense in making its own complementary investigations.

A related concern was whether the impact of the proposed changes in the Rules of Criminal Procedure would be sufficient to warrant the proposed changes. Members noted many other sources of information about cooperation would not be affected by the proposed changes.

Members also raised the question whether changes in the Rules of Criminal Procedure were the right remedy for the problem. Several members expressed the view that the executive branch, not the judiciary, should take the lead in solving the problems identified by CACM. The Department of Justice, not the court, has the best opportunity to identify cases in which problems are likely to arise. Others suggested that this might be an issue Congress should address.

Finally, members expressed concern that CACM's proposals were inconsistent with the foundational assumption of open judicial proceedings and raised significant First Amendment issues.

Judge Sutton suggested that the Subcommittee view its task as determining the best response to the problems, which might or might not include changes in the Rules of Criminal Procedure. He encouraged the Subcommittee to consider solutions that might include changes in local rules, the Rules of Criminal Procedure, legislation, or other options.

The call concluded with the request that the reporters gather information and do additional research in preparation for the next call.

- The Subcommittee identified the following additional information or data that would be helpful:
 - How large is the problem compared to the universe of cooperators?
 - What kinds of cases give rise to problems?
 - Is this truly a nationwide problem or are there significant geographic variations?
 - How does the experience in districts that currently seal plea agreements differ, if at all, from the experience in other districts?
- The Subcommittee also requested that the reporters prepare a memorandum on the First Amendment issues raised by CACM's proposals.
- Finally, the Subcommittee requested that the Department of Justice provide the Subcommittee with (1) information regarding its practices and experience in the 10 largest districts as well as any other relevant districts and (2) its recommendations.

At the April 2016 meeting of the Criminal Rules Committee the Subcommittee described its work to date and solicited comments from Advisory Committee members. The discussion is detailed on pages 13–17 of the minutes of the meeting.

VI. Rule 5(d) of the Rules Governing 2255 Actions

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

After discussion at the April 2016 meeting, a subcommittee was appointed to study the proposal. Although the style consultants had advised the Committee that the text of the rule is clear, the split in the lower courts demonstrates that courts are not finding it to be clear. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision. The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

In addition to considering language that could make it clear inmates have a right to file a reply, the subcommittee will also consider whether the rule should set a presumptive time to file a reply and whether parallel changes in the Rules Governing § 2254 Proceedings would be warranted.

VII. Rule 16

A subcommittee has also been appointed to study a proposal that Criminal Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. In support of a proposed amendment, The National Association of Defense Lawyers (NADL) and the New York Council of Defense Lawyers (NYCDL) stated that prosecutorial discovery is a significant problem in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “more gigabytes of information.” Their proposal provides a standard for defining a “complex case” and steps to create reciprocal discovery.

Discussion at the April meeting indicated both support for the proposal and opposition to attempting to regulate matters that some members felt were better left to the sound discretion of the trial judge.

The Department of Justice acknowledged that the proposal for targeted reciprocal discovery presented different issues than previous across-the-board efforts to expand prosecutorial discovery obligations, which the government had strongly opposed. Nevertheless, the Department indicated that it does not view amending the rules as the best way to tackle the problems identified by NADL and the NYCDL. For example, the Department worked with the defense bar to develop guidance for judges on electronic discovery, resulting in the production of a very useful a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules. Best practices and guidance, developed in collaboration with the defense bar, will be able to change quickly as the technology changes.

VIII. Suggestions That Will Not Be Pursued

The Committee also decided not to pursue several suggested amendments.

- The Justice Department has withdrawn its proposal to amend Rule 15's provisions governing the costs of depositions requested by the defense.
- Two suggestions that the rules be amended to give pro se defendants the right to file electronically will not be pursued separately because that issue has been addressed in the Committee's proposal to amend Rule 49.
- The Committee also decided not to pursue a proposal to require redaction of the last four digits of social security numbers, since the issue was common to all of the rules and should be resolved in a uniform fashion by CACM.
- Following the lead of the other committees to whom this suggestion was also submitted, the Committee decided not to pursue a proposal to require litigants citing unpublished cases to serve those cases on pro se parties.
- The Committee decided not to pursue a suggestion that Rule 12 be amended to make it clear that the standard for dismissal of a criminal indictment for failure to state an offense is the same as the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6).

TAB 6B

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

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 (1) *Nongovernmental Corporate Party.* Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

10 (2) *Organizational Victim.* Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~

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

2 FEDERAL RULES OF CRIMINAL PROCEDURE

15 ~~government must file a statement identifying the~~
16 ~~victim.~~ If the organizational victim is a
17 corporation, the statement must also disclose the
18 information required by Rule 12.4(a)(1) to the
19 extent it can be obtained through due diligence.

20 **(b) Time for Filing; Supplemental Filing.** A party
21 must:

- 22 (1) file the Rule 12.4(a) statement within 28 days
23 after~~upon~~ the defendant's initial appearance; and
24 (2) promptly file a supplemental statement if the
25 party learns of any additional required
26 information or any changes in required
27 information~~upon any change in the information~~
28 ~~that the statement requires.~~

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has “an interest that could be substantially affected by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “substantially affected by the outcome of the proceedings.”

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

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

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified
5 time after being served and service is made under
6 Federal Rule of ~~Civil~~Criminal Procedure 49(a)(4)(C),
7 (D), and (E)~~5(b)(2)(C) (mailing), (D) (leaving with~~
8 ~~the clerk), or (F) (other means consented to),~~ 3 days
9 are added after the period would otherwise expire
10 under subdivision (a).²

Committee Note

Rule 49 previously required service and filing “in a manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49.

² This rule text reflects amendments adopted by the Supreme Court and transmitted to Congress on April 28, 2016, which have an anticipated effective date of December 1, 2016.

This amendment revises the cross references in Rule 45(c) to reflect this change.

1 **Rule 49. Serving and Filing Papers**

2 (a) **Service on a Party.**

3 **(1) What is**~~When Required.~~ A party must serve on
4 every other party.**Each of the following must be**
5 **served on every party:** any written motion (other
6 than one to be heard ex parte), written notice,
7 designation of the record on appeal, or similar
8 paper.

9 ~~(b) **How Made.** Service must be made in the manner~~
10 ~~provided for a civil action.~~

11 **(2) Serving a Party's Attorney.** Unless the court
12 **orders otherwise,** ~~W~~when these rules or a court
13 order requires or permits service on a party
14 represented by an attorney, service must be made
15 on the attorney instead of the party, ~~unless the~~
16 ~~court orders otherwise.~~

17 **(3) Service by Electronic Means.**

18 **(A) Using the Court's Electronic Filing System.**

19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 **(B) Using Other Electronic Means. A paper**

28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the
32 serving party learns that it did not reach the
33 person to be served.

- 34 (4) Service by Nonelectronic Means. A paper may
35 be served by:
36 (A) handing it to the person;
37 (B) leaving it:
38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or
42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;
47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;
50 (D) leaving it with the court clerk if the person
51 has no known address; or

52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.

57 **(b) Filing.**

58 (1) When Required; Certificate of Service. Any
59 paper that is required to be served—together
60 with a certificate of service—must be filed
61 within a reasonable time after service. A notice
62 of electronic filing constitutes a certificate of
63 service on any person served by the court’s
64 electronic-filing system.

65 **(2) Means of Filing.**

66 (A) Electronically. A paper is filed
67 electronically by filing it with the court’s
68 electronic-filing system. The user name
69 and password of an attorney of record,

70 together with the attorney's name on a
71 signature block, serves as the attorney's
72 signature. A paper filed electronically is
73 written or in writing under these rules.

74 (B) Nonelectronically. A paper not filed
75 electronically is filed by delivering it:

76 (i) to the clerk; or

77 (ii) to a judge who agrees to accept it for
78 filing, and who must then note the
79 filing date on the paper and promptly
80 send it to the clerk.

81 **(3) Means Used by Represented and Unrepresented**
82 **Parties.**

83 (A) Represented Party. A party represented by
84 an attorney must file electronically, unless
85 nonelectronic filing is allowed by the court
86 for good cause or is allowed or required by
87 local rule.

88 (B) *Unrepresented Party.* A party not
89 represented by an attorney must file
90 nonelectronically, unless allowed to file
91 electronically by court order or local rule.

92 (4) *Signature.* Every written motion and other
93 paper must be signed by at least one attorney of
94 record in the attorney's name—or by a person
95 filing a paper if the person is not represented by
96 an attorney. The paper must state the signer's
97 address, e-mail address, and telephone number.
98 Unless a rule or statute specifically states
99 otherwise, a pleading need not be verified or
100 accompanied by an affidavit. The court must
101 strike an unsigned paper unless the omission is
102 promptly corrected after being called to the
103 attorney's or person's attention.

104 (5) *Acceptance by the Clerk.* The clerk must not
105 refuse to file a paper solely because it is not in

106 the form prescribed by these rules or by a local
107 rule or practice.

108 (c) **Service and Filing by Nonparties.** A nonparty may
109 serve and file a paper only if doing so is required or
110 permitted by law. A nonparty must serve every party
111 as required by Rule 49(a), but may use the court's
112 electronic-filing system only if allowed by court order
113 or local rule.

114 (d) **Notice of a Court Order.** When the court issues an
115 order on any post-arraignment motion, the clerk must
116 ~~provide notice in a manner provided for in a civil~~
117 ~~action~~ serve notice of the entry on each party as
118 required by Rule 49(a). A party also may serve notice
119 of the entry, by the same means. Except as Federal
120 Rule of Appellate Procedure 4(b) provides otherwise,
121 the clerk's failure to give notice does not affect the
122 time to appeal, or relieve—or authorize the court to

123 relieve—a party’s failure to appeal within the allowed
124 time.

125 ~~(d) **Filing.** A party must file with the court a copy of any~~
126 ~~paper the party is required to serve. A paper must be~~
127 ~~filed in a manner provided for in a civil action.~~

128 ~~(e) **Electronic Service and Filing.** A court may, by local~~
129 ~~rule, allow papers to be filed, signed, or verified by~~
130 ~~electronic means that are consistent with any technical~~
131 ~~standards established by the Judicial Conference of~~
132 ~~the United States. A local rule may require electronic~~
133 ~~filing only if reasonable exceptions are allowed. A~~
134 ~~paper filed electronically in compliance with a local~~
135 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on

filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the “unless” clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court’s electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing

using the court's electronic filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic

confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court’s electronic filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in in Civil Rule 5(d)

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**ADVISORY COMMITTEE ON CRIMINAL
RULES DRAFT MINUTES
April 18, 2016, Washington, D.C.**

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met in Washington, D.C., on April 18, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.¹
John S. Siffert, Esq.
James N. Hatten, Clerk of Court Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on
Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Julie Wilson, Rules Office Attorney
Shelly Cox, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center
Margaret Williams, Federal Judicial Center

¹ Ms. Morales was joined at the meeting by Ms. Elizabeth Shapiro.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy opened the meeting and thanked the reporters for their work in preparing the agenda book. He then asked members to introduce themselves, and he welcomed observers, including Peter Goldberger of the National Association of Criminal Defense Lawyers and Catherine M. Recker of the American College of Trial Lawyers. Judge Molloy also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of September 2015 Meeting

A motion to approve the minutes having been moved and seconded, the Committee unanimously approved the September 2015 meeting minutes by voice vote.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

The Committee's proposed amendments to Rules 4, 41, and 45 were submitted to the Supreme Court, which has until May 1 to transmit them to Congress. Ms. Womeldorf expressed the hope that the amendments would soon be sent to Congress.² Judge Molloy expressed his appreciation for the members' hard work on these amendments.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 49

Judge Feinerman, chair of the Rule 49 Subcommittee, acknowledged the reporters' assistance and thanked the subcommittee members for their time, thought, and effort. He then presented the subcommittee's recommended amendment and committee note.

Judge Feinerman began by providing an overview of the subcommittee's work, which grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. The subcommittee's work was guided by two imperatives, which were sometimes in tension: (1) the Advisory Committee's direction to draft a stand-alone rule on filing and service adapted to criminal litigation, and (2) the Standing Committee's direction to depart from the language of Civil Rule 5 only when justified by significant difference between civil and criminal practice. To achieve these objectives, the subcommittee worked closely with representatives of the Civil Rules Committee, who participated in the subcommittee's teleconferences and were in frequent communication with the reporters. Finally, the subcommittee received the advice of the style consultants.

² On April 28, 2016, the Supreme Court transmitted the amendments to Congress.

Judge Feinerman then provided a section-by-section analysis of the proposed amendment to Rule 49, inviting questions and comments from members as he presented each section.

49(a)(1). Judge Feinerman noted that subsection (a) (1) preserves much of the language from the current rule. The language regarding *what must be served* is retained from existing Rule 49(a): “any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.” Parties and courts know what the existing language means, no difficulties have arisen from the current language of the rule, and tinkering with it without a compelling reason could do more harm than good.

The subcommittee proposes, however, a change in the language governing *who must serve*, in order to reverse an unintended change that occurred when the rule was restyled from the passive to the active voice in 2002. That change inadvertently carved out nonparties. The subcommittee recommends a return to the passive construction used prior to 2002, so nonparties (as well as parties) will be required to serve the items described in (a).

Professor King noted that there had been a suggestion that the committee note might include a statement that the amendment did not modify or expand the scope of the rule or change the practice regarding concerning papers, such as discovery, that are disclosed but not necessarily filed or served. Concern had also been expressed about making clear that probation and pretrial services reports were not covered by the amended rule.

Professor Beale added that committee notes cannot change the meaning of the rule, and there is always a question how much explanation should be provided. The proposed committee note does not include language stating that the scope of the papers that must be served has not changed, or language stating that it does not apply to probation and pretrial services reports. Beale also noted that the change to the passive voice in subsection (a) was an example of a point on which the style consultants had yielded to the subcommittee because the passive voice was necessary for substantive reasons. Indeed, the discovery of—and opportunity to correct—the unintended change wrought by restyling was an unanticipated benefit of the current project.

Finally, Judge Feinerman noted that the rule explicitly covers only service “on a party.” Although nothing in the existing (or pre-2002) Rule 49 addresses service on nonparties, this does not seem to have caused any problems. The parties generally use common sense in determining when to serve nonparties, and the subcommittee thought it best not to try, at this time, to craft a rule that would apply in all of the situations when a nonparty may file in a criminal case, perhaps causing unintended consequences.

Rule 49(a)(2). Judge Feinerman noted Rule 49(a)(2) was unchanged except for a minor matter of style.

Rule 49(a)(3). Judge Feinerman then moved on the Rule 49(a)(3), noting it was a completely new provision that distinguishes between electronic service and service by other means. The subcommittee felt it was very important to put electronic service, which is the dominant mode of

service, first. Professor King noted that the both the Civil and Criminal amendments now use the language referring to the “court’s electronic filing system.”

Professor King then drew attention to a difference between the Civil and Criminal proposals, which use different phrasing to describe a situation in which electronic service is ineffective. The Civil proposal says electronic service is ineffective if the server learns that “it did not reach the person to be served.” In contrast, the subcommittee’s proposal provides service is ineffective if the server learns that the person to be served did not receive “the notice of electronic filing” (NEF). The subcommittee thought this language was more accurate.³

Members were reminded that the current rule (as well as the proposed civil rule) now treats electronic service differently than other forms of service (such as mail or delivery to a person’s office or dwelling). Because of concerns about the reliability of electronic service, Civil Rule 5 (which governs in criminal cases as well) provides that service is not effective if the serving party knows that the electronic service did not reach the party to be served. In contrast, all other forms of service are effective if the serving party takes the specified action (such as mailing), even if for some reason the party to be served does not receive service. The civil and criminal proposals retain this favorable treatment for electronic service, which focuses on the serving party’s knowledge that electronic service was not effective.

Discussion turned to the appropriate scope of the exception. Mr. Hatten explained that the clerk’s office does not receive bounce back messages, such as “out of office” notices. The clerks do, however, receive a notice if the CM/ECF system was unable to deliver the email, which occurs, for example, when the recipient’s mailbox is full. In those cases, the clerk’s office will follow up with the recipient of service. As a member noted, it would be a very rare instance in which the serving party learns that CM/ECF service was not effective. A lawyer member wondered if the proposed rule imposed too great a burden on defense lawyers, including those in small firms, who may have no one to monitor their emails. Mr. Hatten responded that in order to use the CM/ECF system lawyers had to agree to receive electronic service, and thus had to have in place a system to monitor their emails.

But a party may learn of and have access to papers that have been served even if the party never received the NEF. For example, a lawyer who did not receive a NEF (because, for example, of a changed email address that was not updated) might nonetheless learn of the document or order and access it from the docket. This would not constitute service under the subcommittee’s proposal, which focuses exclusively on the server’s knowledge of whether the party to be served received the NEF. (On this point, the phrasing of the Civil Rule, which uses “it,” might allow the serving party to argue that the party to be served had received “it.”)

The Committee concluded that if the party to be served has indeed received the document by some other means—whether by mail, email, or simply reading the docket—service should be deemed effective. A member moved to amend proposed Rule 49(a)(3)(A) to provide “service . . . is not

³ This difference was later dropped as part of the effort to eliminate all unnecessary differences between the Criminal and Civil Rules. See note 4, *infra*.

effective if the serving party learns that neither the notice of electronic filing nor the paper reached the person to be served.” The motion passed.⁴ One member noted, however, that it might be difficult to determine the effective date of service if it became effective by some means other than receipt of the NEF, such as the party to be served reviewing the docket.

Professor Beale reminded the Committee of the importance of the use of uniform language in the Civil and Criminal Rules on filing and service, and she stated that the reporters would convey the Committee’s view on this issue to the representatives of the Civil Rules Committee.

Rule 49(a)(4). Judge Feinerman noted that these provisions were drawn, verbatim, from Civil Rule 5. In general, the subcommittee recognized that it would not be helpful to tinker with the language because the Civil Rules Committee was satisfied with the language. For that reason, the subcommittee did not propose a change in the bracketed language on lines 35-36 unless the Civil Rules Committee would support a parallel amendment to Rule 5.

Rule 49(b)(1). Judge Feinerman noted that the major change from the current rule on filing was to restore the passive construction. He asked the reporters to draw the Committee’s attention to key issues. Professor Beale noted that the subcommittee considered, but did not recommend, adding the qualifier “under this rule” between “served” and “together.” She noted there are other rules that provide for service by specific means, such as the Committee’s pending amendment to Rule 4 governing service on foreign corporations. The Subcommittee concluded that the phrase “under this rule” was not necessary. Where other rules identify specific means of service for certain documents or orders, it seems clear that the more general provisions of Rule 49 are not intended to override them. Moreover, adding the phrase “under this Rule” could engender confusion. The phrase is not included in the current rule, and its addition might suggest, misleadingly, that Rule 49 does not apply to a variety of items that other rules require to be served. Professor King noted that the rules specifying particular forms of service were Rule 4 (summons on corporations), Rule 41 (warrants), Rule 46 (sureties), and Rule 58 (appearances). Professor Beale explained that these rules will continue to coexist with Rule 49, which under (a)(1) governs service and filing of “any written motion . . . , written notice, designation of the record on appeal, or similar paper.”

One other point that the subcommittee considered was whether to delete the requirement

⁴ After the meeting, the reporters and chair consulted with representatives of the other committees working on parallel drafts concerning electronic filing and service. There was a consensus that time did not permit consideration of this proposal by other committees before submission to the Standing Committee. In light of the importance of consistency in the rules of electronic filing and service, the representatives of the Criminal Rules Committee agreed to delete the new language from the draft of Rule 49 submitted to the Standing Committee. As the representatives of the other committees noted, the proposal would be a change in current law. Before such a change is recommended, the committees should have an opportunity to consider the policy implications, and whether this approach, if adopted, should be applied to other forms of service. The committees can, however, take the proposal up again at a later date. As part of the later effort to reconcile differences between the various sets of rules, Judges Molloy and Feinerman and the Reporters also reviewed and approved a modification to Rule 49 to retain the language of the Civil Rule, that is, stating that service is ineffective if the serving party learns that “it” was not received.

that filing of any paper required to be served must occur “within a reasonable time after service.” The subcommittee considered deleting this restriction. Members were not aware of any problem with untimely filing in criminal cases, but decided to retain this provision to parallel Civil Rule 5.

One question that had been left open, reflected in brackets on line 40, was whether the rule should refer at this point to “any person” or “any party.” Professor King noted that the Civil Rules Committee had now approved a draft amendment using “any person,” which would be adopted as well in the Criminal amendment.

Rule 49(b)(2). Judge Feinerman noted that here, as in (a), the subcommittee proposed places electronic filing first in (b) for the same reasons it placed electronic service first in Rule 49(a). Also, the Subcommittee reasoned, the subsection including the definition what it means to “file electronically” should precede the use of that term. (In contrast, the civil proposal retains the current order of Rule 5’s subdivisions, which places nonelectronic filing first.) Professor King stated that there was still a minor styling issue to be resolved (“by using” or some alternative such as “by use of”), which would be resolved in favor of uniformity after consultation with the style consultants and the other reporters and chairs. Professor Beale noted that the Civil Rules Committee just completed its meeting three days earlier. She reminded the Committee that because of the emphasis on uniform language among the parallel proposed amendments, it would be essential for Judges Molloy and Feinerman (with the reporters) to have leeway to agree to necessary stylistic changes as the proposals advance to the Standing Committee. Judge Feinerman agreed, though he observed that if he and Judge Molloy were asked to make significant changes in the proposal approved by the Committee, they would consider seeking approval from the Committee.

Professor Beale also drew attention to the proposed provision regarding a filer’s user name and password serving as an attorney’s signature, which was closely related to the signature provision in (b)(4). In September, the Committee did not approve provisions on a signature block, which were phrased differently than the current proposal. The new proposal imports the language of Civil Rule 11(a). The subcommittee found it unnecessary to determine whether Civil Rule 11’s signature provisions are presently included in Rule 49(d)’s directive to file “in a manner provided for in a civil action.” If this requirement is not currently imported by Rule 49(d), the subcommittee thought it would be a desirable requirement as a matter of policy. Accordingly, the subcommittee decided to adopt the language of Rule 11 verbatim. A lawyer member questioned whether it was appropriate to incorporate the language of Civil Rule 11, which requires the attorney’s signature in order to impose restrictions on counsel to certify the accuracy of the pleadings. He stressed that the role of defense counsel in civil and criminal cases is quite different: in criminal cases, the defense does not make representations but rather puts the government to its proof. He expressed concern that the signature requirement signaled an unfortunate drift towards the civil understanding of the lawyer’s role. Professor King responded that the portions of Rule 11 that are relevant to this member’s concern about good faith representations to the court are in Rule 11(b). The subcommittee’s proposal, however, imports only the language of Rule 11(a). By importing only this language, the proposal does not bring in any requirements concerning counsel’s representations.

Judge Feinerman also drew attention to one other aspect of proposed subdivision (b)(2)(A): the phrase “written or in writing.” This language is now in Rule 49(e). The subcommittee favored retaining this language, rather than paring it down, because it captures the variety of phrases now used in the Rules of Criminal Procedure.

Rule 49(b)(3)(A) and (B). Noting that this provision creates a presumption that represented parties must file electronically, but that non represented parties must file by non-electronic means, Judge Feinerman invited the reporters to comment. Professor King reminded the Committee that the new presumption for electronic filing by represented parties was a central goal of the amendment process. It was the proper presumption for unrepresented parties that had originally divided the Civil and Criminal Rules Committees. This Committee took a strong stance that unrepresented parties in criminal cases should not file electronically unless specifically allowed by local rule or court order. The subcommittee’s proposal implements that policy choice.

But even with a stand-alone amendment to Rule 49, the Civil Rules are still of concern to the Criminal Rule Committee because of their effect in habeas cases. Professor King noted that Rule 12 of the 2254 Rules, which govern state habeas cases, incorporates the Federal Rules of Civil Procedure unless they are inconsistent with the habeas rules. And the Rules Governing 2254 and 2255 actions are the responsibility of the Criminal Rules Committee.

The proposal just adopted by the Civil Rules Committee provides that unrepresented parties in civil cases may be permitted or required to file electronically by local rules or orders which permit reasonable exceptions. The Civil Rules Committee wanted to provide explicit authorization for existing programs in some districts that now require inmates to file 2254 pleadings electronically. The clerk of court liaison to the Civil Rules Committee is from a district that now has such a local rule, which was designed in cooperation with officials at a local prison. In that institution, prisoners are required to take their 2254 pleadings to the prison library, where the staff members PDF them and then email them to the court. The same system operates in a neighboring district. Officials in these courts and participating prisons are very pleased with the program. The proposed Civil amendment would allow the continuation of such programs. Although the Criminal Rules Committee has no formal role in the approval of the changes to Rule 5, the reporters requested discussion of the Civil Rule so that they could share the Committee’s views with their Civil counterparts.

Professor Beale noted that the policy implications of the current Civil proposal are somewhat different from the issues previously discussed by the Committee. At its prior meetings, the Committee took a strong stand against a national rule that would override the current local rules in many districts that do not permit electronic filing by unrepresented criminal defendants. But the current proposal does not override any local rules. Instead, it permits districts to adopt local rules that require—with reasonable exceptions—that unrepresented inmates file electronically. She noted that some districts have large caseloads of inmate filings, and the Civil Rules Committee wants to allow them the option of requiring unrepresented inmates to file electronically.

The proposed Civil Rule states that a local rule requiring unrepresented civil parties to file

electronically must allow reasonable exceptions. This provision requiring reasonable exceptions was added at the subcommittee's request, and it provides some protection against a local rule or order that would otherwise impose an unreasonable burden on state habeas filers.

Mr. Hatten put the proposed Civil Rule into its historical context. The current CM/ECF system began as a program in a single district with a heavy caseload of asbestos cases. It was implemented nationally in waves, allowing changes to be made based on experience. The system was designed solely for courts and attorney filers, not for lay filers. The current resources are designed for those filers, and the clerks do not screen filings. From the clerk's perspective (staffing, resources, and work measurement), he said, lay filers present very different issues. He expressed concern that the proposed Civil Rule seemed poised to expand lay filing nationwide without any redesign of the system or sufficient testing in individual courts.

Professor Beale responded that the Civil Rules proposal allowing local rules requiring unrepresented parties to file could be seen as the kind of step-by-step process that had worked well for electronic filing by attorneys and the courts. At present, these are programs developed by individual districts in conjunction with local correctional officials. They seem to be working well. On the other hand, the reporters are not sure how these local rules mesh with the current Rules Governing 2254 and 2255 Proceedings, which refer to internal prison filing systems for legal mail and inmates depositing papers to be filed showing prepaid postage.

Professor King drew attention to several aspects of the current local rules regarding electronic filing by inmates that were of special concern to the Civil Rules Committee. The inmates do not receive individual access to the CM/ECF system. Rather, officials in the prison library receive the inmates' papers, convert them to PDFs, and then submit them to the court electronically. This has many advantages: it is cheaper and faster than using the mail, and it produces a record of when the paper was sent and received. We do not know exactly how other aspects of these programs work. For example, do inmates in these programs receive NEFs?

There was general agreement that these programs would not work everywhere, and electronic filing by inmates would not be possible in many districts. Justice Gilbertson stated that in South Dakota no state prisoners have access to electronic filing, and most prisoner filings are hand written. Requiring inmates to file electronically in his state would shut down inmate filing. At Judge Molloy's request, Justice Gilbertson agreed to make enquiries about other states through the National Center for State Courts.

A member asked who determines whether a local rule permits "reasonable exceptions," or what constitutes such a "reasonable exception." The reporters stated they had not researched this question, but they pointed out that this phrase is present in current Rule 49(e), as well as its Civil counterpart, Rule 5(d)(3). No one had noted any special problems in connection with the phrase. It seems likely that the proposed Civil rule would be given the same interpretation as the current rules.

Concluding the discussion, Judge Feinerman reiterated the importance of the Civil Rules Committee's inclusion of the requirement that any local rule requiring unrepresented parties to file

electronically must provide for reasonable exceptions. He expressed the hope that this language would accommodate due process concerns and prevent the imposition of unreasonable burdens on inmate filers. He also observed that courts are unlikely to adopt local rules requiring electronic filing by unrepresented inmates without first consulting with prison authorities to determine what is feasible.

Rule 49(b)(4). Judge Feinerman then turned to one feature of subsection (b)(4) that had not previously been discussed: the provision stating that verification of pleadings is not required unless a statute or rule specifically states otherwise. This provision was drawn from the Civil Rules. Judge Feinerman noted it might provide a useful reminder for 2255 filers, because the Rules Governing 2255 actions require verification. Professor Beale agreed that it might provide a useful clarification for filers in 2255 cases. Additionally, because this language is included in the Civil Rules, its exclusion from Rule 49 might lead to a negative implication. Since the language might have some value and could do no harm, she concluded that it seemed best to parallel the Civil Rules.

Rule 49(c). Judge Feinerman explained that this provision makes explicit that nonparties may file and serve in criminal cases. Unlike the other provisions already discussed, he pointed out, (c) does not distinguish between represented and unrepresented nonparties. All nonparties are presumptively required to file by nonelectronic means. He identified several reasons for requiring nonparties to file outside the CM/ECF system. First, the architecture of the CM/ECF system is designed to permit only the government or a defendant to file electronically. Even a registered attorney user cannot file in a criminal case unless the attorney indicates that he represents either the government or a defendant. Second, members had informed the Subcommittee that many nonparty filers prefer not to use the CM/ECF system. Finally, victims may file material that should not go into the system and be available to all parties. The rule does allow the court to permit a particular nonparty to file electronically (with the assistance of the clerk), and it gives districts the option of adopting local court rules that allow nonparties to file electronically.

Judge Feinerman noted that the proposed rule does not refer to filings by probation or pretrial services, which are neither parties nor nonparties (“neither fish nor fowl”). Because probation and pretrial services do file their reports electronically in some districts, he raised the question whether the committee note should be amended to make it clear they were not covered by Rule 49. Although there has been no question of the applicability of the current rule to probation and pretrial services, the addition of (c) now makes the application of the rule to nonparties clear. Members discussed the practice in their own districts. In some, probation and pretrial services did not use the CM/ECF system, but in others all of their reports were filed using CM/ECF (though presentence reports and some other documents were sealed). Professor Beale observed that everyone agreed that when the court issues an opinion, it is not governed by Rule 49. Since pretrial services and probation are arms of the court, the Subcommittee thought they were distinguishable from the parties and nonparties governed by the rule.

A motion was made to add language to the note stating that the rule was not applicable to the court or its probation and pretrial services divisions, but it was withdrawn after discussion. Professor

Coquillette reminded the Committee of the limited function of committee notes. A member noted that the Federal Defenders are also, as a matter of organization, a part of the court, but they are of course subject to Rule 49. Another member stated that he did not see a problem that required any change. Everyone understands that probation and pretrial services are part of the court and not covered by the Rule. The member who had made the motion withdrew it.

Rule 49(d). Judge Feinerman then turned to the last subsection of the proposed rule, which requires the clerk to serve notice of the entry of the court's order, and allows a party to serve the notice. He stated that the language in the Subcommittee draft was drawn from Civil Rule 77(d)(1), and its inclusion was consistent with the general presumption in favor of incorporating the relevant provisions of the Civil Rules. Professor Beale noted the interaction between the notice provisions and FRAP 4. FRAP 4(a) governs civil appeals, and 4(b) governs criminal appeals. Although the impact of the provision allowing a party to give notice would be somewhat different in civil and criminal cases, she observed that it seemed to have sufficient utility in criminal cases to justify its inclusion. Under FRAP 4(b), the notice given by a party might be relevant to a defendant's efforts to establish excusable neglect or good cause for a late filing. The Subcommittee had no strong feelings about this provision. Beale stated that in her view, since this provision was in the Civil Rule, might have some benefit in criminal cases, and would do no harm, it was appropriate to include it.

There was a motion to approve the Subcommittee draft, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment, with the provision that Judge Molloy, Judge Feinerman, and the reporters would need to work with the other committees, and it might be necessary to make minor changes for consistency with the other proposed amendments.

The Committee voted unanimously to approve the proposed amendments to Rule 49, as amended, to transmit them to the Standing Committee, and to recognize the authority of the Committee chair, Subcommittee chair, and reporters to make minor changes to conform to the language of parallel proposals from other committees.

Discussion of the committee note was deferred until after the lunch break, to allow the reporters to determine what revisions would be required in light of the amendment to proposed Rule 49(a)(3)(A).

Judge Feinerman turned next to the Subcommittee's proposal to amend Rule 45. He explained that Rule 45(c) currently refers to several subsections of Civil Rule 5 describing different means of filing. As part of creating a stand-alone rule on filing and service, the Subcommittee's proposal incorporated these forms of service into Rule 49. Accordingly, the Subcommittee proposed an amendment replacing the cross references to Rule 5 with the appropriate cross references in Rule 49. Ms. Womeldorf and Professor Coquillette confirmed that because this would be a technical and conforming amendment, it was not necessary to publish it for public comment. On the other hand, failure to publish now with the Rule 49 proposal might lead to some confusion and produce comments suggesting the need for such an amendment. Publication would make it clear that the

Committee was aware that its proposed amendment to Rule 49 would require this technical and conforming amendment. Under these circumstances, the reporters recommended publication.

The Committee voted unanimously to approve and transmit the proposed amendment to Rule 45(c) to the Standing Committee with the recommendation that it be published for public comment.

Judge Kethledge presented the report of the Rule 12.4 Subcommittee. The current rule, he explained, provides that if an organization is a victim, the government must file a statement identifying the victim; if the organizational victim is a corporation, the government must file a statement identifying any parent corporation and any publicly held corporation that owns more than 10% of the victim corporation's stock, or stating that there is no such corporation. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 is to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

In light of the amendment to the Code of Judicial Conduct, the Department of Justice asked the Committee to consider amending Rule 12.4 to restrict the scope of the government's required disclosures. It emphasized the difficulty of complying with the rule in cases with large numbers of organizational victims each of whom has sustained only a de minimus injury. The archetype, he said, was an antitrust prosecution where many victim corporations have paid a few cents more for a common product, such as a software program.

The Subcommittee agreed that the government had presented a persuasive case for bringing the rule in line with the change in the Code of Judicial Conduct in order to relieve the government of the burden of disclosure in such de minimus cases.

In drafting the language of its proposed amendment, the Subcommittee responded to feedback Judge Molloy had received from the Standing Committee. Standing Committee members stressed the importance of retaining judicial control. If the rule is to be revised, the court, not the government, should decide whether disclosure was needed in individual cases.

The Subcommittee recommended an amendment relieving the government of the burden of making the disclosures when it can show "good cause" for that relief. This standard, Judge Kethledge explained, retains judicial control and allows the court to balance the burden of disclosure against the risks of non-disclosure. Under a good cause standard, the court makes a holistic determination, rather than looking solely at the harm to the corporate victim.

The style consultants objected that "good cause" was a vague standard, but Judge Kethledge stated the Subcommittee strongly disagreed and viewed the matter as one of substance rather than mere style. Courts have a great deal of experience with the good cause standard,

which is used in many other Federal Rules of Criminal Procedure. In contrast, the standard suggested by the style consultants—“minor harm”—is not used in any other Federal Rule of Criminal Procedure, it is not used in the Code of Judicial Conduct, and it would not allow the court to look at the overall balance of the burden of disclosure against the risks of non-disclosure.

Professor Beale stated that similar language was under consideration by the Appellate Rules Committee; the reporter for that committee had consulted with the Criminal Rules reporters and participated in the Subcommittee’s telephone conferences. However, the Appellate Rules provision concerning disclosures regarding corporate victims was a small part of a larger project which was not yet ready for presentation to the Standing Committee. She noted that the current draft under consideration by the Appellate Rules Committee included not only corporations, but also other “publicly held entities.” Noting that the reporters were not sure precisely what that phrase would include, she asked if Judge Kethledge or others had a view on whether similar language should be added to Rule 12.4. Judge Kethledge stated that he had no strong view. Speaking for the Department of Justice, Ms. Morales stated that the Department was satisfied with the proposal as it stood, without that phrase.

Judge Kethledge then turned to the proposed amendment to Rule 12.4(b), explaining that it was a modest proposal that had merit but likely would not have advanced on its own. But if we do amend Rule 12.4, it would be useful to set a fixed time for the disclosures, and to make it clear that not only changed, but also new information should be disclosed. In response to a member’s comment that the rules now generally state time in multiples of seven, Judge Kethledge and the reporters took this as a friendly amendment. Although 30 days falls just over the line into the longer time periods that do not have to be divisible by seven, it seemed desirable to revise the time period here to 28 days.

A member also expressed concern with the wording of the Subcommittee’s proposed amendment to Rule 12.4, because it did not explicitly state that new information must be disclosed only if it falls within the scope of the disclosures required by the rule. Although that is implied, lawyers might argue for a broader interpretation. Members suggested various formulations, and a motion was made to revise (b) to require the government to provide a supplemental statement “if the party learns of *any* additional *required* information or any required information changes.” The motion also contained the friendly amendment making the time for filing 28 days after the defendant’s initial appearance. The motion passed unanimously. Professor Beale reminded the Committee that this language was subject to revision by the style consultants.

The Committee then unanimously approved the proposed amendment to Rule 12.4, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment.

Discussion then turned to the proposed committee note. Members suggested deleting two phrases—“in relevant cases” and “the government alleges.” Judge Kethledge agreed that they

were not necessary, and accepted those suggestions on behalf of the Subcommittee. The proposed committee note was also revised to refer to 28, rather than 30, days.

The Committee voted unanimously to approve the committee note to Rule 12.4, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Following the lunch break, the reporters presented language amending the committee note to take account of the change in subsection (a)(3)(B) of the amendment to Rule 49. The proposed language stated that “(A) provides that electronic service is not effective if the serving party learns that neither “the notice of electronic filing” nor the paper to be served reached the person to be served.”⁵

The Committee voted unanimously to approve the committee note to Rule 49, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Judge Dever, chair of the Rule 15 Subcommittee, informed the Committee that the Department of Justice had withdrawn its request for consideration of an amendment to address the inconsistency between the text of the rule and the committee note regarding the expenses of certain depositions requested by the defense. Ms. Morales explained that the Department was withdrawing its proposal because there had been so few instances in which the rule might create a problem that it did not seem possible to show a need for a rules change at this time. However, the Department intended to return to the Committee if it confronted a problem in a significant number of cases.

Introducing the next item on the agenda, Judge Molloy explained that, with the aid of a study prepared by the Federal Judicial Center (FJC), the Committee on Court Administration and Management (CACM) had studied the problem of threats and harm to cooperating defendants, and had endorsed recommendations that would necessitate changes in the Federal Rules of Criminal Procedure. After discussion at the January 2016 meeting of the Standing Committee, the matter was referred to the Criminal Rules Committee. Judge Molloy then appointed a subcommittee, chaired by Judge Lewis Kaplan, to consider the FJC study and CACM’s recommendations.

Judge Kaplan reported on the Subcommittee’s actions and sought input from members who are not on the Subcommittee. The starting point for the Subcommittee is that CACM concluded, based on the FJC study, that there is a national problem with cooperators being identified and then either the cooperator being threatened or harmed, or the cooperator’s family being threatened or harmed, or others being deterred from cooperating. The FJC determined that to some degree the information used to identify these cooperators comes from court documents.

⁵ Because the change to the proposed text of the rule that prompted this amendment to the note was later deleted, this change to the proposed Committee Note was deleted as well. See note 4, supra.

Accordingly, CACM concluded that a uniform national measure, including changes to the rules and a great deal of sealing, was required. CACM felt sufficiently strongly that it recommended these procedures be adopted as an interim measure by local district rules. The recommendations seek to prevent the identification of cooperators by making all plea agreements look identical, requiring every agreement to include an unsealed portion and a sealed portion that contains either the cooperation agreement or a statement that there is no cooperation agreement. Similarly, the minutes of all plea proceedings would also contain a sealed portion for any discussion of cooperation. Thus if someone examines the court records, there is no indication which cases involved cooperation.

After receiving CACM's recommendations, the FJC study, and a background memorandum from the reporters, the Subcommittee held a lengthy and productive telephone conference to get the initial reaction of members. Judge Kaplan summarized the Subcommittee discussion. First, there was agreement that any retaliation against cooperators is very serious, and the Committee should think very hard about any measures that would address it. However, other institutions, especially the Department of Justice and Bureau of Prisons, also have a role to play. Subcommittee members also voiced a variety of concerns and raised many questions:

- How widespread is the problem? The FJC study provided anecdotal evidence concerning 400-600 instances of harm or threats, but approximately 10,000 defendants receive credit for cooperation each year.
- To what extent would the cooperators be identified even if the sealing recommendations were followed? In other words, would the recommendation solve the problem?
- What impact would the CACM recommendations have on the defense function? The defense relies on research regarding cooperation to impeach and to argue for proportional sentencing.

The Subcommittee concluded by asking the reporters to gather additional information on the following questions:

- How big is the problem compared to the universe of cooperators?
- Do identifiable classes of cases account for most of the incidents?
- Are there important geographic variations?
- How does the incidence of problems compare with the widely varied approaches taken in different districts?

The reporters were also asked to prepare a memorandum on the First Amendment issues raised by CACM's recommendations. Judge Kaplan noted that in his circuit the court of appeals has severely restricted sealing practices.

Before the Subcommittee's next telephone conference in July, further information will be gathered from the FJC and the Department of Justice. The Subcommittee asked the Department

of Justice for its position regarding CACM's interim and long term proposals and requested additional information about the Department's practices.

Judge Kaplan then asked Committee members for their initial thoughts about the problem and CACM's recommendations.

Many members agreed that retaliation against cooperators is a serious problem, and that the Committee had a responsibility to consider potential solutions. One member described it as a moral obligation to do whatever we can to protect cooperators and not to implement or maintain procedures that could discourage cooperators. Another member noted that although he was not generally in favor of sealing, courts now seal for reasons such as the protection of trade secrets. Preventing harm to cooperators is certainly at least as pressing a reason for sealing. If our records are being used, we have to figure out what we can do to be part of the solution.

But members also raised a variety of concerns and questions about CACM's proposals.

Several members spoke of the need for more information about the scope of the problem and the degree to which it arises from court records. Several members noted that violent threats to cooperators were much more likely in certain kinds of cases (such as cases involving gangs, drugs, terrorism, and organized crime) than in white collar prosecutions. There may also be differences among districts. A member noted that in sparsely settled areas everyone knows who is cooperating, and sealing would have no effect. Members also expressed the need for more information about the connection between the records that could be sealed and the potential for threats and harm. One member stated that criminal defendants and inmates are resourceful, and they have many different ways to identify cooperating defendants without court records, including continuances, absences at status hearings, and Rule 35 motions. Other members agreed that it would be important to determine whether the recommended procedures would make a big difference in reducing threats and harm to cooperators. Members noted, however, that this will be difficult to determine for many reasons. Although we can identify cooperators who have been threatened or harmed, the threat or harm may have been the result of some interaction in the prison, not the cooperation. Similarly, family members may not know the reason for a threat or assault. It will be difficult to be certain how helpful a rule change would be.

A member noted that the experience in that member's district raised questions about the causal connection between sealing and threats/harm: that member's circuit was among those that most severely restricted sealing, but the member's district also had one of the lowest rates of threats/harm to cooperators.

Lawyer members expressed concern about the effect of CACM's proposal on their ability to represent their clients effectively. A member who represents both cooperating and non-cooperating defendants described various ways sealing would hamper the defense.

- Sealing would make it impossible to research disparity in sentencing. In the member's district, failure to conduct that research constitutes ineffective assistance of counsel.

- Sealing would make counseling clients much more difficult.
- Sealing would hamper the ability to challenge racial disparities.
- Sealing would limit access to exculpatory material, even when prosecutors try in good faith to comply with *Brady*.

Another lawyer member noted that there may be a serious problem of retaliatory threats/harm in certain kinds of cases, such as terrorism or gang cases, but a national rule requiring sealing in all cases would also make it more difficult to effectively represent defendants in white collar cases, which present no threat of violent retaliation.

A member agreed that the Committee would need to determine how much the current rules are contributing to the problem of threats/harm; consider whether a rules change could solve the problem; and address objections including ineffective assistance of counsel, *Brady*, and the First Amendment.

Another member added other issues that should be explored. The first is a comparing the effectiveness of sealing to other alternatives that might address the problem. It would be important to know if sealing would make a significant difference. Second, it would be helpful to understand exactly what the FJC counted as physical harm in order to gauge the seriousness of the problem.

A member who had participated in CACM's deliberations stated that the FCJ study and the findings made by Judge Clark after an evidentiary hearing demonstrated the existence of a problem. The member noted that CACM had raised many of the same questions now being asked by the Committee. It is important to determine the prevalence of the problem of threats/harm to cooperators and whether it is limited to certain kinds of cases or geographic areas. It would also be very helpful to have information about the experience of cooperating defendants from the District of Maryland, which already follows the procedures CACM is recommending. Has it solved the problem?

The Department of Justice representatives, Ms. Shapiro and Ms. Morales, stated that the Department has not determined its position on the CACM proposals for interim rules in the district courts and changes in the Rules of Criminal Procedure. Ms. Shapiro was a member of the privacy subcommittee of the Standing Committee, which held the Fordham conference in 2010. At that time the Department was unable to reach an internal consensus on the best approach. It surveyed the districts at that time and is updating that survey now. In 2010, practices in the districts varied, and judges in each district were committed to their own practices and thought them most effective.

Ms. Morales expressed the view that it would be very difficult to trace particular harms/threats to rules that could be amended. Even if we can identify cooperators who have been harmed, we won't know why they were injured. It could have been because of a dispute in the prison. We can identify the individuals who get Rule 35 or 5K sentencing reductions for cooperation, but they are only a subset of the cooperators. Many other individuals may have

cooperated at some point, but not to the degree necessary to get a Rule 35 or 5K reduction. So it will be hard to get enough information to feel comfortable that we can assess the impact of the current rules or of changes in the rules.

Professor Coquillette emphasized Judge Sutton's hope that the Subcommittee and the full Committee will take a broad view of the issue. If the Committee determines that it is not a problem that can be solved by amending the rules, it would be beneficial for it to remain engaged, be aware of what is being studied and considered by other constituencies, and be as helpful as possible.

Margaret Williams, who was one of the authors of the FJC report prepared for CACM, was present at the meeting and was asked to comment. She stated that the FJC data would permit an analysis of whether the frequency of threats/harms varies from district to district. But the FJC's data will not answer other issues that have been raised. The survey did not ask about the types of cases in which there had been threats/harm (though some respondents volunteered that information). As noted by a member, Maryland has sealing procedures like those recommended by CACM, but those procedures were already in place at the time of the FJC's study. So the FJC its data would not permit a "before and after" analysis of the effect of sealing.

Judge Kaplan thanked the members for their responses, and commented that it was likely there would be a lot of unknowns at the end of the Subcommittee's work.

The Committee turned next to new suggested amendments.

Professor Beale briefly described 15-CR-D, from Sai, which proposed multiple changes: (1) redaction of the last four digits of social security numbers in pleadings; (2) sealing of affidavits in support of applications for appointed counsel; (3) providing unpublished materials cited in pleadings to pro se litigants; and (4) electronic filing for pro se litigants. The suggestion had been addressed to all of the rules committees. The other committees had already held their spring meetings, and Professor Beale explained the actions they had taken.

Regarding the proposal to redact the last four digits of individual social security numbers, Professor Beale reported that the other committees had all agreed that the Rules Committees should not take this issue up. Rather, it should be referred to the Committee for Court Administration and Management, which made the policy decision reflected in the current rules, and is in the best position to do research and consider tradeoffs. Professor Beale noted that she and Professor King recommended that the Committee take the same approach.

With regard to the sealing of affidavits, Professor Beale noted that the Civil Rules Committee was not, at this time, moving forward with this suggestion. A member noted, however, that applications for appointments under the Criminal Justice Act are already filed ex parte under seal. So on the criminal side, no further action is needed.

With regard to requiring litigants to provide copies of unpublished opinions to pro se

litigants, the Civil Rules Committee had decided not to move forward at this time. This may be a good practice, but is not necessarily something that should be mandated in a national rule.

Finally, with regard to the question whether pro se litigants should be permitted to file electronically using the CM/ECF system, that proposal was at odds with the Committee's decision to preclude such filing in the proposed amendment to Rule 49 absent a court order or local rule.

After a brief discussion, the Committee concurred in the decision to refer the question of the last four digits of Social Security numbers to CAMC, and it decided to take no further action on the other proposals.

The next suggestion, 15-CR-E, from Robert Miller, also proposed that indigent parties be allowed to file in the CM/ECF system. Judge Molloy and Professor Beale agreed that like 15-CR-D, this proposal had been considered and rejected by the Committee's action in approving the current proposal to amend Rule 49.

The next suggestion, 15-CR-F, came from Judge Richard Wesley, who drew a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings to the Committee's attention. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Some courts have held that the inmate who brings the 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts (and the committee note) treat this as a right.

Professor Beale solicited the advice of the style consultants on language that might respond to this split and clarify that the rule was intended to create a right to file. She noted that the consultants thought the rule's current language clearly creates a right, and there should be no need to clarify the language. But confronted by the split in the lower courts, they did suggest some language that might be employed to make this clearer.

Professor King noted the 2255 caseload is very heavy in some districts and courts must process these cases quickly. She surmised that the courts that ruled an inmate has no right to file may have been looking at pre-2004 precedents without realizing that the rule was modified in 2004 to provide for a right to reply. She summed up the reasons in favor of putting this proposal on the Committee's agenda for further study:

- A rule is causing a problem. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision.
- Although the style consultants believe the text is clear now, the split in the lower courts demonstrates that courts are not finding it to be clear.
- The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

Professor King acknowledged that we do not know precisely how many cases would be affected

by a clarification of the rule. However, the suggestion did come to the Committee from a member of the Standing Committee, which indicated that the Standing Committee might be receptive if the Criminal Rules Committee considered an amendment.

Judge Molloy informed the Committee of his intention to form a subcommittee to address Rule 5(d), and members were invited to make comments that might be helpful to it. Professor King noted that one issue for the subcommittee would be whether there was also a need to clarify the 2254 Rules. Another issue was whether the rule should specify a presumptive time for the filing of a reply. In 2004, the Committee felt there was no reason not to permit an inmate to file a reply to the government's response. But the Committee chose not to set a presumptive time for filing. The style consultants questioned this omission, noting that other rules specify time limits for filing.

Members discussed their practices concerning the time for filing a reply in 2255 cases. Several members set a briefing schedule giving the government 28 days to respond to the petition, and the inmate 21 or 28 days to respond. One judge who set such a schedule noted that he had never turned down a request for an extension of time. Several other members noted they typically set similar schedules: 28 days for the government and 28 for the respondent.

Later in the meeting, Judge Molloy announced that he was appointing the following to serve on the Rule 5 Subcommittee:

Judge Kemp, chair
Ms. Brook
Judge Dever
Justice Gilbertson
Mr. Hatten
Judge Hood
Ms. Morales (Department of Justice)

The next suggestion, 16-CR-A, came from James Burnham, who proposed that Rule 12(b)(3)(B)(v) be amended to make it clear that the standard for the dismissal of a criminal indictment is the same as the standard for the dismissal of a civil complaint under Civil Rule 12(b)(6). Professor Beale commented that the proposal presents the policy question whether criminal practice should be brought closer to the civil model.

A member who said he was "intrigued" by the proposal presented a recent example. Several elderly men had cut through several levels of security fences to gain entry to a nuclear facility, where they prayed. They did no other harm to the facility. After they refused to plead to a more minor offense, the government added a more serious charge that required an intent to harm the national defense. The defendant's conviction was reversed on appeal. The appellate court held that as a matter of law the facts established by the prosecution could not prove the necessary intent, and thus did not constitute sabotage. Although the appellate court concluded that the conduct in question did not, as a matter of law, constitute the offense charged, at the trial

court level there had been a jury trial and a lengthy sentencing hearing. The member, who noted that there is a slight difference in the language of the civil and criminal rules, acknowledged that he did not know whether there are also significant differences in the pleading rules in criminal and civil cases.

Judge Molloy observed that the pleading practices are set by the appellate rulings holding that an indictment is sufficient if it states the date and parallels the language of the offense that has been charged.

Another member expressed interest in the proposal but thought it was unlikely to be adopted. He noted that a mechanism to raise claims already exists. As amended in 2014, Rule 12 of the Rules of Criminal Procedure provides for a pretrial motion to challenge “a defect in the indictment or information, including . . . failure to state an offense.” But circuit law determines what constitutes failure to state an offense. The Second Circuit will uphold a conviction if the proof is sufficient and not inconsistent with the indictment, which may be bare bones.

A member responded that minimal pleading in criminal cases is hundreds of years old, not something new. This looks like a proposal to return to the old common law pleading rules. He is sympathetic to the problem this poses for defendants, but it’s a problem about the pleading standards.

A judge member stated that with indictments stated in broad general terms and very limited pretrial discovery he does have occasional cases in which defense counsel at the pretrial conference says that he or she still does not know what the defendant is being accused of. The issue is closely connected to discovery. The member expressed interest in exploring the question whether the government could be required to be more specific at some point: if not at the outset, then at some point before trial.

Speaking for the Department of Justice, Ms. Morales said that the Supreme Court has ruled that the pretrial notice requirements are met by an indictment issued by a grand jury. This proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.

Judge Molloy asked whether Mr. Burnham’s objections could be met by a rules change, or were really objections to how the courts have interpreted the rule. Two members responded. One noted that Burnham had proposed specific language to amend Rule 12. Another said this was not really a proposal about changing the language of Rule 12, and that it sought a substantive change that would raise issues under the Rules Enabling Act.

A member described how the rule works in cases brought under RICO, where the government is alleging a pattern of racketeering activity that may extend over a decade or more. According to the precedents, the government can meet the pleading requirements and avoid pretrial dismissal of the indictment with language paralleling the statute defining the offense and the dates involved. Prosecutors have an incentive to do that in order to avoid post trial claims of

some variance between the allegations in the indictment and the proof.

Some members returned to the idea that this is a sufficiency of the pleading issue. One stated that although Rule 7(c) requires a “plain, concise, and definite statement of the offense charged,” the level of detail that courts accept in criminal cases is less than that required in civil cases. Another member stated that it appears more conclusory language is allowed in criminal than in civil cases.

A member stated that he was not in favor of moving forward with the proposal. He stated it would have significant implications of requiring more specificity for terrorism cases. The Department of Justice is reluctant to provide a high level of specificity in the charging documents that might reveal intelligence means and methods. During the pretrial period, under the Classified Information Procedure Act (CIPA), more specifics are provided in a manner that protects national security. Moreover, the proposal would invite in criminal cases the kind of costly, repetitive, and lengthy pretrial motions practice that now occurs in some kinds of civil cases, including big financial cases, antitrust cases, and securities class actions. If a judge needs to take control of a case to get to the core, the judge has ample tools to do so now.

Judge Molloy announced that he did not intend to set up a Subcommittee to pursue the proposed amendment to Rule 12.

Professor Beale presented 16-CR-B, from the National Association of Defense Lawyers (NACLD) and the New York Council of Defense Lawyers (NYCDL), which proposes that Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. NACDL and NYCDL assert that prosecutorial discovery is a problem in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “more gigabytes of information.” They based their proposal on orders frequently issued by courts in the Southern and Eastern Districts of New York. It provides a standard for defining a “complex case” and steps to create reciprocal discovery.

At Judge Molloy’s request, the reporters briefly described the history of other attempts to amend Rule 16 to require the government to provide additional pretrial discovery. Professor Beale noted that proposals to amend Rule 16 have been defeated in the Criminal Rules Committee, in the Standing Committee, at the Judicial Conference, and in Congress. She reminded the Committee that the Rules Enabling Act process is, by design, conservative: it sets up multiple points at which a controversial proposal may be stopped. She also noted that the Department of Justice had strongly opposed amendments to Rule 16, but had itself implemented many non-rule solutions, including amendments to the U.S. Attorneys’ Manual. She reminded the Committee that 18 U.S.C. § 3500 imposes serious limits on certain forms of pretrial disclosure and reflects many of the interests the Department was seeking to protect in its advocacy in the rules process. She briefly described two attempts to amend the rule during her time as reporter. The first time, after the Department took the unusual step of inviting Committee members to participate in its efforts to revise the U.S. Attorneys’ Manual as an alternative to revising Rule 16, a sharply divided Committee approved an amendment that was

rejected by the Standing Committee. The second time, responding to a letter from Judge Sullivan after the Stevens prosecution, the Committee asked the Federal Judicial Center (FJC) to survey the views of judges, defense lawyers, and prosecutors concerning the need for an amendment. The responses from judges were sharply split, and the Committee, despite a great deal of effort, was unable to formulate a beneficial revision to Rule 16 that would not run afoul of 18 U.S.C. § 3500. Accordingly, the Committee pursued other alternatives, working with the Benchbook committee to encourage judges to supervise discovery.

Ms. Hooper, one of the FJC researchers who conducted the discovery study, stated that the survey found that district judges were evenly split on whether they perceived a problem with prosecutorial failure to disclose exculpatory evidence, 90% of defense lawyers perceived a problem, and prosecutors did not perceive a problem.

Judge Molloy asked whether the judicial members had standing orders similar to the NACDL/ NYCDL proposal. One judge member stated that although he had presided over many cases that would fall within the proposal, he did not have a standing order because every case is different. In a complex case, the trial judge has to require the government to make expedited discovery (which varies depending on the case) so that the defense has adequate time to absorb. Also, if the government has the information in a form that will facilitate the defense getting into it, it must be provided in that format, e.g., hard drives in a certain format. He has ordered CJA funds for technical people to organize the electronically stored information for the defense.

The member expressed the view that it is hard to legislate wisdom for trial judges. The trial judge must get into the case far enough to determine what's required for that case. And it's not appropriate to force a case with a huge amount of documents and witnesses to trial on the normal schedule. Experienced judges understand without being told, or given specific overbroad definitions. In some cases in which enormous quantities of information may be produced, but only a tiny fraction of that material will be relevant.

Other judicial members agreed that these issues are handled by judges on a case-by-case basis, and that it was not clear whether there was a need for rules and metrics. As the case proceeds, defendants and issues may be dropped and what could have been a complex case is no longer.

A practitioner member whose practice regularly includes complex cases responded that courts don't understand the defense perspective, and how hard it is for the defense in cases with, for example, 100,000 taped conversations, to identify specific pieces of evidence that are relevant to the government's theory and to your own case. The only way this can work is for the government to identify the data it will rely on to prove its case. He agreed, however, with the premise that no one-size-fits-all rule works for all cases. But many judges now take a one-size-fits-all approach, and that approach is simply to follow Rule 16. The Rule needs an escape clause for a small set of cases that require special treatment, not a routine application of Rule 16. Although the member did not agree with every provision in the NACDL/NYCDL proposal (which was more like a regulation than a rule), the main point is that an amendment is needed for

this subset of cases because some judges continue to apply Rule 16 in complex cases without any adjustment, which makes it impossible to mount a defense and forces defendants to plead guilty. The member reiterated that some judges do not understand what the defense must do in these cases, so they seek to move their dockets and are reluctant to impose a burden on the government.

The member advocated for something “simple” that would recognize a category of complex cases that require different treatment (e.g., requiring the government to identify its exhibits in advance) and allow the defense adequate time for preparation, but also require reciprocal defense discovery. The member was more concerned at this point about the concept of what is needed—special class of cases requiring special procedures—than the specifics.

Another member opposed moving forward with the proposal, because it was better to leave this to the discretion of judges than to try to legislate with the rules. He emphasized that the complexity of cases can vary on multiple dimensions, particularly the nature of the case and the makeup of the defense team (which could be two local lawyers or 50 lawyers in three law firms in different countries). He also predicted that the Department of Justice would strongly oppose the proposal because of the impact it could have in national security cases. He favored leaving this to judicial discretion, which is more flexible than a rule.

Another member urged consideration of the impact of complex cases on CJA lawyers, who do not have the resources of Federal Defender offices, noting that judges are not familiar with the situation CJA lawyers face in complex cases. The member strongly supported the creation of a subcommittee to try to develop an approach that would preserve judicial discretion but send a signal to judges to modify procedures in complex cases.

Speaking for the Department of Justice, Ms. Morales first stated that the Department distinguished between the current proposal and more general prior attempts to modify Rule 16. But the Department still does not think a rule is the best way to deal with these issues. The Department has worked hard with the defense bar to develop guidance for judges on electronic discovery, which led to a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules.

A member agreed this is a significant issue, and is related to the broader issue of electronic data and discovery, which is being studied by another committee. That committee has been conducting hearings, and has heard repeatedly of the problems encountered by individual CJA lawyers, who lack the knowledge and resources of the Federal Defenders. He noted, however, that it was not yet clear whether this problem is a rules problem.

Judge Molloy announced the appointment of a Rule 16 Subcommittee to study the proposal and the more general issue:

Judge Kethledge, chair

Mr. Filip
Judge Feinerman
Mr. Kerr
Ms. Morales, for the Department of Justice
Mr. Siffert

Professor Beale introduced the last agenda item. She explained that in bankruptcy cases there are routine filings of containing large amounts of personal data that should be redacted. In some cases, a failure to redact has been discovered. Although bankruptcy courts have general taken action to redact material in such cases, the Bankruptcy Committee thought it would be desirable to add a rule providing for such retroactive redaction. When the Bankruptcy Committee presented this to the Standing Committee as an information item, the Standing Committee encouraged the Civil, Criminal, and Appellate Committees to consider whether a similar rule would beneficial.

The issue was being presented at this meeting to get members' initial reactions, with the expectation that it would be on the fall agenda for a more extended discussion. Professor Beale asked for initial reactions on several questions. Had members encountered cases in which information that should have been redacted was filed in a criminal case? If so, did they think a rules change to deal with those cases would be beneficial? And if members had not encountered the problem, might it be beneficial to adopt a rules change to parallel the Bankruptcy rule? This would provide a mechanism to deal with the few cases that might arise in the future, and would avoid the negative implication that might arise from a comparison with the Bankruptcy Rule authorizing retroactive redaction.

Several members said they had encountered failure to redact material in a few cases. In each case the court or the party that failed to make the required redaction took corrective action. In some cases the clerk of court restricted access to a document while corrective action was taken. Professor Beale summed up the responses: failure to redact as required by Rule 49.1 does occur occasionally in criminal cases, and courts have been dealing with it successfully. One judge expressed an interest, if a retroactive redaction procedure is developed, to include a requirement of an explanation of the failure to make the redaction and/or to discover the failure in a timely fashion. Professor Beale stated that the reporters would collaborate with their colleagues on the other committees on these issues. They would consider the argument that a rule providing guidance would be valuable, but also the fact that the issue arises only infrequently and courts have been dealing with it successfully.

Finally, Judge Molloy noted the next meeting of the Committee will be September 19-20 in Missoula, Montana. His tentative plan is to meet in the fall of 2017 in Chicago, and perhaps in New York in the fall of 2018. The next two spring meetings be in Washington, D.C.,

The meeting was adjourned.

TAB 7

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TAB 7A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 31, 2016, in Denver, Colorado. The draft minutes of that meeting are attached.

The Committee's agenda included discussion of several suggestions that were submitted by bankruptcy judges, attorneys, and another Judicial Conference committee. The Committee continued its consideration of rule amendments that would allow a district to opt out of a mandatory national form for chapter 13 plans if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements. And the Committee took action on a number of amendments to bankruptcy rules to conform to proposed and pending changes to the civil and appellate rules. With regard to those amendments, the Committee discussed the coordination efforts among the affected advisory committees that had occurred or would be undertaken.

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

The Committee also requests the publication of several groups of proposed rule and form amendments for public comment. One group—amendments to Rule 3015 and new Rule 3015.1—would implement the local opt-out alternative for chapter 13 plan forms discussed above. Because two rounds of publication and extensive vetting have already occurred, the Committee recommends that the comment period following publication of these amendments be shortened to three months. It also recommends that publication occur in July, rather than August, in order to avoid confusion regarding the comment deadline for proposed rules and forms published on the regular schedule.

The Committee requests publication in August of one proposed new rule and proposed amendments to 10 existing rules, as well as amendments to seven official forms and a new appendix. The majority of these rule and form amendments are being proposed to conform to pending and proposed amendments to the civil and appellate rules and forms.

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

A. Items for Final Approval

(A1) Rules published for comment in August 2015—

- Rules 1001;
- Rule 1006(b); and

(A2) Technical changes previously made to Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424.

B. Items for Publication¹

(B1) For publication in July 2016—

- Rule 3015 and new Rule 3015.1; and

(B2) For publication in August 2016—

- Rule 5005(a)(2);
- Rules 8002(c), 8011(a)(2)(C), and Official Form 417A;
- Rule 8002(b);
- Rule 8013, 8015, 8016, 8022, Official Form 417C, and new Part VIII appendix;
- Rule 8017;

¹ The items recommended for publication would be added to the proposed amendments to Rule 3002.1 (Notice Related to Claims Secured by Security Interest in the Debtor's Principal Residence), which were approved for publication by the Standing Committee at its January 2016 meeting.

- Rule 8002(a);
- Rule 8006;
- New Rule 8018.1;
- Rule 8023;
- Official Form 309F; and
- Official Forms 25A, 25B, 25C, and 26 (renumbered as 425A, 425B, 425C, and 426).

Part III of this report consists of two information items regarding (i) the status of proposed amendments to Rule 9037 to address the redaction of previously filed documents, and (ii) the Committee's decision to take no action regarding the burden of proof for objections to claimed exemptions.

II. Action Items

A. Items for Final Approval

(AI) Rules published for comment in August 2015.

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2015 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

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

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

Action Item 2. Rule 1006(b) (Filing Fee). Rule 1006(b) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received and over the course of several years considered a potential amendment to the rule with respect to courts requiring a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. The

Committee requested the Federal Judicial Center (“FJC”) to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications. Although based on the FJC study and other factors, the Committee ultimately concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application, the FJC study raised a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only “after a hearing on notice to the debtor and the trustee,” to dismiss a case for the failure to pay any installment of the filing fee.

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

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

(A2) *Technical changes to official forms.*

Action Item 3. Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424. The Committee recommends that the Standing Committee give retroactive approval to the technical changes described below that have been made to official bankruptcy forms since the last Standing Committee meeting and that it give notice of these changes to the Judicial Conference.

At its March 15, 2016, meeting, the Judicial Conference approved the Standing Committee’s recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Committee has made the technical changes listed below.

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from “4.3 followed by 4.4” to “4.4 followed by 4.5.”

- Official Form 119 - Because there is no “Part 3” on the form, the reference to “Part 3” at the top of page 1 was changed to “Part 2.”
- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.
- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.
- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form
- Official Form 309I - The last line of instruction 13 on page 2 was deleted, and the penultimate sentence was changed to: “If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline.”
- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3) was changed from “does not apply” to “applies” because it had previously misstated the relationship between that statutory provision and the necessity of a chapter 11 to complete an instructional course in personal financial management in order to obtain a discharge.
- Official Form 424 - The top of page 2 was changed from Rule 8001 to Rule 8006.

B. Items for Publication

(BI) For publication in July 2016.

Action Item 4. Rule 3015 (Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case) and new Rule 3015.1 (Requirements for a Local Form for Plans Filed in a Chapter 13 Case). The Committee recommends that the following rule amendments and new rule be published for public comment in July 2016 and that the comment period extend for three months. The rules in this group appear in Appendix B1.

The amended rule would require the use of an official form for chapter 13 plans unless a district requires the use of a single local form for that purpose that meets the requirements set out in the new rule. As the Committee has previously reported, it decided to consider this opt-out possibility in response to significant opposition that was voiced to the possible adoption of a mandatory national official form for chapter 13 plans. Informal comments on the opt-out proposal have been generally favorable.

The Committee began considering creating an official form for chapter 13 plans in 2011, prompted by the submission of two suggestions that a national plan form be adopted. *See* Suggestions 10-BK-G and 10-BK-M. A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the Committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At the fall 2015 meeting, the Committee gave approval to proposed Official Form 113 (the national plan form) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, but it voted to defer submitting those items to the Standing Committee. This deferral was to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication. It directed the Forms Subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

The Subcommittee reached out to all relevant groups and invited them to provide feedback on the opt-out proposal, as set out in proposed Rules 3015 and 3015.1, as well as on whether they perceived a need for further publication. The following groups provided comments to the Subcommittee in response: National Bankruptcy Conference (“NBC”), National Conference of Bankruptcy Judges (“NCBJ”), National Association of Consumer Bankruptcy Attorneys (“NACBA”), the American Bankruptcy Institute’s Consumer Committee, a large number of chapter 13 trustees whose comments were collected by the National Association of Chapter 13 Trustees, and an informal mortgage servicer group. While the bulk of the comments received were directed at the plan form itself, rather than at the opt-out proposal, three groups (NBC, NCBJ, and the mortgage servicers) and seven individual trustees did express support for allowing districts to opt out of a national plan form. In addition, Bankruptcy Judge Marvin Isgur (S.D. Tex.) circulated the opt-out proposal to the 144 bankruptcy judges who had submitted a letter in 2014 opposing a national plan form, and he reported that there was general acceptance of Rules 3015 and 3015.1 among the group.

The response of NACBA to the subcommittee’s outreach was relatively brief. The president of the organization said that he could not speak for the thousands of NACBA members, and he urged the Committee to publish the proposals that were being considered. He asserted that “adoption of the ‘compromise’ proposal without providing a new comment period would not comply with the law and [would] subject such to litigation and added controversy.” NCBJ also advised that the opt-out proposal be published for public comment.

At the spring meeting, the Committee unanimously approved the Forms Subcommittee’s recommendation that the amendments to Rule 3015 and proposed new Rule 3015.1 be published for public comment. The opt-out concept was not included in the 2013 and 2014 publications, and, although it might be viewed as a lesser-included version of the proposal for a mandatory national form, it does represent a distinct change from the published proposals. Some members

of the Committee stated that they favor republication because of concern about the constituencies that do not feel that they have had a fair opportunity to express their comments on the opt-out proposal. A general desire was expressed to eliminate any possible procedural objections to the Committee's eventual recommendation.

The Committee also unanimously agreed that the Committee should seek to publish Rules 3015 and 3015.1 on a truncated schedule. According to § 440.20.40(d) of the Guide to Judiciary Policy, "The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." Because of the two prior publications and the narrow focus of the revised rules, the Committee believes that the usual 6-month comment period should be shortened so that an entire year can be eliminated from the period leading up to the effective date of the Committee's proposed rules and forms.

If the regular publication schedule were followed, Rules 3015 and 3015.1 would be published in August 2016, and comments would be received by sometime in February 2017. If approved, those rules and the rest of the chapter 13 plan form package would then be on track for an effective date of December 1, 2018.

However, if Rules 3015 and 3015.1 could be published on a truncated schedule, they could be published this summer with a 3-month deadline for submitting comments. A single hearing could be scheduled. The Committee could then vote on approval at its fall meeting in November and seek the Standing Committee's approval in January 2017. Approval of the Judicial Conference could be sought in March 2017. With advance notice to and permission of the Supreme Court, it could be asked to promulgate the rules by May 1, 2017, leading to an effective date for the form and rules of December 1, 2017.

The Committee suggests that, if the shortened schedule is approved, Rules 3015 and 3015.1 be published by themselves in July 2016. A separate publication would avoid creating confusion by having two different comment deadlines for the materials published in August.

The rules and official form approved by the Committee last fall would continue to be held in abeyance until the Committee takes final action on Rules 3015 and 3015.1. This would allow the entire chapter 13 plan package to be sent forward as a package.

(B2) For publication in August 2016.

The Committee recommends that the following rule amendments, new rule, official forms, and rules appendix be published for public comment in August 2016. The rules, forms, and appendix in this group appear in Appendix B2.

Action Item 5. Rule 5005(a)(2) (Electronic Filing and Signing). Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee’s suggestion that the advisory committees work collaboratively on electronic filing and service issues, the Committee has been working with the Civil, Criminal, and Appellate Advisory Committees on matters relating to Rule 5005(a)(2). Coordination between the Civil and Bankruptcy Advisory Committees is particularly warranted because Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically would apply in adversary proceedings unless the Committee amended Rule 7005 to provide otherwise. The bankruptcy rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005’s incorporation of any amendments to Civil Rule 5(d)(3), the Committee would need to amend Rule 5005(a)(2) in a similar manner.

The Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and its March 2016 meetings. The Committee reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. The Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5, as made applicable to adversary proceedings by Rule 7005. The Committee also discussed in detail the proposed amendments to Civil Rule 5 and the variations on those electronic filing and service provisions being considered by the Criminal Advisory Committee with respect to Criminal Rule 49.

In light of the foregoing, the Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used by the bankruptcy rules and the Bankruptcy Code.² The two rules are otherwise consistent. The Committee believes that it is prudent to submit Rule 5005(a)(2) for publication on the same timeline as that adopted for Civil Rule 5(d)(3). Accordingly, the Committee recommends that the Standing Committee approve the proposed amendments to Rule 5005(a)(2) for publication in August 2016, or at the same time that the amendments to Civil Rule 5(d)(3) are published. This recommendation includes any further non-material refinements to the proposed amendments necessary to conform to the Civil Rule published for comment.

Action Item 6. Proposed amendments to the bankruptcy appellate rules and forms to conform to pending and proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”). Part VIII of the Bankruptcy Rules (Appeals) was completely revised in

² The civil rule uses the term “person,” which under § 101(41) of the Bankruptcy Code includes an “individual, partnership, and corporation.” Because only human beings may proceed without an attorney, the bankruptcy rule uses the term “individual” rather than “person.” Where the civil rule refers to “a person proceeding with an attorney,” the bankruptcy rule uses the term “entity,” which under Code § 101(15) includes estates, trusts, governmental units, and United States trustees, as well as persons.

2014 to conform as closely as possible to parallel FRAP provisions. Rather than incorporating FRAP provisions by reference, the Part VIII rules largely track the language of FRAP.

The Supreme Court recently approved and transmitted to Congress a set of FRAP amendments that will go into effect on December 1, 2016, unless Congress takes action to the contrary. With one exception, the Part VIII amendments included in this action item are being proposed to bring the bankruptcy rules into conformity with relevant FRAP provisions that are being amended this year. Because there was no coordination between the two advisory committees at the time the FRAP amendments were proposed and published, the bankruptcy amendments will lag behind the FRAP amendments by two years. One other amendment, discussed below, is being proposed to conform to a parallel FRAP provision that is being proposed for publication this summer. If approved, this bankruptcy rule amendment will be able to go into effect simultaneously with the parallel FRAP amendment.

A. Rules 8002(c), 8011(a)(2)(C), and Official Form 417A (inmate filing provisions). Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the existing provisions in FRAP 4(c) and FRAP 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the institution's internal mail system on or before the last day for filing and several other specified requirements are satisfied. The 2016 amendments to the FRAP rules are intended to clarify certain issues that have produced conflicts in the case law. They (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit. Rules 8002(c) and 8011(a)(2)(C) would be similarly amended.

To implement the FRAP amendments, a new appellate form has been devised to provide a suggested form for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Committee recommends that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. As a Director's rather than official form, its use would not be mandatory, just as will be true for Appellate Form 7. In addition, the Committee proposes for publication an amendment to Official Form 417A (Notice of Appeal and Statement of Election), similar to the amendment to Appellate Forms 1 and 5, that will alert inmate filers to the existence of Director's Form 4170.

B. Rule 8002(b) (timeliness of tolling motions). Rule 8002(b) and its counterpart, FRAP 4(a)(4), set out a list of postjudgment motions that toll the time for filing an appeal. Under the current rules, the motion must be "timely file[d]" in order to have a tolling effect. The 2016 amendment to Rule 4(a)(4) resolves a circuit split on the question whether a tolling motion

filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the pending amendment adds an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. The Committee proposes that a similar amendment to Rule 8002(b) be published for comment.

C. Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits). The 2016 amendments to FRAP 5, 21, 27, 35, and 40 convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the page limits currently set out in those rules would be retained. The pending amendments employ a conversion ratio of 260 words per page. The current ratio is 280 words per page.

The FRAP amendments also reduce the word limits of Rule 32 for briefs to reflect the 260 words-per-page ratio. The 14,000-word limit for a party's principal brief becomes a 13,000-word limit; the limit for a reply brief changes from 7,000 to 6,500 words. The 2016 amendments correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) is amended to reflect the changed length limits. Finally, a new appendix collects all the FRAP length limits in one chart.

The Committee proposes for publication parallel amendments to Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing), along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)). In addition, it approved for publication a proposed appendix to Part VIII, which is similar to the proposed FRAP appendix.

D. Rule 8017 (amicus filings). Rule 8017 is the bankruptcy counterpart to FRAP 29. The pending amendment to FRAP 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule currently does not address the topic; it is limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment would not require courts to accept amicus briefs regarding rehearing, but it would provide guidelines for such briefs that are permitted.

The Committee proposes for publication a parallel amendment to Rule 8017. The proposed amendment designates the existing rule as subdivision (a) and governs amicus briefs during a court's initial consideration of a case on the merits. It adds a new subdivision (b), which governs amicus briefs during a district court's or BAP's consideration of whether to grant rehearing. The latter subdivision could be overridden by a local rule or order in a case.

The Appellate Rules Advisory Committee is proposing for publication another amendment to FRAP 29(a). It would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. The Committee proposes publication of a similar amendment to Rule 8017 in order to maintain consistency between the two sets of rules. This proposed amendment is reflected in the draft of proposed Rule 8017(a)(2) that is included in Appendix B2.

Action Item 7. Additional amendments to the bankruptcy appellate rules. In addition to the conforming amendments to Part VIII rules discussed in the previous action item, the Committee proposes for publication three additional bankruptcy appellate rule amendments and a new bankruptcy appellate rule in response to a suggestion and comments that the Committee has received. The Committee has held the proposed amendments in abeyance until they could be published as part of a package of bankruptcy appellate rule amendments.

A. Rule 8002(a) (separate document requirement). In response to the August 2012 publication of the proposed revision of the Part VIII rules, Chief Judge Christopher M. Klein (Bankr. E.D. Cal.), commented that it would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). He noted that the provision would help clarify timing issues presented by the separate-document requirement.

FRAP 4(a)(7) specifies when a judgment or order is entered for purposes of Rule 4(a) (Appeal in a Civil Case). It provides that, if Civil Rule 58(a) does not require a separate document, the judgment or order is entered when it is entered in the civil docket under Civil Rule 79(a). If Rule 58(a) does require a separate document, the judgment or order is entered when it is entered in the civil docket and either (1) the judgment or order is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first. The rule was amended in 2002 to resolve several circuit splits that arose out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacted with the requirement in Civil Rule 58 that, to be "effective," a judgment must be set forth on a separate document.

The Bankruptcy Rules have adopted Civil Rule 58 and its separate document requirement only for adversary proceedings. Rule 7058 was added in 2009, making Civil Rule 58 applicable in adversary proceedings. At the same time, Rule 9021 was amended to provide that a "judgment or order is effective when entered under Rule 5003 [Records Kept by the Clerk]." The latter rule applies to contested matters and does not require a separate document.

The Committee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Chief Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). It voted at the fall 2013 meeting to propose a new

subdivision (a)(5) defining entry of judgment. If so amended, it would clarify that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

B. Rule 8006(c) (court statement on merits of certification). The Committee proposes for publication another amendment suggested by Chief Judge Klein in response to the 2012 publication of the Part VIII amendments. Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or BAP. Chief Judge Klein suggested that a provision be added to Rule 8006(c) that would be a counterpart to Rule 8006(e)(2). The latter provision authorizes a party to file a short supplemental statement regarding the merits of certification within 14 days after the court certifies a case for direct appeal on its own motion. Chief Judge Klein suggested that the bankruptcy court should have a similar opportunity to comment when the parties certify the appeal.

At the fall 2013 meeting, the Committee concluded that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Committee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The authorization would be permissive, however, so a court would not be required to file a statement. A new subdivision (c)(2) would authorize such supplemental statements by the court.

C. New Rule 8018.1 (district court review of a judgment that the bankruptcy court lacked constitutional authority to enter). The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment. This procedure is consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014).

In response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), Professor Alan Resnick submitted Suggestion 12-BK-H, which proposed a rule amendment to address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. Adopting a procedure that some districts have authorized by local rule, the proposed rule would allow the district court to review the judgment as if the bankruptcy court had treated

the proceeding as non-core under 28 U.S.C. § 157(c)(1).³ This procedure would eliminate the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

In *Arkison* the Supreme Court held that *Stern* claims can be treated as non-core under § 157(c)(1). The Court explained that “because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.” While the case before the Court “did not proceed in precisely that fashion,” the Court nevertheless affirmed. *Id.* at 2174. It concluded that the petitioner had received the equivalent of the review it was entitled to—*de novo* review—because the district court had reviewed the bankruptcy court’s entry of summary judgment *de novo* and had “conclude[ed] in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law.” *Id.* at 2174.

The decision made clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the proposed rule authorizes. Moreover, *Arkison* shows the Court’s acceptance of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court’s review as being tantamount to review of a non-core proceeding. *See also Stern*, 131 S. Ct. at 2602 (noting without criticism that “[b]ecause the District Court concluded that Vickie’s counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court’s judgment as ‘proposed[,] rather than final,’ and engage in an ‘independent review’ of the record”).

The Committee discussed at the spring 2016 meeting whether to include provisions in the rule regarding the time for filing objections and responses to the bankruptcy court’s proposed findings and conclusions and addressing whether parties could choose to rely on their appellate briefs instead. In the end, the Committee was persuaded by district judge members that the rule does not need to spell out procedural details for the conduct of the proceeding once the judge determines that the bankruptcy court judgment should be treated as proposed findings of fact and conclusions of law. The complexity of cases addressed by this rule will vary, and the rule should allow flexibility for the conduct of each case. The district judge, in consultation with the parties, can decide in a given case whether the appellate briefs suffice to present the issues for which de

³ Section 157(c)(1) provides as follows:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.

novo review is sought or whether they should be supplemented with specific objections and responses.

D. Rule 8023 (voluntary dismissal; cross-reference regarding settlements). The rule would be amended by adding a cross-reference to Rule 9019 (Compromise and Arbitration) to provide a reminder that when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The Committee proposes the amendment in response to a comment by the National Conference of Bankruptcy Judges and approved it for publication at the spring 2014 meeting.

The NCBJ stated that Rule 8023 fails to take into account that one of the parties to the appeal being voluntarily dismissed might be the bankruptcy trustee, who is required under Rule 9019 to obtain court approval of any compromise. The NCBJ raised the concern that, by its silence, Rule 8023 could be read as overriding Rule 9019.

The Committee noted that there is a division in the courts concerning a bankruptcy court's jurisdiction, without remand, to approve the settlement of a proceeding on appeal. It concluded, however, that this jurisdictional issue does not need to be resolved by the Committee or addressed in Rule 8023. A reminder in the rule of the possible need to comply with Rule 9019 would be helpful, whether or not parties seeking approval of the settlement of an appeal must first obtain a remand from the appellate court.

Action Item 8. Official Form 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations and Partnerships)). Official Form 309F is used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement, the date of the meeting of creditors, the deadline for filing a proof of claim, the deadline for filing a complaint to determine the dischargeability of certain debts, and the existence of the automatic stay. Line 8 of the form relates to the "Exception to discharge deadline." It states that "You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A)." In response to a suggestion by Bankruptcy Judge Stuart Bernstein (S.D.N.Y.) pointing out that recent caselaw identifies ambiguities in the wording of the cited statutory provision that may render the instruction incorrect, the Committee proposes for publication an amendment to the instruction.

Section 1141(d) of the Bankruptcy Code governs the scope of the discharge in a chapter 11 case. It distinguishes between debtors that are individuals and other debtors, including corporations and partnerships. It excepts from the discharge of an individual debtor "any debt that is excepted from discharge under section 523." § 1141(d)(2). Those exceptions are not generally applicable, however, to chapter 11 debtors that are corporations or partnerships. Instead, as a general matter, those debtors are discharged from "any debt that arose before the date of [the] confirmation [of a plan]." § 1141(d)(1).

In 2005 Congress added § 1141(d)(6), which does except some types of debts from the discharge of a chapter 11 corporate debtor. In addition to certain tax debts, the provision states that the confirmation of a corporate debtor's chapter 11 plan does not discharge the debtor

from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute

The latter statutory reference is to the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*

The Bankruptcy Code provisions referred to in § 1141(d)(6)(A)—paragraphs (2)(A) and (2)(B) of § 523(a)—except from discharge debts for money, property, services, or credit obtained by false pretenses, false representations, or actual fraud, or obtained by the use of a materially false written statement about the debtor's financial condition that the creditor reasonably relied upon and that the debtor made with intent to defraud. Although on its face § 523 governs only the discharge of individual debtors, by virtue of § 1141(d)(6)(A), its coverage is partially extended to corporate debtors in chapter 11 cases.

Section 523(c)(1) provides special procedural rules applicable to debts of a kind specified in § 523(a)(2), (4), and (6). Generally, an action to determine the dischargeability of a debt may be brought at any time, even after the bankruptcy case has concluded. Rule 4007(b) provides that a “complaint other than under § 523(c) may be filed at any time.” Section 523(c)(1), however, provides “the debtor shall be discharged from a debt of a kind specified paragraph (2), (4), or (6) unless, on request of the creditor to whom such debt is owed, the court determines such debt to be excepted from discharge” under one of the specified provisions. Rule 4007(c) implements this provision by requiring that “a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).”

Recent caselaw demonstrates that § 1141(d)(6)(A) is ambiguous in at least two respects:

1. Whether the phrase “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)” applies both to debts owed to a domestic governmental unit and to debts “owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute” or just to the former; and
2. Whether the procedure specified by § 523(c)(1) applies to a debt excepted from discharge by § 1141(d)(6)(A) because it is of a kind specified by § 523(a)(2)(A) or (B).

The bankruptcy court in *United States ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.)*, 493 B.R. 696 (Bankr. S.D.N.Y. 2013), held that § 1141(d)(6)(A) covers the following types of debts: (1) debts owed to a domestic governmental unit that fall within § 523(a)(2)(A) or (B), and (2) debts owed to a person as the result of an FCA action. 493 B.R. at 710. Critical to the result in the case was the court’s determination that the language—“specified in paragraph (2)(A) or (2)(B) of section 523(a)” —applies only to debts owed to domestic governmental units and not to debts owed to persons. If that interpretation is correct, the instruction in Form 309F is overbroad. Only creditors holding debts owed to a domestic governmental unit would be required to file a complaint seeking an exception to discharge under § 1141(d)(6)(A).

On appeal in the *Hawker Beechcraft* case, the district court agreed with the bankruptcy court’s interpretation, but it went further and held that, even though one part of § 1141(d)(6)(A) incorporates by reference § 523(a)(2)(A) and (B), the provision does not incorporate § 523(c)(1), nor does that procedural provision apply on its own to the discharge of debts of a chapter 11 corporate debtor. 515 B.R. 416, 425-429 (S.D.N.Y. 2014). Thus, according to that reading, there is no time limit for seeking a determination of nondischargeability under either part of § 1141(d)(6)(A), and thus the entire explanatory sentence in Form 309F is incorrect.

Although the Committee acknowledged that § 1141(d)(6)(A) can also be read in a manner that is consistent with the form’s instruction, it concluded at the fall 2014 meeting that the best course is to revise the statement in Form 309F so that it does not take a position on if or when the § 523(c) procedure applies to claims described by § 1141(d)(6)(A). That approach would allow further judicial development of the issue without retaining in the form a possibly incorrect statement of the law. It therefore proposes for publication an amendment to line 8 of the form that would read, “If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below.”

Action Item 9. Official Forms 25A, 25B, 25C, 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations, and Profitability). As part of the Committee’s Forms Modernization Project that began in 2008, the Committee deferred consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Committee has now reviewed each of these forms extensively and, as explained further below, is recommending each form, as revised and renumbered, for publication in August 2016.

The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) (which incorporates, among other things, section 704(a)(8)) of the

Bankruptcy Code. The revised forms incorporate stylistic and formatting changes to conform to the general structure of the modernized forms. The Committee believes that these changes make all three forms easier to read and use.

In addition, in reviewing the forms, the Committee identified several places where Official Forms 425A and 425B were inconsistent with the Bankruptcy Code or required additional information to explain fully the debtor's disclosure obligations. For example, Official Form 425A, the plan of reorganization, now provides for separate classification of priority claims that must be classified under the plan and non-priority general unsecured claims. It also clarifies treatment options for executory contracts and unexpired leases and the timing and kinds of discharges available in the small business chapter 11 case. The Committee made parallel changes to Official Form 425B, the disclosure statement, in each appropriate place. The Committee Notes to Official Forms 425A and 425B identify and explain these and the other substantive changes made and recommended by the Committee. They also explicitly state that the plan of reorganization and the disclosure statement set forth in each form are sample documents and not required forms in small business cases.

The Committee's working group sought and received significant input from the Executive Office for U.S. Trustees on Official Form 425C, which is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. As explained in the Committee Note to Official Form 425C, the form is rearranged to eliminate duplicative sections and further explain the kinds of information required by the form. It also clarifies that the person completing the form on behalf of the debtor must answer all questions, unless otherwise provided, and it provides a checkbox to indicate if the report is an amended filing.

Form 26 (renumbered as Official Form 426) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest. The Judicial Conference promulgated Form 26 and related Bankruptcy Rule 2015.3 in response to section 419(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Section 419(a) of BAPCPA, in turn, mandated that debtors in chapter 11 cases disclose certain information on the "value, operations, and profitability of any closely held corporation, partnership or of any other entity in which the debtor holds a substantial or controlling interest." Section 419(b) explains the section's purpose as "to assist parties in interest [in] taking steps to ensure that the debtor's interest in any [controlled entity] ... is used for the payment of allowed claims against the debtor."

In reviewing Form 26, the Committee determined that certain changes would help to clarify the information requested by the form in connection with Rule 2015.3. These changes involve better defining the nondebtor entities for which a debtor must provide information, as well as modifying the exhibits that describe the kinds of information that a debtor must disclose. The Committee Note to Official Form 426 explains the scope of each exhibit and the justifications for the kinds of information requested by each exhibit.

The modified exhibits to Official Form 426 eliminate the requirement that the debtor provide a valuation estimate for the nondebtor entity. In lieu of a valuation, the modified exhibits focus on the information required by existing Exhibit B (retitled as Exhibit A)—i.e., the nondebtor entity’s most recent balance sheet, income statement, cash flow statement, and statement of changes in shareholders’ or partners’ equity (and a summary of the footnotes to those financial statements). The revised form does not change the information concerning the nondebtor entity’s business description in current Exhibit C, except to require that information in retitled Exhibit B. The revised form then adds new Exhibits C, D, and E. These new exhibits focus on intercompany claims, tax allocations, and the payment of claims or administrative expenses that would otherwise have been payable by a debtor.

The Committee unanimously approved Official Forms 425A, 425B, 425C, and 426, finding that the forms conform to the formatting and the underlying objectives of the Forms Modernization Project, including to make the forms more understandable and easier to use. Accordingly, the Committee recommends that the Standing Committee approve Official Forms 425A, 425B, 425C, and 426 for publication in August 2016.

III. Information Items

A. Status of proposed amendment to Rule 9037 to address redaction of previously filed documents. As reported at the January meeting, the Committee on Court Administration and Case Management (“CACM”) submitted a suggestion (14-BK-B) to the Committee regarding the procedure for redacting personal identifiers in documents that have already been filed in bankruptcy cases. It suggested that Rule 9037 (Privacy Protection for Filings Made with the Court) be amended to require that notice be given to affected individuals of a request to redact a previously filed document. This amendment would reflect the Judicial Conference’s recent addition of § 325.70 to the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records), which states in part that “the court should require the . . . party [requesting redaction] to promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable).”

The Committee began its consideration of this suggestion in 2014, and its research included a survey of bankruptcy clerks’ offices to determine how these matters are currently being handled. The survey revealed a variety of procedures regarding how redaction is sought, how unredacted information is protected, and whether and when individuals affected by the request for redaction are given notice.

At the spring meeting, the Committee approved for publication, at an appropriate time, a proposed amendment to Rule 9037 that would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule’s redaction requirements. The Committee approved a procedure that would restrict access to the motion and the unredacted document in order to prevent the filing of

the motion from highlighting the existence of the unredacted document on file. The Committee concluded that the rule itself should not specify the precise technological methods to be used, since they will likely evolve over time.

The Committee was made aware of the existence of commercial services that maintain and make available to subscribers parallel dockets for all the bankruptcy courts. The existence of these dockets outside the control of the courts means that an unredacted document can continue to be accessible despite a belated redaction and the court's restriction of access to the unredacted document in the court's files. The Committee concluded that resolution of this problem is outside the scope of rulemaking authority and that the proposed rule should address only documents within the courts' control. Knowledge of the existence of these services, however, did lead the Committee to conclude that, following a successful motion to redact, access to the motion and the unredacted document should remain restricted. The Committee also recommends that CACM be made aware of the potential impact that these unofficial dockets have on the effectiveness of courts' belated redaction of filed documents.

After the Committee's report in January, it was suggested that because the advisory committees proposed the privacy rules, including Rule 9037, in a coordinated effort, an amendment to any one of them should be considered by all of the relevant advisory committee so that uniformity of the rules could be maintained to the extent possible. Accordingly, after the Committee approved the proposed amendment to Rule 9037 and the style consultants' suggestions were incorporated, the draft was shared with the reporters for the other advisory committees. The Civil Rules Committee discussed the possibility of a similar amendment to Rule 5.2 at its spring meeting. The reporters will continue to discuss wording and organization issues in an attempt to arrive at a uniform provision. Meanwhile, Professor Capra has inquired of Administrative Office staff whether there are technologies available or in development that would allow the immediate protection of unredacted information upon the filing of a motion to redact or that might even render a rule amendment unnecessary by immediately identifying the existence of unredacted information at the time of filing so that proper redaction could occur. Further inquiry into technological solutions will be pursued.

B. Decision to take no action on Suggestion 15-BK-E to amend Rule 4003(c) concerning burden of proof for objections to claimed exemptions. As the Committee reported to the Standing Committee at its January 2016 meeting, the Committee received, and has been evaluating, a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, to consider the amendment or elimination of Bankruptcy Rule 4003(c). Rule 4003(c) provides: "(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." The primary issue is the burden of proof in litigation involving a debtor's entitlement to a claimed exemption under section 522 of the Bankruptcy Code. Specifically, the suggestion posits that the language of Rule 4003(c), which places the burden of proof on the

party objecting to the claimed exemption, alters the substantive rights of the parties in violation of the Rules Enabling Act.

The Committee first considered Suggestion 15-BK-E at its October 2015 meeting. At that time, the Committee determined that additional research and further deliberations would assist in its assessment of the suggestion. The Assistant Reporter provided a supplemental research memorandum, and the Committee again considered the suggestion at its March 2016 meeting. As explained further below, the Committee has determined to take no action on Suggestion 15-BK-E at this time.

Suggestion 15-BK-E posits that Rule 4003(c) violates the Rules Enabling Act because, under the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), the burden of proof is a substantive part of a litigant's claim and therefore should be governed by applicable nonbankruptcy law in exemption litigation. Notably, Suggestion 15-BK-E differs from the claims litigation at issue in *Raleigh* in at least one significant way: Suggestion 15-BK-E involves a potential conflict between a federal rule and state law. The *Raleigh* decision did not involve a federal rule. This distinction required the Committee to consider the Supreme Court's jurisprudence on the Rules Enabling Act under *Hanna v. Plumer*, 380 U.S. 460 (1965), and its progeny; this jurisprudence underscores that a different analysis applies to conflicts involving federal rules and that the procedural-substantive determination may differ in the federal rules context (compared to, for example, an *Erie* choice of law context).

In accordance with *Hanna*, the Committee considered whether (i) the state law and federal rule conflict; (ii) the federal rule is within the scope of the Rules Enabling Act; and (iii) the federal rule under the Rules Enabling Act is constitutional, that is, within Congress's Article I power. *Hanna* articulated the standard for determining whether a federal rule is constitutional as whether the rule was "rationally capable" of being characterized as procedural. *Hanna*, 380 U.S. at 472. *Hanna* articulated the standard for determining whether a federal rule is within the scope of the Rules Enabling Act as "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna*, 380 U.S. at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

The issue presented to the Committee was a difficult one. The *Hanna* test does not clearly define what is substantive or procedural for purposes of the Rules Enabling Act. Moreover, the Supreme Court's most recent decision on the Rules Enabling Act raises questions about the application of the *Hanna* test and whether the inquiry (i.e., procedural or substantive) focuses on the nature of the federal rule or, rather, the state law at issue. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

In its deliberations, the Committee acknowledged Chief Judge Klein's thoughtful analysis of Rule 4003(c) and the *Raleigh* decision in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Ca. 2015), but agreed that the Supreme Court's decision in *Hanna* required a broader analysis of

the issues. The Committee found that the first and third elements of the *Hanna* test were satisfied in that Rule 4003(c) conflicted with at least California law and that Rule 4003(c) was rationally capable of being characterized as procedural for purposes of the Constitutional analysis. The Advisory Committee then turned to the second element of the *Hanna* test and examined the nature of the burden of proof not only under *Raleigh*, but also under *Hanna* and similar cases that endorse a different approach to the procedural-substantive determination.

Based on the supplemental research memorandum, the Committee recognized ways in which the burden of proof could be characterized as procedural in terms of governing “the judicial process for enforcing rights and duties recognized” by federal bankruptcy law.⁴ Rule 4003(c), as its predecessor Bankruptcy Rule 403(c), places the burden of proof on the party objecting to a claimed exemption, regardless of the identity of the objector. This approach aligns with the presumption in favor of a debtor’s claimed exemptions under section 522(l) of the Bankruptcy Code, as well as the general process for scheduling, asserting, and preserving exemptions under section 522 of the Bankruptcy Code. In addition, a state’s ability to opt out of the federal exemption scheme is only one part of the overarching exemption process in federal bankruptcy litigation—a process enacted by Congress under the Bankruptcy Clause of the U.S. Constitution. Accordingly, the Committee generally agreed that Rule 4003(c) could be characterized as really regulating procedure for purposes of *Hanna* and the Rules Enabling Act.

The Advisory Committee also discussed the history to Rule 4003(c) and the fact that the Committee previously analyzed its ability to promulgate a rule allocating the burden of proof in exemption litigation.⁵ Specifically, when the Committee was overhauling the federal bankruptcy rules in connection with the adoption of the 1978 Bankruptcy Code, the Committee considered whether the federal bankruptcy rules could shift the burden of proof away from the moving party. This issue was raised, in part, because of a comment in the legislative history (a report from the House of Representatives) that the bankruptcy rules would not address burden of proof issues. Nevertheless, that same legislative history (as well as a subsequent report from the Senate) specifically noted that Congress intended the federal rules committee to promulgate a bankruptcy rule allocating the burden of proof in at least the claims litigation context. Notably, similar issues were raised in the context of former Bankruptcy Rule 403(c). The Committee found the long history of a federal bankruptcy rule allocating the burden of proof in exemption litigation—despite issues similar to those identified in Suggestion 15-BK-E being raised and considered—to be persuasive evidence of Rule 4003(c)’s presumptive validity.

The Committee also considered the impact of the Supreme Court’s decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), and the apparent disagreement among the Justices concerning the Rules Enabling Act. It recognized and

⁴ See *Sibbach*, 312 U.S. at 14.

⁵ The supplemental research memorandum includes a detailed history of Rule 4003(c) and its predecessor, Bankruptcy Rule 403(c). It also explains the legislative history to section 522 of the Bankruptcy Code and the relationship between section 522 and Rule 4003(c).

discussed the potential import of this uncertainty, as well as the fact that only a few bankruptcy courts in California have declared Rule 4003(c) invalid. Accordingly, in addition to generally agreeing that Rule 4003(c) satisfies the three-part test of *Hanna* and is presumptively valid, the Committee also determined that it would be premature to take any action on Rule 4003(c).

For all of the foregoing reasons, the Committee determined to take no action on Suggestion 15-BK-E at this time and to monitor case law developments concerning both Rule 4003(c) and the Rules Enabling Act more generally.

TAB 7B

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APPENDIX A

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Appendix A

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

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

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

Committee Note

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

The word “administered” is added to recognize the
affirmative duty of the court to exercise the authority

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

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conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

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

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

Changes Made After Publication and Comment

None.

Summary of Public Comment

BK-2015-0004, submitted by Cheryl Siler, on behalf of Aderant. “We agree with the amendments as proposed.”

BK-2015-0003, submitted by M.K. The comment concerns general drafting matters and questions the use of the word “should” in proposed rules.

1 **Rule 1006. Filing Fee**

2 * * * * *

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

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

12 * * * * *

Committee Note

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

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

Changes Made After Publication and Comment

None.

Summary of Public Comment

BK-2015-0004, submitted by Cheryl Siler, on behalf of Aderant. “We agree with the amendments as proposed.”

BK-2015-0003, submitted by M.K. The comment concerns general drafting matters and questions the use of the word “should” in proposed rules.

APPENDIX B1

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Appendix B1

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

For Publication for Public Comment

1 **Rule 3015. Filing, Objection to Confirmation, Effect of**
2 **Confirmation, and Modification of a Plan**
3 **in a Chapter 12 ~~Family Farmer's Debt~~**
4 **~~Adjustment~~ or a Chapter 13 ~~Individual's~~**
5 **~~Debt Adjustment Case~~**

6 (a) FILING A CHAPTER 12 PLAN. The debtor
7 may file a chapter 12 plan with the petition. If a plan is not
8 filed with the petition, it shall be filed within the time
9 prescribed by § 1221 of the Code.

10 (b) FILING A CHAPTER 13 PLAN. The debtor
11 may file a chapter 13 plan with the petition. If a plan is not
12 filed with the petition, it shall be filed within 14 days
13 thereafter, and such time may not be further extended
14 except for cause shown and on notice as the court may
15 direct. If a case is converted to chapter 13, a plan shall be

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

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16 filed within 14 days thereafter, and such time may not be
17 further extended except for cause shown and on notice as
18 the court may direct.

19 (c) ~~DATING.~~ Every proposed plan and any
20 ~~modification thereof shall be dated.~~ FORM OF
21 CHAPTER 13 PLAN. If there is an Official Form for a
22 plan filed in a chapter 13 case, that form must be used
23 unless a Local Form has been adopted in compliance with
24 Rule 3015.1. With either the Official Form or a Local
25 Form, a nonstandard provision is effective only if it is
26 included in a section of the form designated for
27 nonstandard provisions and is also identified in accordance
28 with any other requirements of the form. As used in this
29 rule and the Official Form or a Local Form, “nonstandard
30 provision” means a provision not otherwise included in the
31 Official or Local Form or deviating from it.

32 (d) NOTICE AND COPIES. If the plan ~~The plan or~~
33 ~~a summary of the plan shall be~~ is not included with the ~~each~~
34 notice of the hearing on confirmation mailed under
35 ~~pursuant to Rule 2002,~~ the debtor shall serve the plan on
36 the trustee and all creditors when it is filed with the court.
37 ~~If required by the court, the debtor shall furnish a sufficient~~
38 ~~number of copies to enable the clerk to include a copy of~~
39 ~~the plan with the notice of the hearing.~~

40 (e) TRANSMISSION TO UNITED STATES
41 TRUSTEE. The clerk shall forthwith transmit to the
42 United States trustee a copy of the plan and any
43 modification thereof filed under ~~pursuant to~~ subdivision (a)
44 or (b) of this rule.

45 (f) OBJECTION TO CONFIRMATION;
46 DETERMINATION OF GOOD FAITH IN THE
47 ABSENCE OF AN OBJECTION. An objection to

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48 confirmation of a plan shall be filed and served on the
49 debtor, the trustee, and any other entity designated by the
50 court, and shall be transmitted to the United States trustee,
51 ~~before confirmation of the plan~~ at least seven days before
52 the date set for the hearing on confirmation, unless the
53 court orders otherwise. An objection to confirmation is
54 governed by Rule 9014. If no objection is timely filed, the
55 court may determine that the plan has been proposed in
56 good faith and not by any means forbidden by law without
57 receiving evidence on such issues.

58 (g) EFFECT OF CONFIRMATION. Upon the
59 confirmation of a chapter 12 or chapter 13 plan:

60 (1) any determination in the plan made under
61 Rule 3012 about the amount of a secured claim is
62 binding on the holder of the claim, even if the holder
63 files a contrary proof of claim or the debtor schedules

64 that claim, and regardless of whether an objection to
65 the claim has been filed; and

66 (2) any request in the plan to terminate the stay
67 imposed by § 362(a), § 1201(a), or § 1301(a) is
68 granted.

69 ~~(g)~~(h) MODIFICATION OF PLAN AFTER
70 CONFIRMATION. A request to modify a plan pursuant to
71 under § 1229 or § 1329 of the Code shall identify the
72 proponent and shall be filed together with the proposed
73 modification. The clerk, or some other person as the court
74 may direct, shall give the debtor, the trustee, and all
75 creditors not less than 21 days' notice by mail of the time
76 fixed for filing objections and, if an objection is filed, the
77 hearing to consider the proposed modification, unless the
78 court orders otherwise with respect to creditors who are not
79 affected by the proposed modification. A copy of the

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80 notice shall be transmitted to the United States trustee. A
81 copy of the proposed modification, or a summary thereof,
82 shall be included with the notice. ~~If required by the court,~~
83 ~~the proponent shall furnish a sufficient number of copies of~~
84 ~~the proposed modification, or a summary thereof, to enable~~
85 ~~the clerk to include a copy with each notice.~~ Any objection
86 to the proposed modification shall be filed and served on
87 the debtor, the trustee, and any other entity designated by
88 the court, and shall be transmitted to the United States
89 trustee. An objection to a proposed modification is
90 governed by Rule 9014.

Committee Note

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans unless a Local Form has been adopted consistent with Rule 3015.1. Subdivision (c) also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official or Local Form specifically

designated for such provisions and must be identified in the manner required by the Official or Local Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan before confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan, unless the court orders otherwise.

Subdivision (g) is amended to set out two effects of confirmation. Subdivision (g)(1) provides that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012. Subdivision (g)(2) provides for termination of the automatic stay under §§ 362, 1201, and 1301 as requested in the plan.

Subdivision (h) was formerly subdivision (g). It is redesignated and is amended to reflect that often the party proposing a plan modification is responsible for serving the proposed modification on other parties. The option to serve

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a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

1 **Rule 3015.1. Requirements for a Local Form for Plans**
2 **Filed in a Chapter 13 Case**

3 Notwithstanding Rule 9029(a)(1), a district may
4 require that a Local Form for a plan filed in a chapter 13
5 case be used instead of an Official Form adopted for that
6 purpose if the following conditions are satisfied:

7 (a) a single Local Form is adopted for the district
8 after public notice and an opportunity for public comment;

9 (b) each paragraph is numbered and labeled in
10 boldface type with a heading stating the general subject
11 matter of the paragraph;

12 (c) the Local Form includes an initial paragraph for
13 the debtor to indicate that the plan does or does not:

14 (1) contain any nonstandard provision;

15 (2) limit the amount of a secured claim based
16 on a valuation of the collateral for the claim; or

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- 17 (3) avoid a security interest or lien;
18 (d) the Local Form contains separate paragraphs
19 for:
20 (1) curing any default and maintaining
21 payments on a claim secured by the debtor's principal
22 residence;
23 (2) paying a domestic-support obligation;
24 (3) paying a claim described in the final
25 paragraph of § 1325(a) of the Bankruptcy Code; and
26 (4) surrendering property that secures a claim
27 with a request that the stay be terminated as to the
28 surrendered collateral; and
29 (e) the Local Form contains a final paragraph for:
30 (1) the placement of nonstandard provisions, as
31 defined in Rule 3015(c), along with a statement that

32 any nonstandard provision placed elsewhere in the
33 plan is void; and
34 (2) certification by the debtor's attorney or by
35 an unrepresented debtor that the plan contains no
36 nonstandard provision other than those set out in the
37 final paragraph.

Committee Note

This rule is new. It sets out features required for all Local Forms for plans in chapter 13 cases. If a Local Form does not comply with this rule, it may not be used in lieu of the Official Chapter13 Plan Form. See Rule 3015(c).

Under the rule only one Local Form may be adopted in a district. The rule does not specify the method of adoption, but it does require that adoption of a Local Form be preceded by a public notice and comment period.

To promote consistency among Local Forms and clarity of content of chapter 13 plans, the rule prescribes several formatting and disclosure requirements. Paragraphs in such a form must be numbered and labeled in bold type, and the form must contain separate paragraphs for the cure and

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maintenance of home mortgages, payment of domestic support obligations, treatment of secured claims covered by the “hanging paragraph” of § 1325(a), and surrender of property securing a claim. Whether those portions of the Local Form are used in a given chapter 13 case will depend on the debtor’s individual circumstances.

The rule requires that a Local Form begin with a paragraph for the debtor to call attention to the fact that the plan contains a nonstandard provision, limits the amount of a secured claim based on a valuation of the collateral, or avoids a lien. The last paragraph of a Local Form must be for the inclusion of any nonstandard provisions, as defined by Rule 3015(c), and must include a statement that nonstandard provisions placed elsewhere in the plan are void. The form must also require a certification by the debtor’s attorney or unrepresented debtor that there are no nonstandard provisions other than those placed in the final paragraph.

APPENDIX B2

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Appendix B2

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

For Publication for Public Comment

1 **Rule 5005. Filing and Transmittal of Papers**

2 (a) FILING.

3 * * * * *

4 (2) Electronic Filing and Signing~~by Electronic~~
5 ~~Means.~~

6 (A) By a Represented Entity—Generally
7 Required; Exceptions.~~A court may by local rule~~
8 ~~permit or require documents to be filed, signed,~~
9 ~~or verified by electronic means that are~~
10 ~~consistent with technical standards, if any, that~~
11 ~~the Judicial Conference of the United States~~
12 ~~establishes.~~ An entity represented by an attorney
13 shall file electronically, unless nonelectronic

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

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14 filing is allowed by the court for good cause or is
15 allowed or required by local rule.~~A local rule~~
16 ~~may require filing by electronic means only if~~
17 ~~reasonable exceptions are allowed.~~

18 (B) By an Unrepresented Individual—
19 When Allowed or Required. An individual not
20 represented by an attorney:

21 (i) may file electronically only if
22 allowed by court order or by local rule; and
23 (ii) may be required to file
24 electronically only by court order, or by a
25 local rule that includes reasonable
26 exceptions.

27 (C) Signing. The user name and password
28 of an attorney of record, together with the
29 attorney's name on a signature block, serves as
30 the attorney's signature.

31 (D) Same as a Written Paper. A paper
32 ~~document filed electronically by electronic means~~
33 ~~in compliance with a local rule constitutes~~ is a
34 written paper for ~~the purpose~~ s of ~~applying these~~
35 rules, the Federal Rules of Civil Procedure made
36 applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is

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left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

1 **Rule 8002. Time for Filing a Notice of Appeal**

2 (a) IN GENERAL.

3 * * * * *

4 (5) Entry Defined.

5 (A) A judgment, order, or decree is
6 entered for purposes of this Rule 8002(a):

7 (i) when it is entered in the docket
8 under Rule 5003(a), or

9 (ii) if Rule 7058 applies and
10 Rule 58(a) F.R. Civ. P. requires a separate
11 document, when the judgment, order, or
12 decree is entered in the docket under Rule
13 5003(a) and when the earlier of these events
14 occurs:

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- 15 • the judgment, order, or
16 decree is set out in a separate
17 document; or
18 • 150 days have run from
19 entry of the judgment, order, or
20 decree in the docket under
21 Rule 5003(a).

22 (B) A failure to set out a judgment, order,
23 or decree in a separate document when required
24 by Rule 58(a) F.R. Civ. P. does not affect the
25 validity of an appeal from that judgment, order,
26 or decree.

27 * * * * *

28 (b) EFFECT OF A MOTION ON THE TIME TO
29 APPEAL.

30 (1) *In General.* If a party ~~timely~~ files in the
31 bankruptcy court any of the following motions and

32 does so within the time allowed by these rules, the
33 time to file an appeal runs for all parties from the
34 entry of the order disposing of the last such remaining
35 motion:

36 * * * * *

37 (c) APPEAL BY AN INMATE CONFINED IN AN
38 INSTITUTION.

39 (1) *In General.* If an institution has a system
40 designed for legal mail, an inmate confined there must
41 use that system to receive the benefit of this
42 Rule 8002(c)(1). If an inmate ~~confined in an~~
43 ~~institution~~ files a notice of appeal from a judgment,
44 order, or decree of a bankruptcy court, the notice is
45 timely if it is deposited in the institution's internal
46 mail system on or before the last day for filing. ~~If the~~
47 ~~institution has a system designed for legal mail, the~~
48 ~~inmate must use that system to receive the benefit of~~

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49 ~~this rule. Timely filing may be shown by a~~
50 ~~declaration in compliance with 28 U.S.C. § 1746 or by~~
51 ~~a notarized statement, either of which must set forth~~
52 ~~the date of deposit and state that first class postage~~
53 ~~has been prepaid. and:~~

54 (A) it is accompanied by:

55 (i) a declaration in compliance
56 with 28 U.S.C. § 1746—or a
57 notarized statement—setting out the
58 date of deposit and stating that first-
59 class postage is being prepaid; or

60 (ii) evidence (such as a
61 postmark or date stamp) showing
62 that the notice was so deposited and
63 that postage was prepaid; or

64 (B) the appellate court exercises its
65 discretion to permit the later filing of a

66 declaration or notarized statement that satisfies

67 Rule 8002(c)(1)(A)(i).

68 * * * * *

Committee Note

Clarifying amendments are made to subdivisions (a), (b), and (c) of the rule. They are modeled on parallel provisions of F.R. App. P. 4.

Paragraph (5) is added to subdivision (a) to clarify the effect of the separate-document requirement of F.R. Civ. P. 58(a) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal.

Rule 7058 adopts F.R. Civ. P. Rule 58 for adversary proceedings. If Rule 58(a) requires a judgment to be set out in a separate document, the time for filing a notice of appeal runs—subject to subdivisions (b) and (c)—from when the judgment is docketed and the judgment is set out in a separate document or, if no separate document is prepared, from 150 days from when the judgment is entered in the docket. The court’s failure to comply with the separate-document requirement of Rule 58(a), however, does not affect the validity of an appeal.

Rule 58 does not apply in contested matters. Instead, under Rule 9021, a separate document is not required, and a judgment or order is effective when it is entered in the docket. The time for filing a notice of appeal under

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subdivision (a) therefore begins to run upon docket entry in contested matters, as well as in adversary proceedings for which Rule 58 does not require a separate document.

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R. App. P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former Rule 8002(b)(1) provided that “[i]f a party timely files in the bankruptcy court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” Responding to a circuit split concerning the meaning of “timely” in F.R. App. P. 4(a)(4), the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Bankruptcy Rules will not qualify as a motion that, under Rule 8002(b)(1), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Bankruptcy Rules, another party’s consent or failure to object to the motion’s lateness, or the court’s disposition of the motion without explicit reliance on untimeliness.

Subdivision (c)(1) is revised to conform to F.R. App. P. 4(c)(1), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution’s mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage

“is being prepaid,” not (as directed by the former rule) that first-class postage “has been prepaid.” This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution’s mail system. A new Director’s Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase “exercises its discretion to permit”—rather than simply “permits”—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

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1 **Rule 8006. Certifying a Direct Appeal to the Court of**
2 **Appeals**

3 * * * * *

4 (c) JOINT CERTIFICATION BY ALL
5 APPELLANTS AND APPELLEES.

6 (1) How Accomplished. A joint certification by
7 all the appellants and appellees under 28 U.S.C.
8 § 158(d)(2)(A) must be made by using the appropriate
9 Official Form. The parties may supplement the
10 certification with a short statement of the basis for the
11 certification, which may include the information listed
12 in subdivision (f)(2).

13 (2) Supplemental Statement by the Court.
14 Within 14 days after the parties' certification, the
15 bankruptcy court or the court in which the matter is
16 then pending may file a short supplemental statement
17 about the merits of the certification.

Committee Note

Subdivision (c) is amended to provide authority for the court to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all of the parties to the appeal. It is a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion.

The bankruptcy court may file a supplemental statement within 14 days after the certification, even if the appeal is no longer pending before it according to subdivision (b). If the appeal is pending in the district court or BAP during that 14-day period, the appellate court is authorized to file a statement. In all cases, the filing of a statement by the court is discretionary.

1 **Rule 8011. Filing and Service; Signature**

2 (a) FILING.

3 * * * * *

4 (2) *Method and Timeliness.*

5 * * * * *

6 (C) *Inmate Filing.* If an institution has a
7 system designed for legal mail, an inmate
8 confined there must use that system to receive
9 the benefit of this Rule 8011(a)(2)(C). A
10 document filed by an inmate confined in an
11 institution is timely if it is deposited in the
12 institution's internal mailing system on or before
13 the last day for filing. ~~If the institution has a~~
14 ~~system designed for legal mail, the inmate must~~
15 ~~use that system to receive the benefit of this rule.~~
16 ~~Timely filing may be shown by a declaration in~~

17 ~~compliance with 28 U.S.C. § 1746 or by a~~
18 ~~notarized statement, either of which must set~~
19 ~~forth the date of deposit and state that first class~~
20 ~~postage has been prepaid. and:~~

21 (i) it is accompanied by:

22 • a declaration in compliance
23 with 28 U.S.C. § 1746—or a
24 notarized statement—setting out
25 the date of deposit and stating
26 that first-class postage is being
27 prepaid; or

28 • evidence (such as a
29 postmark or date stamp) showing
30 that the notice was so deposited
31 and that postage was prepaid; or

32 (ii) the appellate court exercises its
33 discretion to permit the later filing of a

34 declaration or notarized statement that
35 satisfies Rule 8011(a)(2)(C)(i).

36 * * * * *

Committee Note

Subdivision (a)(2)(C) is revised to conform to F.R. App. P. 25(a)(2)(C), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution’s mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage “is being prepaid,” not (as directed by the former rule) that first-class postage “has been prepaid.” This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution’s mail system. A new Director’s Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to

accept a declaration or notarized statement at a later date. The rule uses the phrase “exercises its discretion to permit”—rather than simply “permits”—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

1 **Rule 8013. Motions; Intervention**

2 * * * * *

3 (f) FORM OF DOCUMENTS; ~~PAGE~~LENGTH
4 LIMITS; NUMBER OF COPIES.

5 * * * * *

6 (2) *Format of an Electronically Filed*
7 *Document.* A motion, response, or reply filed
8 electronically must comply with the requirements for
9 a paper version regarding covers, line spacing,
10 margins, typeface, and type style. It must also comply
11 with the ~~page~~length limits under paragraph (3).

12 (3) *PageLength Limits.* ~~Unless the district~~
13 ~~court or BAP orders otherwise:~~Except by the district
14 court's or BAP's permission, and excluding the
15 accompanying documents authorized by subdivision
16 (a)(2)(C):

17 (A) a motion or a response to a motion
18 ~~must not exceed 20 pages, exclusive of the~~
19 ~~corporate disclosure statement and~~
20 ~~accompanying documents authorized by~~
21 ~~subdivision (a)(2)(C)~~ produced using a computer
22 must include a certificate under Rule 8015(h)
23 and not exceed 5,200 words; and

24 (B) ~~a reply to a response must not exceed~~
25 ~~10 pages.~~ a handwritten or typewritten motion or
26 a response to a motion must not exceed 20
27 pages;

28 (C) a reply produced using a computer
29 must include a certificate under Rule 8015(h)
30 and not exceed 2,600 words; and

31 (D) a handwritten or typewritten reply
32 must not exceed 10 pages.

33 * * * * *

Committee Note

Subdivision (f)(3) is amended to conform to F.R. App. P. 27(d)(2), which was recently amended to replace page limits with word limits for motions and responses produced using a computer. The word limits were derived from the current page limits, using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); Official Form 417C suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 8013(a)(2)(C) and any items listed in Rule 8015(h).

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1 **Rule 8015. Form and Length of Briefs; Form of**
2 **Appendices and Other Papers**

3 (a) PAPER COPIES OF A BRIEF. If a paper copy
4 of a brief may or must be filed, the following provisions
5 apply:

6 * * * * *

7 (7) *Length.*

8 (A) *Page limitation.* A principal brief
9 must not exceed 30 pages, or a reply brief 15
10 pages, unless it complies with subparagraph (B)
11 ~~and (C)~~.

12 (B) *Type-volume limitation.*

13 (i) A principal brief is acceptable if
14 it contains a certificate under Rule 8015(h)
15 and:

- 16 • ~~it~~ contains no more than
17 ~~14,000~~ 13,000 words; or

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18 • ~~it~~ uses a monospaced face
19 and contains no more than 1,300 lines
20 of text.

21 (ii) A reply brief is acceptable if it
22 includes a certificate under Rule 8015(h)
23 and contains no more than half of the type
24 volume specified in item (i).

25 ~~(iii) Headings, footnotes, and~~
26 ~~quotations count toward the word and line~~
27 ~~limitations. The corporate disclosure~~
28 ~~statement, table of contents, table of~~
29 ~~citations, statement with respect to oral~~
30 ~~argument, any addendum containing~~
31 ~~statutes, rules, or regulations, and any~~
32 ~~certificates of counsel do not count toward~~
33 ~~the limitation.~~

34 ~~(C) Certificate of Compliance.~~

35 ~~(i) A brief submitted under~~
36 ~~subdivision (a)(7)(B) must include a~~
37 ~~certificate signed by the attorney, or an~~
38 ~~unrepresented party, that the brief complies~~
39 ~~with the type-volume limitation. The person~~
40 ~~preparing the certificate may rely on the~~
41 ~~word or line count of the word-processing~~
42 ~~system used to prepare the brief. The~~
43 ~~certificate must state either:~~

44 • ~~the number of words in the~~
45 ~~brief; or~~

46 • ~~the number of lines of~~
47 ~~monospaced type in the brief.~~

48 ~~(ii) The certification requirement is~~
49 ~~satisfied by a certificate of compliance that~~
50 ~~conforms substantially to the appropriate~~
51 ~~Official Form.~~

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52

* * * * *

53

(f) LOCAL VARIATION. A district court or BAP

54

must accept documents that comply with the ~~applicable~~

55

form requirements of this rule and the length limits set by

56

Part VIII of these rules. By local rule or order in a

57

particular case, a district court or BAP may accept

58

documents that do not meet all of the form requirements of

59

this rule or the length limits set by Part VIII of these rules.

60

(g) ITEMS EXCLUDED FROM LENGTH. In

61

computing any length limit, headings, footnotes, and

62

quotations count toward the limit, but the following items

63

do not:

64

• the cover page;

65

• a corporate disclosure statement;

66

• a table of contents;

67

• a table of citations;

68

• a statement regarding oral argument;

- 69 • an addendum containing statutes, rules, or
- 70 regulations;
- 71 • certificates of counsel;
- 72 • the signature block;
- 73 • the proof of service; and
- 74 • any item specifically excluded by these
- 75 rules or by local rule.

76 (h) CERTIFICATE OF COMPLIANCE.

77 (1) Briefs and Documents That Require a

78 Certificate. A brief submitted under Rule 8016(d)(2),

79 8017(b)(4), or 8015(a)(7)(B)—and a document

80 submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or

81 8022(b)(1)—must include a certificate by the

82 attorney, or an unrepresented party, that the document

83 complies with the type-volume limitation. The

84 individual preparing the certificate may rely on the

85 word or line count of the word-processing system

86 used to prepare the document. The certificate must
87 state the number of words—or the number of lines of
88 monospaced type—in the document.

89 (2) *Acceptable Form.* The certificate
90 requirement is satisfied by a certificate of compliance
91 that conforms substantially to the appropriate Official
92 Form.

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 32, which reduced the word limits generally allowed for briefs. When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. Amended F.R. App. P. 32 applies a conversion ratio of 260 words per page and reduces the word limits accordingly. Rule 8015(a)(7) adopts the same reduced word limits for briefs prepared by computer.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (f) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (f) already established this authority as to the length limits in Rule 8015(a)(7); the amendment makes clear that this authority extends to all length limits in Part VIII of the Bankruptcy Rules.

A new subdivision (g) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in subdivision (a)(7)(C) is relocated to a new subdivision (h) and now applies to filings under all type-volume limits (other than Rule 8014(f)'s word limit)—including the new word limits in Rules 8013, 8016, 8017, and 8022. Conforming amendments are made to Official Form 417C.

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1 **Rule 8016. Cross-Appeals**

2 * * * * *

3 (d) LENGTH.

4 (1) *Page Limitation.* Unless it complies with
5 paragraphs (2) ~~and (3)~~, the appellant's principal brief
6 must not exceed 30 pages; the appellee's principal and
7 response brief, 35 pages; the appellant's response and
8 reply brief, 30 pages; and the appellee's reply brief,
9 15 pages.

10 (2) *Type-Volume Limitation.*

11 (A) The appellant's principal brief or the
12 appellant's response and reply brief is acceptable
13 if it includes a certificate under Rule 8015(h)
14 and:

15 (i) ~~it~~ contains no more than ~~14,000~~

16 13,000 words; or

17 (ii) ~~it~~ uses a monospaced face and
18 contains no more than 1,300 lines of text.

19 (B) The appellee's principal and response
20 brief is acceptable if it includes a certificate
21 under Rule 8015(h) and:

22 (i) ~~it~~ contains no more than ~~16,500~~
23 15,300 words; or

24 (ii) ~~it~~ uses a monospaced face and
25 contains no more than 1,500 lines of text.

26 (C) The appellee's reply brief is
27 acceptable if it includes a certificate under
28 Rule 8015(h) and contains no more than half of
29 the type volume specified in subparagraph (A).

30 ~~(D) Headings, footnotes, and quotations~~
31 ~~count toward the word and line limitations. The~~
32 ~~corporate disclosure statement, table of contents,~~
33 ~~table of citations, statement with respect to oral~~

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34 ~~argument, any addendum containing statutes,~~
35 ~~rules, or regulations, and any certificates of~~
36 ~~counsel do not count toward the limitation.~~

37 ~~(3) Certificate of Compliance. A brief~~
38 ~~submitted either electronically or in paper form under~~
39 ~~paragraph (2) must comply with Rule 8015(a)(7)(C).~~

40 * * * * *

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 28.1, which reduced the word limits generally allowed for briefs in cross-appeals. When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in F.R. App. P. 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. Amended F.R. App. P. 32 and 28.1 apply a conversion ratio of 260 words per page and reduce the word limits accordingly. Rule 8016(d)(2) adopts the same reduced word limits.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici.

The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (d) is amended to refer to new Rule 8015(h) (which now contains the certificate-of-compliance provision formerly in Rule 8015(a)(7)(C)).

1 **Rule 8017. Brief of an Amicus Curiae**

2 (a) DURING INITIAL CONSIDERATION OF A
3 CASE ON THE MERITS.

4 (1) Applicability. This Rule 8017(a) governs
5 amicus filings during a court's initial consideration of
6 a case on the merits.

7 (2) When Permitted. The United States or its
8 officer or agency or a state may file an amicus-curiae
9 brief without the consent of the parties or leave of
10 court. Any other amicus curiae may file a brief only
11 by leave of court or if the brief states that all parties
12 have consented to its filing, except that a district court
13 or BAP may strike or may prohibit the filing of an
14 amicus brief that would result in a judge's
15 disqualification. On its own motion, and with notice
16 to all parties to an appeal, the district court or BAP
17 may request a brief by an amicus curiae.

18 ~~(b)~~(3) *Motion for Leave to File.* The motion
19 must be accompanied by the proposed brief and state:

20 ~~(1)~~(A) the movant's interest; and

21 ~~(2)~~(B) the reason why an amicus brief is
22 desirable and why the matters asserted are
23 relevant to the disposition of the appeal.

24 ~~(e)~~(4) *Contents and Form.* An amicus brief
25 must comply with Rule 8015. In addition to the
26 requirements of Rule 8015, the cover must identify
27 the party or parties supported and indicate whether the
28 brief supports affirmance or reversal. If an amicus
29 curiae is a corporation, the brief must include a
30 disclosure statement like that required of parties by
31 Rule 8012. An amicus brief need not comply with
32 Rule 8014, but must include the following:

33 ~~(1)~~(A) a table of contents, with page
34 references;

34 FEDERAL RULE OF BANKRUPTCY PROCEDURE

35 ~~(2)~~(B) a table of authorities—cases
36 (alphabetically arranged), statutes, and other
37 authorities—with references to the pages of the
38 brief where they are cited;

39 ~~(3)~~(C) a concise statement of the
40 identity of the amicus curiae, its interest in the
41 case, and the source of its authority to file;

42 ~~(4)~~(D) unless the amicus curiae is one
43 listed in the first sentence of subdivision (a)(2), a
44 statement that indicates whether:

45 ~~(A)~~(i) a party’s counsel authored
46 the brief in whole or in part;

47 ~~(B)~~(ii) a party or a party’s counsel
48 contributed money that was intended to fund
49 preparing or submitting the brief; and

50 ~~(C)~~(iii) a person—other than the
51 amicus curiae, its members, or its counsel—

52 contributed money that was intended to fund
53 preparing or submitting the brief and, if so,
54 identifies each such person;

55 ~~(5)~~(E) an argument, which may be
56 preceded by a summary and need not include a
57 statement of the applicable standard of review;

58 ~~(6)~~(F) a certificate of compliance, if
59 required by Rule 8015(a)(7)(C) or 8015(b).

60 ~~(d)~~(5) *Length.* Except by the district court's
61 or BAP's permission, an amicus brief must be no
62 more than one-half the maximum length authorized by
63 these rules for a party's principal brief. If the court
64 grants a party permission to file a longer brief, that
65 extension does not affect the length of an amicus
66 brief.

67 ~~(e)~~(6) *Time for Filing.* An amicus curiae
68 must file its brief, accompanied by a motion for filing

36 FEDERAL RULE OF BANKRUPTCY PROCEDURE

69 when necessary, no later than 7 days after the
70 principal brief of the party being supported is filed.
71 An amicus curiae that does not support either party
72 must file its brief no later than 7 days after the
73 appellant's principal brief is filed. The district court
74 or BAP may grant leave for later filing, specifying the
75 time within which an opposing party may answer.

76 ~~(f)~~(7) *Reply Brief.* Except by the district
77 court's or BAP's permission, an amicus curiae may
78 not file a reply brief.

79 ~~(g)~~(8) *Oral Argument.* An amicus curiae
80 may participate in oral argument only with the district
81 court's or BAP's permission.

82 (b) DURING CONSIDERATION OF WHETHER
83 TO GRANT REHEARING.

84 (1) Applicability. This Rule 8017(b) governs
85 amicus filings during a district court's or BAP's

86 consideration of whether to grant rehearing, unless a
87 local rule or order in a case provides otherwise.

88 (2) *When Permitted.* The United States or its
89 officer or agency or a state may file an amicus-curiae
90 brief without the consent of the parties or leave of
91 court. Any other amicus curiae may file a brief only
92 by leave of court.

93 (3) *Motion for Leave to File.* Rule 8017(a)(3)
94 applies to a motion for leave.

95 (4) *Contents, Form, and Length.*
96 Rule 8017(a)(4) applies to the amicus brief. The brief
97 must include a certificate under Rule 8015(h) and not
98 exceed 2,600 words.

99 (5) *Time for Filing.* An amicus curiae
100 supporting the motion for rehearing or supporting
101 neither party must file its brief, accompanied by a
102 motion for filing when necessary, no later than 7 days

103 after the motion is filed. An amicus curiae opposing
104 the motion for rehearing must file its brief,
105 accompanied by a motion for filing when necessary,
106 no later than the date set by the court for the response.

Committee Note

Rule 8017 is amended to conform to the recent amendment to F.R. App. P. 29, which now addresses amicus filings in connection with petitions for rehearing. Former Rule 8017 is renumbered Rule 8017(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the district court's or BAP's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a motion for rehearing. Subdivision (b) sets default rules that apply when a district court or BAP does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with motions for rehearing, and governing the procedures when such filings are permitted.

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R. App. 29(a).

1 **Rule 8018.1. District-Court Review of a Judgment that**
2 **the Bankruptcy Court Lacked the**
3 **Constitutional Authority to Enter**

4 If, on appeal, a district court determines that the
5 bankruptcy court did not have the power under Article III
6 of the Constitution to enter the judgment, order, or decree
7 appealed from, the district court may treat it as proposed
8 findings of fact and conclusions of law.

Committee Note

This rule is new. It is added to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from. Consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the district court in that situation may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. Upon making the determination to proceed in that manner, the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party's objections, see Rule 9033; treat the parties' briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law.

1 **Rule 8022. Motion for Rehearing**

2 * * * * *

3 (b) FORM OF MOTION; LENGTH. The motion
4 must comply in form with Rule 8013(f)(1) and (2). Copies
5 must be served and filed as provided by Rule 8011. ~~Unless~~
6 ~~the district court or BAP orders otherwise, a motion for~~
7 ~~rehearing must not exceed 15 pages.~~Except by the district
8 court's or BAP's permission:

9 (1) a motion for rehearing produced using a
10 computer must include a certificate under Rule
11 8015(h) and not exceed 3,900 words; and

12 (2) a handwritten or typewritten motion must
13 not exceed 15 pages.

Committee Note

Subdivision (b) is amended to conform to the recent
amendment to F.R. App. P. 40(b), which was one of several
appellate rules in which word limits were substituted for
page limits for documents prepared by computer. The

word limits were derived from the previous page limits using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); completion of Official Form 417C suffices to meet that requirement.

Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 8015(g).

1 **Rule 8023. Voluntary Dismissal**

2 Subject to Rule 9019. The clerk of the district court
3 or BAP must dismiss an appeal if the parties file a signed
4 dismissal agreement specifying how costs are to be paid
5 and pay any fees that are due. An appeal may be dismissed
6 on the appellant's motion on terms agreed to by the parties
7 or fixed by the district court or BAP.

Committee Note

The rule is amended to provide a reminder that, when
dismissal of an appeal is sought as the result of a settlement
by the parties, Rule 9019 may require approval of the
settlement by the bankruptcy court.

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**Appendix:
Length Limits Stated in Part VIII of
the Federal Rules of Bankruptcy Procedure**

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monofaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
 - You must use the word limit if you produce your document on a computer; and
 - You must use the page limit if you handwrite your document or type it on a typewriter.

| | Rule | Document Type | Word Limit | Page Limit | Line Limit |
|--|-------------|---|-------------------|-------------------|-------------------|
| Motions | 8013(f)(3) | • Motion • Response to a motion | 5,200 | 20 | Not applicable |
| | 8013(f)(3) | • Reply to a response to a motion | 2,600 | 10 | Not applicable |
| Parties' briefs (where no cross-appeal) | 8015(a)(7) | • Principal brief | 13,000 | 30 | 1,300 |
| | 8015(a)(7) | • Reply brief | 6,500 | 15 | 650 |
| Parties' briefs (where cross-appeal) | 8016(d) | • Appellant's principal brief • Appellant's response and reply brief | 13,000 | 30 | 1,300 |
| | 8016(d) | • Appellee's principal and response brief | 15,300 | 35 | 1,500 |
| | 8016(d) | • Appellee's reply brief | 6,500 | 15 | 650 |

| | Rule | Document type | Word limit | Page limit | Line limit |
|------------------------------------|-------------|---|--|--|--|
| Party's supplemental letter | 8014(f) | • Letter citing supplemental authorities | 350 | Not applicable | Not applicable |
| Amicus briefs | 8017(a)(5) | • Amicus brief during initial consideration of case on merits | One-half the length set by the Part VIII Rules for a party's principal brief | One-half the length set by the Part VIII Rules for a party's principal brief | One-half the length set by the Part VIII Rules for a party's principal brief |
| | 8017(b)(4) | • Amicus brief during consideration of whether to grant rehearing | 2,600 | Not applicable | Not applicable |
| Motion for rehearing | 8022(b) | • Motion for rehearing | 3,900 | 15 | Not applicable |

Information to identify the case:

| | |
|--|---|
| Debtor _____ Name | EIN _____ |
| United States Bankruptcy Court for the: _____ District of _____ (State) | [Date case filed for chapter 11 _____ MM / DD / YYYY OR [Date case filed in chapter _____ MM / DD / YYYY Date case converted to chapter 11 _____ MM / DD / YYYY] |
| Case number: _____ | |

Official Form 309F (For Corporations or Partnerships)**Notice of Chapter 11 Bankruptcy Case**

12/4517

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. Debtor's full name

2. All other names used in the last 8 years

3. Address

4. Debtor's attorney

Name and address

Contact phone _____

Email _____

5. Bankruptcy clerk's office

Documents in this case may be filed at this address.

You may inspect all records filed in this case at this office or online at www.pacer.gov.

Hours open _____

Contact phone _____

6. Meeting of creditors

The debtor's representative must attend the meeting to be questioned under oath.

Creditors may attend, but are not required to do so.

_____ at _____
Date Time

Location: _____

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

For more information, see page 2 ►

7. Proof of claim deadline**Deadline for filing proof of claim:**

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

8. Exception to discharge deadline

The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.

~~You~~ If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint ~~if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A) by the deadline stated below.~~

Deadline for filing the complaint: _____**9. Creditors with a foreign address**

If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.

11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

COMMITTEE NOTE

Official Form 309F (For Corporations or Partnerships), *Notice of Chapter 11 Bankruptcy Case*, is amended at Line 8. Line 8 previously stated that a creditor seeking to have a debt excepted from discharge under § 1141(d)(6)(A) must file a complaint by the stated deadline. That statement has been revised in light of ambiguities in § 1141(d)(6)(A) regarding its relationship with § 523. Specifically, the provision is unclear about whether not only a debt “owed to a domestic governmental unit” but also a debt “owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute” must be of the type described by § 523(a)(2)(A) and (B). The provision is also unclear about whether the procedural requirements of § 523(c)(1) apply, given that § 1141(d)(6)(A) specifically refers to § 523(a) but not to § 523(c). Rather than take a position on the proper interpretation of § 1141(d)(6)(A), the form leaves to creditors the determination of whether § 523(c) applies to their claims, in which case they must commence a dischargeability proceeding by the Rule 4007(c) deadline that is stated on the form.

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____

2. Party: _____ Attorney: _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[Note to inmate filers: If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4710 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

Committee Note

The form is amended to include a notice to inmate filers that Director's Form 4710 may be used to provide a declaration under Rule 8002(c)(1) regarding the mailing of a notice of appeal using an institution's legal mail system.

[This certification must be appended to your brief document if the its length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements Rule 8015(a)(7)(B) or 8016(d)(2)

1. This brief document complies with [the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because: Fed. R. Bankr. P. [insert Rule citation; e.g., 8015(a)(7)(B)] [the word limit of Fed. R. Bankr. P. [insert Rule citation; e.g., 8013(f)(3)(A)] because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g) [and [insert applicable Rule citation, if any]]:

- this brief document contains [state the number of] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [state the number of] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because:

- this document has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in [state font size and name of type style], or
- this brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

Signature

Date: _____

Print name of person signing certificate of compliance:

Committee Note

The form is amended to reflect changes in the length limits specified by Part VIII of the Bankruptcy Rules for appellate documents and the broadened requirement for a certificate of compliance under Rule 8015(h). The rule now requires certification of compliance with the type-volume or word limits for briefs filed under Rule 8015(a)(7)(b) 8016(d)(2), or 8017(b)(4), and documents filed under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1).

Fill in this information to identify the case:

Debtor 1 First Name Middle Name Last Name
Debtor 2 (Spouse, if filing) First Name Middle Name Last Name
United States Bankruptcy Court for the: District of (State)
Case number:

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11

12/17

Name of Proponent's Plan of Reorganization, Dated Insert Date

Article 1: Summary

This Plan of Reorganization (the Plan) under chapter 11 of the Bankruptcy Code (the Code) proposes to pay creditors of insert the name of the Debtor (the Debtor) from Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income.

This Plan provides for: classes of priority claims; classes of secured claims; classes of non-priority unsecured claims; and classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)

Article 2: Classification of Claims and Interests

2.01 Class 1 All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), gap period claims in an involuntary case under § 507(a)(3), and priority tax claims under § 507(a)(8)).

Add classes of priority claims, if applicable

2.02 Class 2 The claim of to the extent allowed as a secured claim under § 506 of the Code.

Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).

- 2.03 **Class 3** All non-priority unsecured claims allowed under § 502 of the Code.
[Add other classes of unsecured claims, if any.]
- 2.04 **Class 4** Equity interests of the Debtor. [If the Debtor is an individual, change this heading to *The interests of the individual Debtor in property of the estate.*]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

- 3.01 **Unclassified claims** Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
- 3.02 **Administrative expense claims** Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
- 3.03 **Priority tax claims** Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
- 3.04 **Statutory fees** All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
- 3.05 **Prospective quarterly fees** All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

| Class | Impairment | Treatment |
|--|--|--|
| Class 1 - Priority claims excluding those in Article 3 | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: [];"] [Add classes of priority claims if applicable] |
| Class 2 - Secured claim of [Insert name of secured creditor.] | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable] |
| Class 3 - Non-priority unsecured creditors | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable] |
| Class 4 - Equity security holders of the Debtor | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.] |

Article 5: Allowance and Disallowance of Claims

- 5.01 **Disputed claim** A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either:
- (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or
 - (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
- 5.02 **Delay of distribution on a disputed claim** No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 **Settlement of disputed claims** The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01 **Assumed executory contracts and unexpired leases** (a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date:
[List assumed, or if applicable assigned, executory contracts and unexpired leases.]

(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date.

A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than [] days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01 **Definitions and rules of construction** The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions:
[Insert additional definitions if necessary].

8.02 **Effective date** The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.

8.03 **Severability** If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 **Binding effect** The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 **Captions** The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

8.06 **Controlling effect** Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

8.07 **Corporate governance** [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

Article 9: Discharge

Check one box.

9.01

Discharge if the Debtor is an individual and § 1141(d)(3) is not applicable.

Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Discharge if the Debtor is a partnership and § 1141(d)(3) is not applicable. On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable. On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

No discharge if § 1141(d)(3) is applicable. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

By The Plan Proponent: _____

By Attorney for the Plan Proponent: _____

Committee Note

Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*, replaces Official Form 25A, *Plan of Reorganization in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. It is intended to provide an illustrative format, rather than a specific prescription for the form's language or content of a plan in any particular case.

In Article 1, *Summary*, a category is added for priority claims that are required to be classified and provided for under the plan, and the category for "unsecured claims" is revised to provide for only "non-priority unsecured claims." Also, the value that the proponent estimates to be distributed to unsecured claims is revised to clarify that the estimate is limited to non-priority claims. The instruction to identify and briefly summarize priority and administrative claims that will not be paid on the effective date of the plan, to the extent permitted by the Bankruptcy Code, is eliminated because it is duplicative of the information requested in Articles 3 and 4.

In Article 2, *Classification of Claims and Interests*, section 2.01 is revised to clarify that the priority of claims is determined under section 507(a) of the Bankruptcy Code and to provide for the classification of priority claims where necessary and appropriate. *See* 11 U.S.C. § 1129(a)(9)(B). Section 2.03 is revised to clarify that Class 3 "unsecured claims" are limited to "non-priority unsecured claims."

In Article 3, *Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees*, the title and categories of claims have been revised to include all unclassified administrative and priority claims and all fees payable under 28 U.S.C. § 1930 for which the Bankruptcy Code specifies the treatment under the plan. *See* 11 U.S.C. § 1129(a)(9), (12). In the title, the reference to "United States Trustee fees" is changed to "Quarterly and Court Fees" to include all of the fees payable under

28 U.S.C. § 1930. Also, section 3.04 is revised to include all statutory fees under 28 U.S.C. § 1930(a), and quarterly fees payable under 28 U.S.C. § 1930(a)(6) and (7) after the effective date of the plan are moved to a new section 3.05.

Article 4, *Treatment of Claims and Interests Under the Plan*, is revised to conform to the changes made in sections 2.01 and 2.03 of the plan to classify priority claims, if applicable, and to distinguish the non-priority unsecured claims.

In Article 6, *Provisions for Executory Contracts and Unexpired Leases*, references to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable. Section 6.01 is revised to clarify that executory contracts and unexpired leases are assumed, and if applicable assigned, under section 6.01(a) and rejected under section 6.01(b) as of the effective date of the plan. Section 6.01(b) is revised to clarify that all executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Article 9, *Discharge*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Official Form 425B

Disclosure Statement for Small Business Under Chapter 11

12/17

[Name of Proponent]’s Disclosure Statement, Dated [Insert Date]

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I. Introduction

This is the disclosure statement (the *Disclosure Statement*) in the small business chapter 11 case of [] (the *Debtor*). This Disclosure Statement provides information about the Debtor and the Plan filed on [insert date] (the *Plan*) to help you decide how to vote.

A copy of the Plan is attached as *Exhibit A*. **Your rights may be affected.** You should read the Plan and this Disclosure Statement carefully. You may wish to consult an attorney about your rights and your treatment under the Plan.

The proposed distributions under the Plan are discussed at pages [] - [] of this Disclosure Statement. [General unsecured creditors are classified in Class [], and will receive a distribution of [] % of their allowed claims, to be distributed as follows [].]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the *Court*) will consider when deciding whether to confirm the Plan,
- Why [the proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. A separate order has been entered setting the following information:

- Time and place of the hearing to [finally approve this disclosure statement and] confirm the plan,
- Deadline for voting to accept or reject the plan, and
- Deadline for objecting to the [adequacy of disclosure and] confirmation of the plan.

If you want additional information about the Plan or the voting procedure, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.

II. Background

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of [_____] [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in § 101(31) of the United States Bankruptcy Code (the Code) and their relationship to the Debtor.

For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the 2 years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor During the Bankruptcy

List the name and position of all current officers, directors, managing members, or other persons in control (collectively the *Management*) who will not have a position post-confirmation that you list in III D 2.

| Name | Position |
|------|----------|
| | |
| | |
| | |
| | |
| | |
| | |

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor's bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, Debtor in Possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers

Check one box.

The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

The Debtor estimates that up to \$ [] may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

| Transaction | Defendant | Amount Claimed |
|-------------|-----------|----------------|
| | | |
| | | |

The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. Claims Objections

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. Disputed claims are treated in Article 5 of the Plan.

H. Current and Historical Financial Conditions

The identity and fair market value of the estate's assets are listed in *Exhibit B*. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in *Exhibit C*.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case is set

forth in *Exhibit D.*]

[A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D.*]

III. Summary of the Plan of Reorganization and Treatment of Claims and Equity Interests

A. What Is the Purpose of the Plan of Reorganization?

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. Therefore, the Plan Proponent has *not* placed the following claims in any class:

1. Administrative expenses, involuntary gap claims, and quarterly and Court fees

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 503(b) of the Code. Administrative expenses include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition, and compensation for services and reimbursement of expenses awarded by the court under § 330(a) of the Code. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment. Involuntary gap claims allowed under § 502(f) of the Code are entitled to the same treatment as administrative expense claims. The Code also requires that fees owed under section 1930 of title 28, including quarterly and court fees, have been paid or will be paid on the effective date of the Plan.

The following chart lists the Debtor's estimated administrative expenses, and quarterly and court fees, and their proposed treatment under the Plan:

| Type | Estimated Amount Owed | Proposed Treatment |
|--------------------------|-----------------------|---|
| Administrative expenses | | Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment |
| Involuntary gap claims | | Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment |
| Statutory Court fees | | Paid in full on the effective date of the Plan |
| Statutory quarterly fees | | Paid in full on the effective date of the Plan |
| Total | | |

2. Priority tax claims

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim pursuant to 11 U.S.C. § 511, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor’s estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

| Description (Name and type of tax) | Estimated Amount Owed | Date of Assessment | Treatment |
|---------------------------------------|-----------------------|--------------------|------------------------|
| | \$ | | Payment interval |
| | | | [Monthly] payment \$ |
| | | | Begin date |
| | | | End date |
| | | | Interest rate % |
| | | | Total payout amount \$ |
| | \$ | | Payment interval |
| | | | [Monthly] payment \$ |
| | | | Begin date |
| | | | End date |
| | | | Interest rate % |
| | | | Total payout amount \$ |

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. Classes of secured claims

Allowed Secured Claims are claims secured by property of the Debtor’s bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor’s claim is less than the amount of the creditor’s allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor’s secured prepetition claims and their proposed treatment under the Plan:

| Class # | Description | Insider? | Impairment? | Treatment |
|---------|---------------------------|------------------------------|-------------------------------------|---|
| | Secured claim of: | <input type="checkbox"/> Yes | <input type="checkbox"/> Impaired | [Monthly] payment \$ |
| | Name | <input type="checkbox"/> No | <input type="checkbox"/> Unimpaired | |
| | Collateral description | | | Payments begin |
| | Allowed secured amount \$ | | | Payments end |
| | Priority of lien | | | [Balloon payment] |
| | Principal owed | | | Interest rate % |
| | Pre-pet. arrearage | | | Treatment of lien |
| | Total claim \$ | | | [Additional payment required to cure defaults] \$ |
| | Secured claim of: | <input type="checkbox"/> Yes | <input type="checkbox"/> Impaired | [Monthly] payment \$ |

| | | | |
|------------------------|-----------------------------|-------------------------------------|--|
| Name | <input type="checkbox"/> No | <input type="checkbox"/> Unimpaired | Payment begin |
| Collateral description | | | Payments end |
| Allowed secured amount | \$ | | [Balloon payment] |
| Priority of lien | | | Interest rate |
| Principal owed | | | % |
| Pre-pet. arrearage | | | Treatment of lien |
| Total claim | \$ | | [Additional payment required to cure defaults] |
| | | | \$ |

2. Classes of priority unsecured claims

The Code requires that, with respect to a class of claims of a kind referred to in §§ 507(a)(1), (4), (5), (6), and (7), each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim, unless a particular claimant agrees to a different treatment or the class agrees to deferred cash payments.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (7) of the Code and their proposed treatment under the Plan:

| Class # | Description | Impairment? | Treatment |
|---------|---|--|-----------|
| | Priority unsecured claim pursuant to section [insert] | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | |
| | Total amount of claims | | \$ |
| | Priority unsecured claim pursuant to section [insert] | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | |
| | Total amount of claims | | \$ |

3. Classes of general unsecured claims

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of § 1122(b) convenience class if applicable.]

The following chart identifies the Plan’s proposed treatment of classes [] through [], which contain general unsecured claims against the Debtor:

| Class # | Description | Impairment? | Treatment |
|---------|-----------------------------|--|--|
| | [1122(b) Convenience Class] | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"] |
| | General unsecured class | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | [Monthly] payment \$ _____ Payments begin _____ Payments end _____ [Balloon payment] \$ _____ Interest rate from [date] _____ % Estimated percent of claim paid _____ % |

4. Classes of equity interest holders

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (*LLC*), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan’s proposed treatment of the classes of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition Debtor had issued multiple classes of stock.]

| Class # | Description | Impairment? | Treatment |
|---------|-------------------------|--|-----------|
| | Equity interest holders | <input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired | |

D. Means of Implementing the Plan

1. Source of payments

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. Post-confirmation Management

The Post-Confirmation Management of the Debtor (including officers, directors, managing members, and other persons in control), and their compensation, shall be as follows:

| Name | Position | Compensation |
|------|----------|--------------|
| | | |

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor's ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan in Article 6 lists all executory contracts and unexpired leases that the Debtor will assume, and if applicable assign, under the Plan. *Assumption* means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Article 6 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Article 6 or have not previously been assumed, and if applicable assigned, or are not the subject of a pending motion to assume, and if applicable assign, will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is .

Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and equity interest holders concerned with how the plan may affect their tax liability should consult with their own accountants, attorneys, and/or advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum:

- (1) Tax consequences to the Debtor of the Plan;
- (2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. Confirmation Requirements and Procedures

To be confirmable, the Plan must meet the requirements listed in §1129 of the Code. These include the requirements that:

- the Plan must be proposed in good faith;
- if a class of claims is impaired under the Plan, at least one impaired class of claims must accept the Plan, without counting votes of insiders;
- the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and
- the Plan must be feasible.

These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both

- (1) allowed or allowed for voting purposes and
- (2) impaired.

In this case, the Plan Proponent believes that classes are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. What is an allowed claim or an allowed equity interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either

- (1) the Debtor has scheduled the claim on the Debtor’s schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or
- (2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was .

[If applicable – The deadline for filing objections to claims is .

2. What is an impaired claim or impaired equity interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it is in a

class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered *impaired* if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. Who is not entitled to vote

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not “allowed claims” or “allowed equity interests” (as discussed above), unless they have been “allowed” for voting purposes.
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code; and
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan;
- administrative expenses.

Even if you are not entitled to vote on the plan, you have a right to object to the confirmation of the Plan [and to the adequacy of the Disclosure Statement].

4. Who can vote in more than one class

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless:

- (1) all impaired classes have voted to accept the Plan; or
- (2) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and the Plan is eligible to be confirmed by “cram down” of the non-accepting classes, as discussed later in Section B.2.

1. Votes necessary for a class to accept the plan

A class of claims accepts the Plan if both of the following occur:

- (1) the holders of more than $\frac{1}{2}$ of the allowed claims in the class, who vote, cast their votes to accept the Plan, and
- (2) the holders of at least $\frac{2}{3}$ in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least $\frac{2}{3}$ in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. Treatment of non-accepting classes of secured claims, general unsecured claims, and interests

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan upon the request of the Plan proponent if the non-accepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds non-accepting classes is commonly referred to as a *cram down* plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not *discriminate unfairly*, and is *fair and equitable* toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a *cram down* confirmation will affect your claim or equity interest, as

the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as *Exhibit E*.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. Ability to initially fund plan

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as *Exhibit F*.

2. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information. Those projections are listed in *Exhibit G*.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of \$.

The final Plan payment is expected to be paid on .

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

V. Effect of Confirmation of Plan

A. Discharge of Debtor

Check one box.

Discharge if the Debtor is an individual and 11 U.S.C. § 1141(d)(3) is not applicable. Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Discharge if the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.

Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt:

- (i) imposed by the Plan, or
- (ii) to the extent provided in 11 U.S.C. § 1141(d)(6).

No Discharge if § 1141(d)(3) is applicable. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or re-voting on the Plan.

[If the Debtor is not an individual, add the following:

“The Plan Proponent may also seek to modify the Plan at any time after confirmation only if

- (1) the Plan has not been substantially consummated and
- (2) the Court authorizes the proposed modifications after notice and a hearing.]

[If the Debtor is an individual, add the following:

“Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to

- (1) increase or reduce the amount of payments under the Plan on claims of a particular class,
- (2) extend or reduce the time period for such payments, or
- (3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.]

Debtor _____
Name

Case number _____

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. Other Plan Provisions

[Insert other provisions here, as necessary and appropriate.]

[Signature of the Plan Proponent]

[Signature of the Attorney for the Plan Proponent]

Debtor _____
Name

Case number _____

Exhibits

Exhibit A: Copy of Proposed Plan of Reorganization

Debtor _____
Name

Case number _____

Exhibit B: Identity and Value of Material Assets of Debtor

Debtor _____
Name

Case number _____

Exhibit C: Prepetition Financial Statements
(to be taken from those filed with the court)

Debtor _____
Name

Case number _____

**Exhibit D: [Most Recently Filed Postpetition Operating Report]
[Summary of Postpetition Operating Reports]**

Exhibit E: Liquidation Analysis

Plan Proponent's Estimated Liquidation Value of Assets

| Assets | | |
|---|---|-----------------------|
| a. Cash on hand | | \$ |
| b. Accounts receivable | | \$ |
| c. Inventory | | \$ |
| d. Office furniture and equipment | | \$ |
| e. Machinery and equipment | | \$ |
| f. Automobiles | | \$ |
| g. Building and land | | \$ |
| h. Customer list | | \$ |
| i. Investment property (such as stocks, bonds or other financial assets) | | \$ |
| j. Lawsuits or other claims against third-parties | | \$ |
| K Other intangibles (such as avoiding powers actions) | | \$ |
| Total Assets at Liquidation Value | | \$ |
| Less: Secured creditors' recoveries | - | \$ |
| Less: Chapter 7 trustee fees and expenses | - | \$ |
| Less: Chapter 11 administrative expenses | - | \$ |
| Less: Priority claims, excluding administrative expense claims | - | \$ |
| [Less: Debtor's claimed exemptions] | - | \$ |
| (1) Balance for unsecured claims | | \$ |
| (2) Total dollar amount of unsecured claims | | \$ |
| Percentage of claims which unsecured creditors would receive or retain in a chapter 7 liquidation: | | % |
| Percentage of claims which unsecured creditors will receive or retain under the Plan: | | % [Divide (1) by (2)] |

Exhibit F: Cash on hand on the effective date of the Plan

| | |
|---|------|
| Cash on hand on effective date of plan | \$ |
| Less: Amount of administrative expenses payable on effective date of the Plan | - \$ |
| Less: Amount of statutory costs and charges | - \$ |
| Less: Amount of cure payments for executory contracts | - \$ |
| Less: Other Plan payments due on effective date of the Plan | - \$ |
| Balance after paying these amounts | \$ |

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:

| | |
|--|----|
| Cash in Debtor's bank account now | \$ |
| Net earnings between now and effective date of the Plan [State the basis for such projections] | \$ |
| Borrowing [Separately state terms of repayment] | \$ |
| Capital contributions | \$ |
| Other | \$ |
| Total (This number should match "cash on hand" figure noted above) | \$ |

Debtor _____
Name

Case number _____

Exhibit G: Projections of Cash Flow for Post-Confirmation Period

Committee Note

Official Form 425B, *Disclosure Statement for Small Business Under Chapter 11*, replaces Official Form 25B, *Disclosure Statement in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. Where possible, the form parallels how businesses commonly keep their financial records. It is intended to provide an illustrative format for disclosure, rather than a specific prescription for the form's language or content.

Part I, *Introduction*, is revised to clarify that the disclosure statement is being provided for purposes of voting on the plan. The instructions that the recipient discuss the plan and disclosure statement with an attorney are revised to clarify that, if the recipient has an attorney, the recipient is not required to consult with the attorney, but may wish to consult with an attorney regardless of whether it has one.

Part I.B., *Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing*, is revised to provide for the court's entry of a separate order setting time frames for hearings and deadlines, *see* Official Form 313, and to delete those dates from the form as redundant. Also, this part is revised to clarify that requests for additional information about the voting procedure, in addition to the plan, should be directed to the plan proponent's representative.

In Part I.C., *Disclaimer*, the instruction to provide the date by which an objection to final approval of the disclosure statement must be filed is eliminated as duplicative of the court's order required under Part I.B. Repetitive language indicating that the court's approval of the disclosure statement is not final is eliminated.

In Part II.C., *Management of the Debtor During the Bankruptcy*, the title is revised to eliminate the reference to the debtor's management before the bankruptcy, and the instruction is revised to limit the required disclosure to those current officers,

directors, managing members, and other persons in control who will not retain a position after confirmation. The instruction to provide information regarding the debtor's pre-petition management is deleted because similar information is required in the *Statement of Financial Affairs of Non-Individuals Filing for Bankruptcy*, Official Form 207. The instruction to provide information regarding the debtor's post-confirmation management is incorporated in Part III.D.2, *Post-confirmation Management*, of the form.

In Part III.B.1, *Administrative expenses, involuntary gap claims, and quarterly and Court fees*, the title and form are revised to clarify that the debtor must provide for the treatment of all fees and expenses owed under 28 U.S.C. § 1930, including quarterly fees and court fees. *See* 11 U.S.C. § 1129(a)(12). Also, the title and form are revised to include involuntary "gap" period claims in an involuntary case under section 502(f) of the Bankruptcy Code. *See* 11 U.S.C. §§ 507(a)(3), 1129(a)(9)(A). The reference to the provision governing the allowance of administrative expenses is corrected and changed from section 507(a) to 503(b) of the Bankruptcy Code. The example is revised to include compensation for services and reimbursement of expenses awarded by the court under section 330(a) of the Bankruptcy Code. The requirement that any agreement to pay professional fees and expenses and other unclassified administrative expenses on a date other than the effective date be in writing is deleted. *See* 11 U.S.C. § 1129(a)(9). The list is revised to include a single category of administrative expenses allowed under section 503(b) of the Bankruptcy Code, deleting as redundant the specific categories for reclamation claims under section 503(b)(9) and approved professional fees and expenses under section 503(b)(2), and to clarify that any holder of an allowed administrative expense claim may agree to payment other than in full on the effective date. *Id.*

Part III.B.2, *Priority tax claims*, is revised to include a reference to section 511 of the Bankruptcy Code governing the rate of interest on tax claims.

Part III.C.2, *Classes of priority unsecured claims*, is revised to comply with section 1129(a)(9)(B), including the addition that any particular claimant may agree to treatment other than cash

payment in full on the effective date and to clarify that any class may agree to deferred cash payments. *See* 11 U.S.C. § 1129(a)(9)(B).

Part III.D.2, *Post-confirmation Management*, is revised to comply with section 1129(a)(5) of the Bankruptcy Code.

Part III.F., *Executory Contracts and Unexpired Leases*, is revised to incorporate changes to Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*. “Exhibit 5.1” is changed to “Article 6” of the plan. References to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable, including the requirement that a party objecting to the assignment of an executory contract or unexpired lease under the plan must timely file and serve an objection to the plan. The form is revised to clarify that executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Part IV, *Confirmation Requirements and Procedures*, the introduction is revised to delete references to subsections (a) and (b) to clarify that a plan must satisfy all of the requirements of section 1129 of the Bankruptcy Code. Also, the form is revised to clarify that the requirement to obtain the acceptance of at least one impaired accepting class of claims, excluding any acceptance by an insider, applies only if the plan proposes to impair at least one class of claims. *See* 11 U.S.C. § 1129(a)(10).

In Part IV.B.1, *Votes necessary for a class to accept the plan*, the standards for confirmation in the event the plan has impaired classes have been corrected. *See* 11 U.S.C. § 1129(a)(8)(A), (10) and (b).

The title to Part IV.B.2, *Treatment of non-accepting classes of secured claims, general unsecured claims, and interests*, is revised for clarity to exclude priority claimants. *See* 11 U.S.C. § 1129(b). Also, the requirement that the proponent must request

confirmation pursuant to section 1129(b) of the Bankruptcy Code is added.

In Part IV.D.2, *Ability to make future plan payments and operate without further reorganization*, the requirement that the plan proponent show that the business will have sufficient cash flow to operate the business, in addition to making the required plan payments, is new. See 11 U.S.C. § 1129(a)(11).

In Part V.A., *Discharge of Debtor*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

In the title to Exhibit G, *Projections of Cash Flow for Post-Confirmation Period*, the reference to “and Earnings” is deleted to ensure consistency given the disparate ways in which “earnings” can be interpreted.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Check if this is an amended filing

Official Form 425C

Monthly Operating Report for Small Business Under Chapter 11

12/17

Month: _____ Date report filed: _____
MM / DD / YYYY

Line of business: _____ NAISC code: _____

In accordance with title 28, section 1746, of the United States Code, I declare under penalty of perjury that I have examined the following small business monthly operating report and the accompanying attachments and, to the best of my knowledge, these documents are true, correct, and complete.

Responsible party: _____

Original signature of responsible party _____

Printed name of responsible party _____

1. Questionnaire

Answer all questions on behalf of the debtor for the period covered by this report, unless otherwise indicated.

| | Yes | No | N/A |
|--|--------------------------|--------------------------|--------------------------|
| If you answer No to any of the questions in lines 1-9, attach an explanation and label it Exhibit A. | | | |
| 1. Did the business operate during the entire reporting period? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Do you plan to continue to operate the business next month? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Have you paid all of your bills on time? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Did you pay your employees on time? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Have you deposited all the receipts for your business into debtor in possession (DIP) accounts? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Have you timely filed your tax returns and paid all of your taxes? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. Have you timely filed all other required government filings? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. Are you current on your quarterly fee payments to the U.S. Trustee or Bankruptcy Administrator? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Have you timely paid all of your insurance premiums? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| If you answer Yes to any of the questions in lines 10-18, attach an explanation and label it Exhibit B. | | | |
| 10. Do you have any bank accounts open other than the DIP accounts? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. Have you sold any assets other than inventory? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. Have you sold or transferred any assets or provided services to anyone related to the DIP in any way? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. Did any insurance company cancel your policy? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. Did you have any unusual or significant unanticipated expenses? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. Have you borrowed money from anyone or has anyone made any payments on your behalf? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 16. Has anyone made an investment in your business? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

17. Have you paid any bills you owed before you filed bankruptcy?
18. Have you allowed any checks to clear the bank that were issued before you filed bankruptcy?

2. Summary of Cash Activity for All Accounts

19. Total opening balance of all accounts

This amount must equal what you reported as the cash on hand at the end of the month in the previous month. If this is your first report, report the total cash on hand as of the date of the filing of this case.

\$ _____

20. Total cash receipts

Attach a listing of all cash received for the month and label it *Exhibit C*. Include all cash received even if you have not deposited it at the bank, collections on receivables, credit card deposits, cash received from other parties, or loans, gifts, or payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit C*.

Report the total from *Exhibit C* here.

\$ _____

21. Total cash disbursements

Attach a listing of all payments you made in the month and label it *Exhibit D*. List the date paid, payee, purpose, and amount. Include all cash payments, debit card transactions, checks issued even if they have not cleared the bank, outstanding checks issued before the bankruptcy was filed that were allowed to clear this month, and payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit D*.

Report the total from *Exhibit D* here.

- \$ _____

22. Net cash flow

Subtract line 21 from line 20 and report the result here.
This amount may be different from what you may have calculated as *net profit*.

+ \$ _____

23. Cash on hand at the end of the month

Add line 22 + line 19. Report the result here.

Report this figure as the *cash on hand at the beginning of the month* on your next operating report.

= \$ _____

This amount may not match your bank account balance because you may have outstanding checks that have not cleared the bank or deposits in transit.

3. Unpaid Bills

Attach a list of all debts (including taxes) which you have incurred since the date you filed bankruptcy but have not paid. Label it *Exhibit E*. Include the date the debt was incurred, who is owed the money, the purpose of the debt, and when the debt is due. Report the total from *Exhibit E* here.

24. Total payables

(*Exhibit E*)

\$ _____

4. Money Owed to You

Attach a list of all amounts owed to you by your customers for work you have done or merchandise you have sold. Include amounts owed to you both before, and after you filed bankruptcy. Label it *Exhibit F*. Identify who owes you money, how much is owed, and when payment is due. Report the total from *Exhibit F* here.

25. **Total receivables** \$ _____
(*Exhibit F*)

5. Employees

26. What was the number of employees when the case was filed? _____
27. What is the number of employees as of the date of this monthly report? _____

6. Professional Fees

28. How much have you paid this month in professional fees related to this bankruptcy case? \$ _____
29. How much have you paid in professional fees related to this bankruptcy case since the case was filed? \$ _____
30. How much have you paid this month in other professional fees? \$ _____
31. How much have you paid in total other professional fees since filing the case? \$ _____

7. Projections

Compare your actual cash receipts and disbursements to what you projected in the previous month. Projected figures in the first month should match those provided at the initial debtor interview, if any.

| | <u>Column A</u> | - | <u>Column B</u> | = | <u>Column C</u> |
|--|--|---|----------------------------------|---|----------------------------------|
| | Projected | | Actual | | Difference |
| | Copy lines 35-37 from the previous month's report. | | Copy lines 21-23 of this report. | | Subtract Column B from Column A. |
| 32. Cash receipts | \$ _____ | - | \$ _____ | = | \$ _____ |
| 33. Cash disbursements | \$ _____ | - | \$ _____ | = | \$ _____ |
| 34. Net cash flow | \$ _____ | - | \$ _____ | = | \$ _____ |
| 35. Total projected cash receipts for the next month: | | | | | \$ _____ |
| 36. Total projected cash disbursements for the next month: | | | | | - \$ _____ |
| 37. Total projected net cash flow for the next month: | | | | | = \$ _____ |

8. Additional Information

If available, check the box to the left and attach copies of the following documents.

- 38. Bank statements for each open account (redact all but the last 4 digits of account numbers).
- 39. Bank reconciliation reports for each account.
- 40. Financial reports such as an income statement (profit & loss) and/or balance sheet.
- 41. Budget, projection, or forecast reports.
- 42. Project, job costing, or work-in-progress reports.

Committee Note

Official Form 425C, *Monthly Operating Report for Small Business Under Chapter 11*, replaces Official Form 25C, *Small Business Monthly Operating Report*. It is revised as part of the Forms Modernization Project, which was designed so that persons completing the forms would do so accurately and completely. To facilitate this, Official Form 425C is renumbered and includes formatting and stylistic changes throughout the form. The form requires basic financial information that the Internal Revenue Service recommends that businesses maintain.

The form is revised to add a checkbox to indicate if the report is an amended filing. It also clarifies that persons completing the form on behalf of the debtor should answer all questions for the period covered by the report, unless otherwise indicated. All instructions indicating that the U.S. Trustee may waive the attachments to the form are eliminated.

The form is reorganized. The previous sections for *Tax and Banking Information* are eliminated as redundant of information requested elsewhere within the form. The previous sections for *Income, Summary of Cash on Hand, Expenses, and Cash Profit* are revised and incorporated into Section 2, *Summary of Cash Activity for All Accounts*.

In Part 1, *Questionnaire*, a third checkbox column option, “N/A,” has been added to indicate if the question is not applicable. New exhibits to be attached provide explanations for any negative responses to questions 1 through 9 (Exhibit A) and any affirmative answers to questions 10 through 18 (Exhibit B). The questions are reorganized and renumbered, and several are revised. Question 1 is revised to ask whether the business operated during the period. Question 8, regarding the payment of quarterly fees under 28 U.S.C. § 1930(a)(6), is revised to include payments to the bankruptcy administrator. Question 15 is expanded to include payments made on the debtor’s behalf. The question whether the debtor has paid anything to an attorney or other professionals is eliminated, as redundant of information disclosed in Part 6. A new

question 17 is added inquiring whether the debtor has allowed any checks to clear the bank that were issued before the bankruptcy case.

Part 2, *Summary of Cash Activity for All Accounts*, clarifies and simplifies the reporting of the debtor's cash on hand during the period, and the letters of the attached exhibits are revised. References to "income," "expenses," and "cash profit" are eliminated. Line 19 clarifies that the cash on hand at the beginning of the month is the same as the cash on hand reported at the end of the previous month (or the commencement of the case if no prior report has been submitted). Net cash flow during the month, calculated in line 22, is equal to total cash receipts in line 20 (as itemized in Exhibit C) less total cash disbursements in line 21 (as itemized in Exhibit D). Net cash flow is added to the beginning balance to calculate the cash on hand at the end of the month in line 23. The form is revised to add explanations of the receipts and disbursements to be included in Exhibits C and D, as well as an instruction to clarify that bank statements should not be submitted in lieu of the exhibits.

In Part 3, *Unpaid Bills*, the exhibit letter is revised to *Exhibit E*.

In Part 4, *Money Owed to You*, the exhibit letter is revised to *Exhibit F*.

In Part 6, *Professional Fees*, the subheadings "*Bankruptcy Related*" and "*Non-Bankruptcy Related*" are eliminated.

Part 7, *Projections*, is revised to compare the debtor's actual cash receipts, cash disbursements, and net cash flow for the month to the projections in the previous month's report (or if the case is new, that the debtor reported at the initial debtor interview). See 11 U.S.C. § 308(b)(2) and (3). References to "income," "expenses," "cash profit," and the 180 day look-back period are eliminated.

Part 8, *Additional Information*, is revised to clarify which documents should be attached, if available and regardless of whether the debtor prepares them internally. These documents are:

Official Form 425C (Committee Note)

(1) redacted bank statements for each open account; (2) bank reconciliation reports for each account; (3) financial reports such as an income statement (profit & loss) or balance sheet; (4) budget, projection, or forecast reports; and (5) project, job casting, or work-in-progress reports.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Official Form 426

**Periodic Report Regarding Value, Operations, and Profitability of Entities
in Which the Debtor's Estate Holds a Substantial or Controlling Interest**

12/17

This is the *Periodic Report* as of [] on the value, operations, and profitability of those entities in which a Debtor holds, or two or more Debtors collectively hold, a substantial or controlling interest (a "Controlled Non-Debtor Entity"), as required by Bankruptcy Rule 2015.3. For purposes of this form, "Debtor" shall include the estate of such Debtor.

[Name of Debtor] holds a substantial or controlling interest in the following entities:

| Name of Controlled Non-Debtor Entity | Interest of the Debtor | Tab # |
|--------------------------------------|------------------------|-------|
| | | |
| | | |
| | | |

This *Periodic Report* contains separate reports (*Entity Reports*) on the value, operations, and profitability of each Controlled Non-Debtor Entity.

Each *Entity Report* consists of five exhibits.

- *Exhibit A* contains the most recently available: balance sheet, statement of income (*loss*), statement of cash flows, and a statement of changes in shareholders' or partners' equity (*deficit*) for the period covered by the *Entity Report*, along with summarized footnotes.
- *Exhibit B* describes the Controlled Non-Debtor Entity's business operations.
- *Exhibit C* describes claims between the Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity.
- *Exhibit D* describes how federal, state or local taxes, and any tax attributes, refunds, or other benefits, have been allocated between or among the Controlled Non-Debtor Entity and any Debtor or any other Controlled Non-Debtor Entity and includes a copy of each tax sharing or tax allocation agreement to which the Controlled Non-Debtor Entity is a party with any other Controlled Non-Debtor Entity.
- *Exhibit E* describes any payment, by the Controlled Non-Debtor Entity, of any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor, or the incurrence of any obligation to make such payments, together with the reason for the entity's payment thereof or incurrence of any obligation with respect thereto.

This *Periodic Report* must be signed by a representative of the trustee or debtor in possession.

Debtor _____
Name

Case number _____

The undersigned, having reviewed the *Entity Reports* for each Controlled Non-Debtor Entity, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that to the best of his or her knowledge, (i) this *Periodic Report* and the attached *Entity Reports* are complete, accurate and truthful to the best of his or her knowledge, and (ii) the Debtor did not cause the creation of any entity with actual deliberate intent to evade the requirements of Bankruptcy Rule 2015.3

For non-individual Debtors:

X

Signature of Authorized Individual

Printed name of Authorized Individual

Date _____
MM / DD / YYYY

For individual Debtors:

X

Signature of Debtor 1

Printed name of Debtor 1

Date _____
MM / DD / YYYY

X

Signature of Debtor 2

Printed name of Debtor 2

Date _____
MM / DD / YYYY

Debtor _____
Name

Case number _____

Exhibit A: Financial Statements for [Name of Controlled Non-Debtor Entity]

Debtor _____
Name

Case number _____

Exhibit A-1: Balance Sheet for [Name of Controlled Non-Debtor Entity] as of [date]

[Provide a balance sheet dated as of the end of the most recent 3-month period of the current fiscal year and as of the end of the preceding fiscal year.

Describe the source of this information.]

Exhibit A-2: Statement of Income (*Loss*) for [Name of Controlled Non-Debtor Entity] for period ending [date]

[Provide a statement of income (*loss*) for the following periods:

(i) For the initial report:

- a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and
- b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Debtor _____
Name

Case number _____

Exhibit A-3: Statement of Cash Flows for [Name of Controlled Non-Debtor Entity] for period ending [date]

[Provide a statement of changes in cash position for the following periods:

(i) For the initial report:

- a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and
- b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

**Exhibit A-4: Statement of Changes in Shareholders'/Partners' Equity (*Deficit*) for [Name of Controlled Non-Debtor Entity]
for period ending [date]**

[Provide a statement of changes in shareholders'/partners equity (*deficit*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Debtor _____
Name

Case number _____

Exhibit B: Description of Operations for [Name of Controlled Non-Debtor Entity]

[Describe the nature and extent of the Debtor's interest in the Controlled Non-Debtor Entity.

Describe the business conducted and intended to be conducted by the Controlled Non-Debtor Entity, focusing on the entity's dominant business segments.

Describe the source of this information.]

Debtor _____
Name

Case number _____

Exhibit C: Description of Intercompany Claims

[List and describe the Controlled Non-Debtor Entity's claims against any other Controlled Non-Debtor Entity, together with the basis for such claims and whether each claim is contingent, unliquidated or disputed.

Describe the source of this information.]

Debtor _____
Name

Case number _____

Exhibit D: Allocation of Tax Liabilities and Assets

[Describe how income, losses, tax payments, tax refunds or other tax attributes relating to federal, state or local taxes have been allocated between or among the Controlled Non-Debtor Entity and one or more other Controlled Non-Debtor Entities.

Include a copy of each tax sharing or tax allocation agreement to which the entity is a party with any other Controlled Non-Debtor Entity.

Describe the source of this information.]

Debtor _____
Name

Case number _____

Exhibit E: Description of Controlled Non-Debtor Entity's payments of Administrative Expenses or Professional Fees otherwise payable by a Debtor

[Describe any payment made, or obligations incurred (or claims purchased), by the Controlled Non-Debtor Entity in connection with any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor.

Describe the source of this information.]

COMMITTEE NOTE

Official Form 426, *Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*, is revised and renumbered as part of the Forms Modernization Project. It implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

In addition to formatting revisions, certain aspects of Official Form 426 are changed to make the form easier for the debtor to complete and to better identify the kinds of information that a debtor must disclose in accordance with section 419 of BAPCPA and Rule 2015.3.

Official Form 426 limits its application to entities in which the debtor has a substantial or controlling interest, which the rule defines as a “Controlled Non-Debtor Entity.” The scope of this defined term is guided by subdivisions (a) and (c) of Rule 2015.3.

Official Form 426 eliminates the requirement to file a valuation of the Controlled Non-Debtor Entity. Exhibit A to Official Form 426 requires only periodic filings of the Controlled Non-Debtor Entity’s most recently available balance sheet, statement of income (*loss*), statement of cash flows, and statement of changes in shareholders’ or partners’ equity (*deficit*), together with summarized footnotes for such financial statements. If any of these financial statements are not available, the debtor can seek relief under Rule 2015.3(d).

Exhibit B to Official Form 426 requires a description of the Controlled Non-Debtor Entity's business, which was required by Exhibit C of former Rule 26.

Exhibits C, D, and E to Official Form 426 are new. Exhibit C requires a description of claims between a Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity. Exhibit D requires disclosure of information relating to the allocation of taxable income, losses, and other attributes among Controlled Non-Debtor Entities. Exhibit E requires disclosure about a Controlled Non-Debtor Entity's payment of claims or administrative expenses that would otherwise have been payable by a debtor.

TAB 7C

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 31, 2016
Denver, Colorado

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Arthur I. Harris
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire
Professor Edward R. Morrison

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and
Procedure (Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee
Officer
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Eugene R. Wedoff
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for
U.S. Trustee
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Michael T. Bates, Lindquist & Venum, LLP, Minneapolis, Minnesota
Edward Boltz, Law Offices of John T. Orcutt, National Association of Consumer
Bankruptcy Attorneys
Michael Delmonico, Ford Motor Credit Company
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia

Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees
Alice Whitten, Wells Fargo

Discussion Agenda

1. Greetings.

Judge Sandra Ikuta opened the meeting by welcoming everyone to Denver. Participants and visitors introduced themselves. Judge Ikuta noted that Consent Agenda Item 3A had been moved from the consent agenda to the discussion agenda and would be addressed after Discussion Agenda Item 6C.

2. Approval of the minutes from the Fall 2015 Meeting.

The minutes were approved with one edit.

3. Oral reports on meetings of other committees:

- (A) January 7, 2016 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

Professor Michelle Harner provided this report to the Committee. For bankruptcy, the proposed rule amendments following the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011) (the *Stern* amendments) were approved. There was a report on private information in court documents based on a study conducted by the Federal Judicial Center (FJC); the study suggested, among other things, that bankruptcy had improved its record of preventing disclosure of private information in documents. Also, there was a discussion regarding coordination of efforts regarding similar rules among the rules committees, and the use of parallel language where possible.

Judge Ikuta stated that the Committee will discuss coordination efforts regarding rule changes at the meeting. Judge Jeffrey Sutton added that the Judicial Conference approved the Committee's requests for retroactive approval of technical form changes.

- (B) November 5, 2015 meeting of the Advisory Committee on Civil Rules.

Judge Arthur Harris reported that there are several amendments under consideration by the Civil Rules Committee that may impact the Committee. Two examples are the amendments to Rule 5 and the class action rules. There are several pilot projects under consideration that may have some impact on bankruptcy. There may be some bankruptcy districts included as part of the pilot projects, although this is yet to be decided.

- (C) December 10-11, 2015 meeting of the Committee on the Administration

of the Bankruptcy System (the Bankruptcy Committee).

Judge Erithe Smith reported on the issues considered by the Bankruptcy Committee that could impact the work of the Committee. The Bankruptcy Committee considered fees related to searches for records held by the National Archives and Records Administration (NARA). The suggested fee for a record search is \$10, with an additional fee for actual document retrieval. The Bankruptcy Committee supports this fee as it allows for a more focused document search and an overall better cost for the consumer.

Cost containment is still being discussed by the Bankruptcy Committee, in particular, the consolidation of bankruptcy courts. The concept is to pair bankruptcy courts for a three-year term as a pilot project for study to determine whether there are enough similarities among the courts to permit them to work together on a more permanent basis. The program will be studied by the FJC.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.
 - (A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Tab 4A: Memo of March 3, 2016 by Professor Gibson.
-Proposed Rule 9037(h).

This suggestion is from the Court Administration and Case Management Committee (CACM), and is an effort to solve a problem with personally identifiable information on court dockets. Judge Harris noted that although there are solutions to this problem, the bigger issue is preventing the information from getting on the dockets in the first place. As noted, the FJC study was presented to the Standing Committee at its January meeting regarding documents with personally identifiable information.

The subcommittee's discussions focused on potentially adding a new subdivision (h) to Rule 9037. It determined, however, that any amendment to the bankruptcy privacy rule should be coordinated with possible amendments to the appellate, civil, and criminal versions of the privacy rule and that it may make sense for the Committee to wait to publish until other rules committees have had a chance to consider possible amendments. Professor Elizabeth Gibson suggested that the Committee hold its recommended amendment at the Committee level until such time that the other rules committees are ready with any amendments, and Judge Sutton agreed with this proposal.

Judge Harris detailed the proposed amendments as set forth in the agenda book. A suggestion was made to remove the "under seal" language because the CM/ECF system automatically restricts these types of motions from the public, making the proposed language redundant. The group discussed this issue, and the language "motion to redact" as a replacement

for “under seal” was accepted as an amendment. A motion was passed to approve the proposed amendment, including the revised language, and to hold the amendment until the issue has been considered by the other rules committees. Professor Gibson advised the Committee about several stylistic suggestions from the reporter for the Civil Rules Committee, and the Committee agreed that the language approved at this meeting is subject to change as the other rules committees move forward in their discussions, and that it will be discussed at the Committee’s fall meeting.

- (B) Suggestion 15-BK-E to amend or eliminate Rule 4003(c), which currently allocates the burden of proof in exemption litigation.

Tab 4 B: Memo of March 4, 2016 by Professor Harner.
-Supplemental Memorandum of February 11, 2016.

Judge Harris introduced Suggestion 15-BK-E, noting that the Committee had discussed this matter on a preliminary basis at its fall 2015 meeting. Professor Harner then explained the structure of Rule 4003(c), which allocates the burden of proof to the objecting party in exemption litigation, and the general issues raised by Suggestion 15-BK-E. The primary issue posed by the suggestion is whether the federal bankruptcy rules or the law governing the rule of decision controls the burden of proof in exemption litigation. Under the Supreme Court’s holding in *Hanna v. Plumer*, 380 U.S. 460 (1965), a federal rule promulgated under the Rules Enabling Act is valid so long as it is within Congress’s Article I power and is within the scope of the Rules Enabling Act. Considering the parameters of the Rules Enabling Act, and because several states characterize the burden of proof as being procedural, Rule 4003(c) meets the Rules Enabling Act test. The basic test for whether a rule is within the scope of the Rules Enabling Act is whether the rule “really regulates procedure.” Because there is a strong argument that Rule 4003(c) does really regulate procedure, the subcommittee concluded that there is no need to amend Rule 4003(c) at this time. Although the recommendation is to take no action, the issue deserves monitoring as more case law develops.

The Committee discussed this suggestion and adopted the subcommittee’s recommendation to take no action at this time, but to continue to monitor the matter.

5. Report by the Subcommittee on Forms.

- (A) Discussion regarding proposed chapter 13 plan form (Official Form 113), and related proposed amendments to certain bankruptcy rules.

Tab 5A: Memo of March 7, 2016 by Professor Gibson.
-Proposed Rules 3015 and 3015.1.

Judge Dow provided a brief history of the Chapter 13 plan project. Following the two rounds of publication, a compromise regarding the plan was reached involving an opt-out procedure for the official plan form. In evaluating and implementing the compromise, the subcommittee gathered informal input from relevant chapter 13 constituencies. The opt-out

proposal would require the use of a national form for chapter 13 plans unless a district promulgated its own form that met the requirements specified in a new rule. At the fall 2015 meeting, the Committee approved proposed Official Form 113 and the related amendments to Rules 2002, 3002, 3007,¹ 3012, 4003, 5009, 7001, and 9009, but agreed to defer submitting those items to the Standing Committee. The deferral was to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication.

The subcommittee considered these issues and reached out to the relevant groups regarding the proposed amendments to Rule 3015 and new Rule 3015.1, as well as the republication issue. Several groups supported publication of the rules implementing the opt-out proposal. Based on its review, the subcommittee recommended that the Committee approve the publication of the amendment to Rule 3015 and new Rule 3015.1. The rules will implement the opt-out proposal. The subcommittee also recommended the approval of a shortened comment period that would permit for an effective date of December 2017 for the chapter 13 plan form and all related rules. Judge Isgur spoke briefly regarding his support (and his knowledge of general support among his colleagues) for this proposal.

A motion was made to approve the recommendation to publish Rules 3015 and 3015.1 on a shortened comment period, starting in July 2016, with one public hearing, and a proposed effective date of December 2017. The motion was approved.

- (B) Report regarding suggestion for Notice of Change of Address Form (Suggestion 15-BK-D) submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of National Association of Chapter 13 Trustees.

Tab 5B: Memo of March 3, 2016 by Professor Harner.
-Appendices A and B.

Professor Harner advised that the subcommittee recommends no action at this time. Based on research completed by Professor Harner and Jim Waldron, there is no indication of need for this rule change. Mr. Waldron surveyed the clerks of court, and Professor Harner examined the issue of unclaimed funds. Although unclaimed funds are an issue for the courts, it is not necessarily something for the Committee to resolve through the rule-making process. Also, many courts have local forms for changes of address, and it wasn't clear that the existence the local forms impacted the unclaimed funds problem. A suggestion was made to refer the issue to the Bankruptcy Committee.

6. Report by the Subcommittee on Business Issues.

- (A) Recommendation regarding proposed amendments to Official Forms 25A, 25B, 25C, and 26 (including renumbering the forms as 425A, 425B, 425C, and 426).

¹ At the fall meeting, the Committee approved the amendments to Rule 3007 subject to further review by the Subcommittee on Business Issues. As discussed at item 6D, the Business Subcommittee recommends the approval of the published version of the amended rule.

Tab 6A: Memo of March 3, 2016 regarding Official Forms 425A, 425B, and 425C by Professor Harner.
Memo of March 3, 2016 regarding Official Form 426 by Professor Harner.
-Proposed Official Forms 425A, 425B, 425C, and 426.

Forms 425A, 425B, and 425C (formerly Forms 25A, 25B, and 25C) are used in small business cases. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) of the Bankruptcy Code. The forms were revised to match the style of the forms modernization project, along with several substantive changes the subcommittee identified several places where Official Forms 425A, 425B, and 425C were inconsistent with the Bankruptcy Code, required additional information to explain fully the debtor's disclosure obligations, or contained duplicative questions. The subcommittee's working group received significant input on Form 425C from the Executive Office of the U.S. Trustee.

Form 426 (formerly Form 26) is used by chapter 11 debtors to disclose certain information regarding entities in which the debtors hold substantial or controlling interests, as mandated by Rule 2015.3. The subcommittee's working group updated the form to match the format used by the forms modernization project, clarified some of the questions, and revised the required exhibits.

The subcommittee recommended that the Committee approve Official Forms 425A, 425B, 425C, and 426 for publication with two minor edits, and a motion to approve the recommendation was passed.

- (B) Suggestion 12-BK-H regarding a new rule allowing a district court to treat a bankruptcy court judgment as proposed findings of fact and conclusions of law.

Tab 6B: Memo of March 4, 2016 with proposed Rule 8018.1 by Professor Gibson.

The subcommittee is proposing a simplified version of the original proposed amendment to Rule 9033, now new Rule 8018.1. The original proposal was considered at the fall 2015 meeting and returned to the subcommittee for further discussion. The rule was changed from an amendment to Rule 9033 to new Rule 8018.1 based on a suggestion at the fall meeting to place the rule within the bankruptcy appellate rules (the Part VIII Rules). The case citation to *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) was retained in the committee note to explain the basis for the rule. The revised amendment is recommended for publication.

An issue was raised as to whether the rule was necessary, given that it repeats the holding in *Arkison*. Several members commented that the rule is helpful. Professor Gibson noted that the citation to *Arkison* is a reminder to future committee members that if the case is overruled,

the rule must be re-visited. An issue was raised whether the rule should also address circuit court bankruptcy appeals as well.

A motion was made to approve the rule as presented for publication and the motion was approved.

- (C) Report on preliminary research on noticing issues in bankruptcy cases.

Tab 6C: Memo of March 4, 2016 by Professor Harner including consideration of Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014 0001-0062 (includes Appendices A, B, and C).
-Appendix D (Memo to reporters and attachment).

Professor Harner completed preliminary research on various noticing issues, and provided a chart of all bankruptcy rule noticing provisions. Unlike other rules, the bankruptcy rules are fairly onerous in terms of noticing responsibilities. Several specific suggestions regarding noticing have been submitted. The subcommittee considered whether to complete a review of all noticing in the bankruptcy rules. The general view was that the burdens and costs often associated with noticing under the current rules may be reduced by the continued use of electronic noticing. The rules committees in general are considering changing electronic noticing as a coordinated effort, and it makes sense to wait to see these changes prior to making any changes to the rules regarding noticing in bankruptcy. The subcommittee will continue to monitor the work of the other committees, and any changes in technology that impact noticing. In addition, the subcommittee indicated that it will review the specific suggestions and comments received to date concerning noticing issues in bankruptcy cases and report back to the full Committee with any specific recommendations.

- (D) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

This issue was moved from the consent agenda to the discussion agenda. The subcommittee recommends approving Rule 3007(a)(2) with subparagraph (b) deleted (as originally proposed prior to the fall 2015 meeting), and to leave any remaining issues with the rule for consideration as part of the noticing project.

A motion was made to approve the recommendation to include the originally published version of Rule 3007(a) as part of the chapter 13 package, and the motion was approved.

- 7. Report by the Subcommittee on Privacy, Public Access, and Appeals.

- (A) Recommendation concerning pending amendments to the Federal Rules of Appellate Procedure and whether to publish similar amendments to the Federal Rules of Bankruptcy Procedure.

Tab 7A: Memo of March 7, 2016 by Professor Gibson.

- Proposed Rules 8002, 8011, 8013, 8015, 8016, 8017, 8022.
- Appendix to Part VIII Rules length limits.
- Proposed Official Form 417A (Notice of Appeal).
- Proposed Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements and Type-Style Requirements).
- Proposed Director's Form 4170 (Inmate Filer's Declaration).

Several amendments were needed to parallel the amended Federal Rules of Appellate Procedure that will likely go into effect in December 2016. When the Committee revised the Part VIII rules, the decision was made to maintain consistency with the Appellate Rules. The proposed amendments to Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022 are necessary to maintain the same language. The proposed amendments include the length limits adopted by the Appellate Rules Committee.

In addition, the subcommittee recommends the publication of amendments to Official Forms 417A and 417C and a new appendix to the Part VIII rules that sets out all of the Part VIII document-length limits. Finally, it proposes a Director's form for an inmate filer's declaration, to be promulgated when the other rule and form amendments go into effect (likely December 2018).

Professor Gibson noted several small edits to the proposed amended rules. Also, the proposed amendments to Rule 8017 are meant to go forward on the same publication schedule as the proposed amended Appellate Rules, however, the Appellate Committee is reconsidering the language of the amendment. The subcommittee's recommendation is to track the Appellate Committee's language when it is finalized. Once the changes are adopted by the Appellate Committee, this Committee can decide whether to adopt the proposed language.

Professor Gibson also explained that two amendments to the Appellate Rules were approved for publication by the Appellate Rules Committee but the subcommittee recommends that the Committee not adopt them. The first is a rule for staying the mandate, which is inapplicable to the Part VIII rules. The second was the timing for reply briefs, and the Part VIII rules already deviate from the Appellate Rules in this respect.

A motion was made to approve the recommendation to publish the Part VIII rules, along with the amended Official Forms, and proposed Director's Form. The motion was approved.

8. Report by the Subcommittee on Technology and Cross Border Insolvency.
 - (A) Status report on proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d).

The Civil Rules Committee will consider amendments to Civil Rule 5(d) at its meeting this spring. Professor Harner noted that the Criminal and Appellate Rules Committees also were considering amendments to their respective companion rules on electronic filing and service. The Committee would continue to monitor developments with respect to these companion rules.

Professor Gibson explained that the Committee previously approved amendments to Rule 5005(a)(2) that would track the current proposed amendments to Civil Rule 5(d). The Committee discussed the potential value to submitting the amendments to Rule 5005(a)(2) to the Standing Committee for publication on the same schedule as that pursued by the Civil Rules Committee for Civil Rule 5(d) and authorized Professor Gibson to do so with any necessary non-substantive conforming changes.

9. Coordination with Other Committees.

Judge Ikuta advised that the topic is on the agenda to promote more coordination and communication between the five advisory committees, as well as the Standing Committee, regarding potential rule amendments. There should be a heavy presumption in favor of parallel language. An example is the current electronic service rule provisions, for which the Criminal Rules Committee is going a different course for specific reasons. Professor Gibson stated that generally, one committee should lead the way on each issue. She noted the amendments regarding redaction as a good example of the need for coordination. Professor Harner created a chart with rule amendment cross-references for bankruptcy. Rebecca Womeldorf commented on the role of the Rules Committee Support Office (RCSO) in terms of coordination. The RCSO could provide alerts when a suggestion or possible rule amendment seems to impact more than one of the advisory committees, including other Judicial Conference committees.

Information Items

10. Future meetings: Fall 2016 in Washington D.C.

The Committee members will consider the list of hub cities for the spring 2017 meetings, and make a decision regarding location.

11. Deferred Recommendations.

The following previously approved recommendations will be included in the report of this meeting and submitted to the Standing Committee at its next meeting:

- Recommendation to publish amendment to line 8 of Official Form 309F. *Approved at fall 2015 Advisory Committee meeting.*

-Recommendation to publish amendments to Rules 8002 (Time for Filing Notice of Appeal), 8006 (Certifying a Direct Appeal to the Court of Appeal), and 8023 (Voluntary Dismissal). *All approved at fall 2015 Advisory Committee meeting.*

The following recommendations for final approval, all approved at the fall 2015 Advisory Committee meeting, will be bundled with the proposed amendments to Rules 3015 and 3015.1 at Discussion Agenda 5 and submitted to the Standing Committee in the future.

-Chapter 13 Plan Form (Official Form 113) and associated Rules 2002, 3002, 3012, 4003,

5009, 7001, and 9009.

12. New business.

There is one new suggestion regarding Form 101, and the matter was referred to the Forms Subcommittee.

13. Adjourn.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. Other than item 3A, none of the matters were moved to the Discussion Agenda. On motion, the items on the Consent Agenda were approved.

1. Subcommittee on Consumer Issues.

- (A) Recommendation of no action regarding Suggestion 14-BK-G to remove Social Security Number from mailed or electronically distributed 341 notices.

Tab Consent 1A: Memo of March 7, 2016 by Professor Gibson.

- (B) Report on comments concerning proposed amendment to Rule 1006(b) (payment of filing fees in installments) and recommendation to approve the amendment.

Tab Consent 1B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1006(b).

2. Subcommittee on Forms.

- (A) Recommendation to approve technical changes to Official Bankruptcy Forms 106E/F, 119, 201, 206 Summary, 206E/F, 309A, 309I, 423, and 424.

Tab Consent 2A: Memo of February 29, 2016 by Ms. Healy and Mr. Myers.

- (B) Recommendation of no action regarding suggestion 15-BK-J (seeking clarification of proposed amendments to Rule 9009).

Tab Consent 2B: Memo of March 2, 2016 by Professor Gibson.

- (C) Recommendation of no action regarding suggestion 16-BK-A concerning NAICS code on Official Form 201.

Tab Consent 2C: Memo of March 2, 2016 by Professor Gibson.

3. Subcommittee on Business Issues.

(A) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

Tab Consent 3A: Memo of March 3, 2016 by Professor Gibson.

(B) Report on comments and recommendation concerning proposed amendment to Rule 1001(scope of rules and forms) and recommendation to approve the amendment.

Consent Tab 3B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1001.

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TAB 8

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Chambers of
WILLIAM JAY RILEY
Chief Judge
United States Court of Appeals
Eighth Circuit



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April 29, 2016

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: William Jay Riley
Judiciary Planning Coordinator

A handwritten signature in blue ink, appearing to read "WR", is written over the name "William Jay Riley" in the "From:" field.

RE: JUDICIARY STRATEGIC PLANNING (**ACTION REQUESTED**)

RESPONSE DUE DATE: Following Summer 2016 Judicial Conference Committee Meetings

Each summer, the Executive Committee is provided with an update on the efforts of Judicial Conference committees to implement the *Strategic Plan for the Federal Judiciary*. To assist me in preparing this update, I am requesting reports on the strategic initiatives that your committees are pursuing. These initiatives are critical elements of the judiciary's strategic planning approach, transforming high-level strategies and goals from the *Strategic Plan* into specific efforts with measurable outcomes. The materials for your summer 2016 meetings will include strategic planning items detailing this request.

Also, thank you again for your suggestions about strategic planning priorities. As indicated in the Memorandum of Action from the Executive Committee's February 11-12 meeting, after considering committee suggestions the Executive Committee added one new goal (Goal 4.1d) and affirmed the four strategies and one goal that had previously been identified as priorities for the next two years:

Priority Strategies and Goals

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Strategy 4.1 Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

- Goal 4.1d** Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. *(new priority)*
- Goal 7.2b** Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Please consider these priority strategies and goals when setting the agendas for future committee meetings and determining which initiatives to pursue. In addition, please consider these priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

Finally, I encourage you to suggest topics for future long-range planning meetings of Judicial Conference committee chairs. Topics under consideration for the September 12 meeting are attached. These topics will also be included in the materials for your summer 2016 meeting.

Thank you for your efforts to implement the *Strategic Plan for the Federal Judiciary*. Please contact me or Brian Lynch at the Administrative Office if you have any questions or suggestions.

Attachment

cc: Executive Committee
Committee Staff

DRAFT AGENDA**LONG-RANGE PLANNING MEETING OF
JUDICIAL CONFERENCE COMMITTEE CHAIRS**

MONDAY, SEPTEMBER 12, 2016

As appropriate, Judicial Conference committee chairs meet in connection with their attendance at Judicial Conference sessions to confer on judiciary-wide trends and discuss long-range planning issues that cut across committee lines.¹ Topics under consideration for the September 12, 2016 meeting are described below. Suggested topics for this meeting and future long-range planning meetings are welcome and encouraged.

POTENTIAL DISCUSSION TOPICS**1. Trends in the Use of Data to Inform Judiciary Policy and Resource Allocation Decisions**

Judicial Conference committees increasingly rely on sophisticated analyses to inform policy and resource allocation recommendations and decisions. In November 2015, AO Director James Duff approved a Data Strategy and Governance Plan that includes goals to clarify data ownership and stewardship responsibilities, integrate data from multiple sources, and standardize analytical tools. A Judiciary Data Working Group was established in April 2016 to advise the AO on the execution of the plan. A description of the plan has been [posted to JNet](#).

Anticipated results include more timely and responsive data and analysis to support Judicial Conference committees; reduced costs associated with data collection, analysis, and management; reduced burdens on AO and judiciary staff in responding to requests for data and analysis from judiciary and external stakeholders; and better-informed policy and resource allocation decisions.

Gary Yakimov, Chief of the AO's Judiciary Data and Analysis Office, will facilitate a discussion of the committee chairs on (a) committee needs for data and analysis; (b) state-of-the art data visualization tools developed for use by the courts to provide a more detailed and dynamic view of their own data; (c) best practices in federal agencies and other organizations; and (d) progress to date in the implementation of the Data Strategy and Governance Plan.

¹[The Judicial Conference and its Committees](#), August 2013, p. 6.

2. Strategic Implications of Trends in Criminal Law and Sentencing

A number of trends in criminal law and sentencing have the potential to significantly affect the volume and nature of work for judges, probation and pretrial services officers, federal public defenders, and panel attorneys, including:

- changes to sentencing guidelines, and the retroactive application of certain guidelines amendments;
- proposed legislation that would reduce some mandatory minimum sentences and allow certain inmates to petition for retroactive reduced sentences;
- litigation following *Johnson v. United States* regarding resentences for those sentenced under the Armed Career Criminal Act;
- continued interest in specialty courts, which often require more time from judges, probation and pretrial services officers, and public defenders; and
- shifts in prosecutorial priorities; including a focus on more serious offenses and changing strategies regarding drug and immigration offenses.

These trends may affect the composition of the population under supervision, altering the proportion of higher- and lower-risk defendants and offenders. Large populations of offenders have become eligible for relief, requiring intensive efforts to effectively represent clients and assess populations that may be eligible for release but still require supervision. In addition, resource allocation mechanisms may not keep pace with workload changes that are likely to vary from district to district.

Committee chairs will discuss the cross-committee strategic implications of these trends, including the impacts on workload, resource allocation mechanisms, staffing formulas, space and security.

3. Strategic Implications of the Federal Judiciary's Long-Range Budget Outlook

For the past three years, the judiciary has received essentially full funding of its appropriations requirements, with Congress treating the judiciary as a top funding priority. Fiscal year 2016 also brought long-awaited funding to the General Services Administration for the construction of courthouses on the judiciary's Courthouse Project Priorities plan, representing the judiciary's highest courthouse construction priorities. The credibility of the judiciary's appropriations requests, including a decade-long cost-containment strategy to limit the growth in judiciary resource requirements, has contributed to the judiciary's relatively favorable treatment by its appropriators.

Despite recent successes, the budget outlook for 2017 and beyond is uncertain. The appropriations subcommittees that consider the judiciary's budget requests continue to operate under spending caps established by the Budget Control Act of 2011. Under these caps, recent judiciary budget increases have been funded in part by reductions to other agencies such as the Internal Revenue Service, a trend that may not continue. The transition to a new Administration and a new Congress could further complicate judiciary funding – if the judiciary's 2017 appropriation is not enacted during the current Congress, there could be a substantial delay in the final approval of an appropriation.

Moreover, while the judiciary continues to pursue cost-containment objectives, the need for major investments in certain areas may place pressure on the judiciary's overall effort to limit the increase in requirements. Among these requirements are long-term needs such as the need for additional judgeships and an increase in hourly rates for panel attorneys, but also requirements that have emerged more recently, including the need for additional resources to protect judiciary systems and information from cyber-attacks, and the need to upgrade physical access control systems in court facilities.

Committee chairs will discuss the strategic implications of the judiciary's long-range budget outlook. The discussion will build on a discussion between the Budget Committee and the chairs of program committees at the July 2016 Budget Committee.

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