

**COMMITTEE ON RULES OF  
PRACTICE AND PROCEDURE**

**Washington, DC  
May 28-29, 2015**



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**JUDICIAL CONFERENCE OF THE UNITED STATES  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
MAY 28-29, 2015**

**AGENDA**

**I. Opening Business**

- A. Welcome and opening remarks by Judge Jeffrey S. Sutton
- B. Report on March 2015 Judicial Conference Session
- C. Report on proposed amendments adopted by the Supreme Court and transmitted to Congress
  - Bankruptcy Rule 1007
  - Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84 and the Appendix of Forms

**II. ACTION: Approving Minutes of the January 2015 Committee Meeting**

**III. Inter-Committee Work on Electronic Filing, Service, and Notice**

- A. **ACTION:** Approving and transmitting “3-Day Rule” Package to the Judicial Conference
  - 1. Appellate Rule 26(c). Computing and Extending Time
  - 2. Bankruptcy Rule 9006(f). Computing and Extending Time; Time for Motion Papers
  - 3. Civil Rule 6(d). Computing and Extending Time; Time for Motion Papers
  - 4. Criminal Rule 45(c). Computing and Extending Time
- B. Discussion of additional possible rules amendments
  - “E-Rules”
  - Criminal Rule 49 and Rules Governing Sections 2254 and 2255 Cases

**IV. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi**

- A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
  - 1. Rule 4. Arrest Warrant or Summons on a Complaint
  - 2. Rule 41. Search and Seizure

- B. Information item
  - Suggestions to amend Criminal Rule 35

**V. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell**

- A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
  - 1. Rule 82. Jurisdiction and Venue Unaffected
  - 2. Rule 4(m). Summons
- B. Discussion items
  - 1. Education efforts regarding the Duke Rules Package
  - 2. Report on the work of the Rule 23 Subcommittee
    - Mini-conference scheduled for September 11, 2015 in Dallas, Texas
  - 3. Report on the work of the Discovery Subcommittee
    - Requester pays issues
  - 4. Report on the work of the Pilot Project Subcommittee
  - 5. Report on the work of the Appellate-Civil Subcommittee

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

- **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
  - 1. Inmate Filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7
  - 2. Tolling Motions: Rule 4(a)(4)
  - 3. Length Limits: Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6
  - 4. Amicus Filings in Connection with Rehearing: Rule 29
  - 5. Rule 26(a)(4)(C): technical amendment without publication to update cross-reference to Rule 13

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

- A. **ACTION:** Approving and transmitting to the Judicial Conference:
  - 1. Matters published in August 2014 for which the Advisory Committee seeks final approval—amendments to Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B



2. Modernized forms previously approved by the Standing Committee for which the Advisory Committee seeks approval of renumbering and/or minor revisions that do not require publication—modernized Official Forms 3A, 3B, 17A, 17B, 17C, 6I, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 112, and the Committee Note to Official Form 107
  3. Forms for which the Advisory Committee seeks approval of renumbering—Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D
- B. **ACTION:** Transmitting to the Judicial Conference the following modernized Official Bankruptcy Forms approved at the Committee’s May 2014 meeting:
- Official Bankruptcy Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106A/B (as revised at Action Item A), 106C, 106D (as revised at Action Item A), 106E/F (as revised at Action Item A), 106G, 106H, 107 (Committee Note as revised at Action Item A), 112 (as revised at Action Item A), 119, 121 318, 423, and 427
- C. **ACTION:** Approving publishing for public comment proposed amendments to Bankruptcy Rule 1006(b)
- D. Information item
- Consideration of compromise proposal regarding proposed Official Form 113, *Chapter 13 Plan Form*, and related amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009

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

- A. **ACTION:** Approving publishing for public comment proposed amendments to:
1. Rule 803(16). Hearsay Exception for Statements in Ancient Documents
  2. Rule 902. Evidence that is Self-Authenticating
- B. Information items
1. Mini-conference planned in conjunction with fall meeting regarding hearsay exceptions for prior statements of testifying witnesses and possible expansion of the residual exception
  2. Possible amendments to the notice provisions in the Evidence Rules
  3. Best practices manual for authenticating electronic evidence

**IX. Report of the Administrative Office**

**X. Next meeting: January 7-8, 2016 in Phoenix, Arizona**

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**Committee on Rules of Practice and Procedure**

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

<b>Members</b>	<b>Position</b>	<b>District/Circuit</b>	<b>Start Date</b>	<b>End Date</b>
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2015
James M. Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Jack Zouhary	D	Ohio (Northern)	2012	2015
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<b>Liaison for the Advisory Committee on Civil Rules</b>	<b>Judge Arthur I. Harris</b> <i>(Bankruptcy)</i>
<b>Liaison for the Advisory Committee on Civil Rules</b>	<b>Judge Neil M. Gorsuch</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Criminal Rules</b>	<b>Judge Amy J. St. Eve</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Evidence Rules</b>	<b>Judge Paul S. Diamond</b> <i>(Civil)</i>
<b>Liaison for the Advisory Committee on Evidence Rules</b>	<b>Judge James C. Dever III</b> <i>(Criminal)</i>
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**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

Meeting of January 8–9, 2015

Phoenix, Arizona

**Draft Minutes**

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**ATTENDANCE**

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair  
Dean C. Colson, Esquire  
Associate Justice Brent E. Dickson  
Roy T. Englert, Jr., Esquire  
Gregory G. Garre, Esquire  
Judge Neil M. Gorsuch  
Judge Susan P. Graber  
Dean David F. Levi  
Judge Patrick J. Schiltz  
Judge Amy J. St. Eve  
Judge Richard C. Wesley  
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

- Advisory Committee on Appellate Rules —
  - Judge Steven M. Colloton, Chair
  - Professor Catherine T. Struve, Reporter (tel)
- Advisory Committee on Bankruptcy Rules —
  - Judge Sandra Segal Ikuta, Chair
  - Professor S. Elizabeth Gibson, Reporter
  - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
  - Judge David G. Campbell, Chair
  - Professor Edward H. Cooper, Reporter
  - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
  - Judge Reena Raggi, Chair
  - Professor Sara Sun Beale, Reporter (tel)
- Advisory Committee on Evidence Rules —
  - Judge William K. Sessions III, Chair
  - Professor Daniel J. Capra, Reporter (tel)
- Subcommittee on CM/ECF
  - Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

- |                                 |  |
|---------------------------------|--|
| Professor Daniel R. Coquillette | Reporter, Standing Committee                           |
| Jonathan C. Rose                | Secretary, Standing Committee; Rules Committee Officer |
| Julie Wilson                    | Attorney, Rules Committee Support Staff (tel)          |
| Scott Myers                     | Attorney, Rules Committee Support Staff (tel)          |
| Bridget M. Healy                | Attorney, Rules Committee Support Staff (tel)          |
| Andrea L. Kuperman              | Chief Counsel to the Rules Committee                   |
| Frances F. Skillman             | Rules Office Paralegal Specialist                      |
| Toni Loftin                     | Rules Office Administrative Specialist                 |
| Michael Shih                    | Law Clerk to Judge Jeffrey S. Sutton                   |

## INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.**

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

### *Informational Items*

#### FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

only if “extraordinary circumstances” exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words “by order” into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the “extraordinary circumstances” rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

#### DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

#### CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares’s presentation.

#### **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Ikuta presented the advisory committee’s report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

*Amendment for Final Approval*

## FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that “These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.”

**The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.**

*Informational Items*

## PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee’s proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors’ use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form’s absence, bankruptcy courts could not easily

discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

#### FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

#### CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

#### **REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE**

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

*Informational Items*

## ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

## ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

## CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

## UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

*Dissolution of the Subcommittee*

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

### **REPORT OF THE ADMINISTRATIVE OFFICE**

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

#### *Informational Items*

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

### **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

#### *Informational Items*

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.



These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

#### SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

#### FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

#### HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

#### FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

*Informational Items*

## CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

## FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

## FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

## FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

### **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

#### *Informational Items*

#### FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

#### RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

## STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

### FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

## CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

## PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

## **PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS**

### *Introduction*

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

### *Judge Wedoff: Improving the Speed of Case Administration*

#### PRESENTATION

Judge Wedoff spoke about the impact of “rocket dockets” on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation’s median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

#### DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

*Judge Scirica: Requiring Initial Disclosure of Unfavorable Material*

## PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a “civil *Brady* regime” would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

## DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona’s local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn’t define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of “employment.” Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.



Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

*Judge Fitzwater: Streamlined Procedure*

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it “elegant on paper but of no practical use.” He also pointed out two potential implementation issues: First, different lawyers define a “small-stakes case” differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining “small stakes” using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

\* \* \*

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

### **NEXT COMMITTEE MEETING**

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton  
Chair

# TAB 2

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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. COLLOTON  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

DAVID G. CAMPBELL  
CIVIL RULES

REENA RAGGI  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

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

**FROM:** Honorable Reena Raggi, Chair  
Advisory Committee on Criminal Rules

**DATE:** May 6, 2015

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

---

## I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Advisory Committee”) met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals. The Draft Minutes are attached. (Tab B).

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

- (1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and
- (2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and
- (3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

In addition, the Advisory Committee has two information items to bring to the attention of the Standing Committee.

## II. ACTION ITEMS

### A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

#### 1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the “new reality”: a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a “growing class of organizations, particularly foreign corporations” that have gained “an undue advantage” over the government relating to the initiation of criminal proceedings.”

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served “within the jurisdiction of the United States.”<sup>1</sup> In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

#### 2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences

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<sup>1</sup> Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made “anywhere else a federal statute authorizes an arrest.”



(forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but
- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service “by any other means that gives notice.” This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization “by other means not prohibited by international agreement, as the court orders.”(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.<sup>2</sup>

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<sup>2</sup> These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by “any other means not prohibited by international agreement, as the court orders.” Although Fed. R. Civ. P. 4(f)(2)(C) precludes service “prohibited by the foreign country’s law,” that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service “permitted by an applicable international agreement,” but does not prohibit service that is not so permitted, as long as service “gives notice.”

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal—which does not require prior judicial approval of the means of service—a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

### 3. Public Comments and Subcommittee Review

#### *a. Public comments*

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

#### *b. The Subcommittee's review and recommendations*

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The

Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

#### 4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

##### *a. Opposition to the proposed amendment*

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been unable to serve process on Pangang under current Rule 4.<sup>3</sup> The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this

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<sup>3</sup> On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage*, justice.gov (Jul. 11, 2014), [www.justice.gov/2,0v/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e](http://www.justice.gov/2,0v/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e). Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd*, 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

#### *b. Suggested revisions*

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

***Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.***

**B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)**

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,<sup>4</sup> but permits out-of-district

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<sup>4</sup> Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

searches in specified circumstances.<sup>5</sup> The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

#### 1. Reasons for the proposed amendment

Rule 41's territorial venue provisions—which generally limit searches to locations within a district—create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote

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<sup>5</sup> Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts—or perhaps all 94 districts—requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

## 2. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically

stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),<sup>6</sup> where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

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<sup>6</sup> 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

- (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
- (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
- (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.



### 3. Public Comments and Subcommittee Review

#### *a. The public comments*

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.

The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

#### *(i) Fourth Amendment concerns*

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

*(ii) Title III*

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

*(iii) Extraterritoriality and international law concerns*

Some comments focused on the possibility that the devices to be searched—whose location was by definition unknown—might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

*(iv) The role of Congress*

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

*(v) Notice concerns*

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

*b. The Subcommittee's review and recommendation*

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

#### 4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

##### *a. Opposition to the proposed amendment*

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to “venue” in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there

is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make *ex parte* determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued *ex parte* and reviewed in back-end litigation.

*b. Proposed revisions*

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

*(i) The caption*

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

*(ii) Notice*

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to “the person whose property was searched or who possessed the information that was seized or copied.” Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both “the person whose property was searched” and whoever “possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee’s proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

***Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.***

**C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)**

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

**1. Reasons for the proposal**

The proposed amendment to Rule 45(c) is a product of the Standing Committee’s CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee’s conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time

computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

## 2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase “Time for Motion Papers” to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action “within a specified time *after service*,” the parallel Civil and Bankruptcy Rules require action “within a specified [or prescribed] time *after being served*.” Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) “(other means consented to).” It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to “(F) (other means consented to except electronic service).”

The Advisory Committee’s CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA’s concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this

issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

### 3. Suggested Revisions

#### *a. Addition to Committee Note.*

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just



before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.”

*b. Change to the Caption*

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words “Time for Motion Papers.” These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

*c. Substituting “being served” for “service”*

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action “within a specified time after *being served*” instead of “time after *service*.” The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

***Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.***

### **III. INFORMATION ITEMS**

#### **A. CM/ECF Proposals Regarding Electronic Filing**

##### **1. Discussion at the spring meeting**

At the time of the Criminal Rules meeting, a proposed amendment to the Civil Rules would have mandated electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments. The proposed Civil amendment was of particular concern to the Advisory Committee on Criminal Rules because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that “Service must be made in the manner provided for a civil action,” and Rule 49(d) states “A paper must be filed in a manner provided for in a civil action.” Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Advisory Committee on Criminal Rules has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 Cases, and these rules also incorporate Civil Rules.

Committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically unless they could show individual good cause not to do so, or the local district had exempted them from the national requirement.

The Committee's Clerk of Court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rule making to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners,

the Advisory Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Advisory Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Advisory Committee that the proposed national rule should not be adopted if it will require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers has already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project should also include the Rules Governing 2254 and 2255 cases, for which the Advisory Committee has responsibility.

## 2. Later events

Following the spring meeting, the reporters and chair shared the Advisory Committee's concerns with their counterparts on other committees, who were very responsive. The Civil Rules Committee received and approved at its spring meeting a revised version of the amendment under consideration that exempts persons not represented by counsel from the requirement to file electronically. The other committees also discussed extensively electronic service and signatures, issues that the Advisory Committee has not yet considered.

The Advisory Committee will benefit from the opportunity to study the provisions now under consideration in by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committee), so that it can determine how best to revise the Criminal Rules. As noted, this will include consideration of new provisions in the Criminal Rules that would replace the current provisions adopting the Civil Rules on filing and service. These issues have been referred to the Advisory Committee's CM/ECF Subcommittee, which will report its views at the Advisory Committee's fall meeting.

The Advisory Committee's goal is to have a proposed amendment that could be published, along with rules from the other committees, in August 2016.

### **B. New Proposal**

The Committee also discussed a suggested amendment to Rules 35 that would bar appeal waivers before sentencing. It declined to proceed further with the proposal.

# TAB 2B

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**ADVISORY COMMITTEE ON CRIMINAL RULES**  
**DRAFT MINUTES**  
**March 16-17, Orlando, Florida**

**I. Attendance and Preliminary Matters**

The Criminal Rules Advisory Committee (“Committee”) met in Orlando, Florida on March 16-17, 2015. The following persons were in attendance:

Judge Reena Raggi, Chair  
Hon. David Bitkower<sup>1</sup>  
Judge James C. Dever  
Judge Gary S. Feinerman  
Mark Filip, Esq.  
Chief Justice David E. Gilbertson  
Professor Orin S. Kerr  
Judge Raymond M. Kethledge  
Judge David M. Lawson  
Judge Timothy R. Rice  
John S. Siffert, Esq.  
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  
James N. Hatten, Clerk of Court Liaison<sup>2</sup>

In addition, the following members participated by telephone:

Carol A. Brook, Esq.  
Judge Morrison C. England, Jr.

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  
Frances F. Skillman, Rules Committee Support Office  
Laural L. Hooper, Federal Judicial Center

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<sup>1</sup> The Department of Justice was also represented throughout the meeting by Jonathan Wroblewski, Director of the Criminal Division’s Office of Policy & Legislation.

<sup>2</sup> Mr. Hatten was present only on March 17.

## **II. CHAIR'S REMARKS AND OPENING BUSINESS**

### **A. Chair's Remarks**

Judge Raggi introduced Rebecca Womeldorf, the new Rules Committee Officer and Secretary to the Committee on Practice and Procedure. She welcomed observers Peter Goldberger of the National Association of Criminal Defense Lawyers and Robert Welsh of the American College of Trial Lawyers. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

### **B. Minutes of November 2014 Meeting**

Judge Raggi reminded Committee members that the minutes, which were included in the Agenda Book, were approved last fall before their inclusion in the Agenda Book for the Standing Committee's January meeting.

## **III. CRIMINAL RULES ACTIONS**

### **A. Proposed Amendment to Rule 41**

Judge Kethledge, chair of the Rule 41 Subcommittee, reported on the history of the proposed amendment, the Subcommittee's review of the responses submitted during the public comment period, and its recommendations.

In September 2013 the Department of Justice came to the Advisory Committee with two problems. The current version of Rule 41 provides (1) no venue to apply for a warrant to search a computer whose physical location is unknown because of anonymizing technology, and (2) only a cumbersome procedure to apply for warrants to search computers that have been damaged by botnets that extend over many districts. Judge Kethledge emphasized these are procedural—not substantive—problems. The Department proposed an amendment to address these procedural problems.

In April 2014, the Advisory Committee significantly revised the Justice Department's original proposal, crafting a narrowly tailored proposed amendment that closely tracked the contours of the two problems that gave rise to it. The Standing Committee approved the publication of the proposed amendment for public comment.

The Rule 41 Subcommittee received and gave careful consideration to the public comments, including more than 40 written comments and three additional memoranda from the Department of Justice. Several hours of public comments were also presented at hearings before the full Advisory Committee in November 2014. The Subcommittee then held three conference calls in which it discussed the testimony, the written comments, the Department's memoranda, and its own concerns about some of the language of the published amendment.

After careful consideration, the Subcommittee unanimously recommended that the Advisory Committee approve several proposed revisions to the amendment as published, and



approve the revised amendment for transmittal to the Standing Committee.

Judge Kethledge summarized the issues raised in the public comments before stating the Subcommittee's specific recommendations for revisions.

In general, the concerns of those opposing the amendment are substantive, not procedural. Commenters argued that searches conducted under the proposed amendment would not satisfy the Fourth Amendment's particularity requirement, or would be conducted in an unreasonably destructive manner, or would violate Title III's restrictions on wiretaps. These are all substantive concerns on which the amendment expressly takes no position. The amendment leaves these issues for the courts to decide on a case-by-case basis, applying the Fourth Amendment to each application for a warrant.

Similarly, arguments that any changes should be left to Congress are unpersuasive. Venue is not substance. It is process, and Congress has authorized the courts "to prescribe general rules of practice and procedure." This amendment would be an exercise of that authority. Judge Kethledge noted that the Department of Justice had acted in conformity with Judicial Conference policy by using the Rules Enabling Act for these procedural issues rather than going to Congress.

The Department came to the Committee with a procedural problem that is impairing its ability to investigate serious computer crimes that are occurring now. Judge Kethledge respectfully submitted that it would be irresponsible for the Advisory Committee not to provide a venue for the government to make a showing to a judicial officer as to the lawfulness of these searches. He then invited other members of the Subcommittee (Judge Dever, Judge Lawson, Judge Rice, Mr. Filip, Professor Kerr, and the representatives of the Department of Justice) to comment.

Subcommittee members noted that the deliberative process had worked well: the proposed amendment had been narrowed to address the problems created by the current rule, and all of the comments had been reviewed and considered with great care. They expressed support for the amendment (with the proposed revisions to be discussed), and agreed that it addresses procedural—not substantive—issues. One member noted that a proposed revision to be discussed later in the meeting, using the term "venue" in the caption, may help to make this clear to the public. Responding to the concern that these matters should be left to Congress, Judge Raggi commented that under the Rules Enabling Act, Congress will necessarily play a significant role: any proposed amendment must be submitted to Congress before it can go into effect.

Professor Beale stated that the proposed amendment also includes provisions describing how notice of remote electronic searches is to be given. This portion of the proposed amendment will be applicable to all remote electronic searches, including those now being made under Rule 41 when the location of the device to be searched is known. The current notice provisions of Rule 41 are not well adapted to searches of this nature, because they refer to leaving a copy of the warrant and a receipt "at the place where the officer took the property." She noted that some of the comments focused on the adequacy of the proposed notice provisions, and that several of the

Subcommittee's proposed revisions of the amendment concerned the notice provisions.

Professor Beale thanked Ms. Healy for her work in the preparation of the agenda book, and noted that members had before them a hard copy replacement for one tab in the section on Rule 41.

Judge Raggi noted that the Subcommittee members and the staff had worked heroically to review the large number of comments received, including many at the very end of the comment period, and to prepare the agenda book under significant time constraints due to the short interval between the end of the comment period and the date for publication of the Agenda Book. Judge Kethledge concurred and also thanked the reporters.

Judge Raggi then invited comments from members not on the Rule 41 Subcommittee, asking members to focus first on the general issues raised by the proposed amendment. She confirmed that the members on the telephone could hear all of the discussion.

One member, acknowledging the care and hard work that had gone into the drafting and revision of the proposed amendment, nonetheless opposed it, raising concerns heard from the defense community as well as those who filed public comments. The member disagreed with the characterization of this as a procedural rule, arguing that it has too many substantive effects to be regarded as merely procedural. In effect, it opens the door to judges making *ex parte* decisions about core privacy concerns, and the defense does not participate until too late in the process, in back-end litigation. This is too great a risk. Authority tends to expand, and it is not possible to predict exactly how this authority will develop. Given the importance of the privacy concerns and the many unknowns, it is preferable for Congress to act first, as it did in Title III. In this member's view, the commenters who opposed did not misunderstand the amendment, because the result will not be narrow. In response to an observation that the defense role would be the same under the amendment as it would be for all other searches, the member expressed the view that the privacy concerns are greater here. For many people, computers are their lives, and these privacy concerns should be considered by Congress.

Another member said he was not hearing the same concerns from the criminal defense bar. He emphasized the public's interest in protections against new ways criminals can use technology to jeopardize the economy, national security, and individual privacy by identity theft, terrorism, corporate espionage, child pornography, and other serious offenses. Defense lawyers agree the government must be able to do its job in protecting society. For example, if a trade secret is lost, it is gone forever. The risk of such criminal activity is clear and present. In this member's view, the commenters who opposed the amendment did not recognize that the government must demonstrate probable cause to obtain a warrant, and they did not recognize the importance of affording the government a venue to show that it is entitled to a warrant to take the necessary actions to respond to these threats. There are risks that individual privacy will be invaded, but the greater risk to privacy comes from burgeoning electronic criminal activity, often shielded by anonymizing software, rather than government search warrants that must satisfy probable cause regardless of venue.

Judge Kethledge stated that it is the Committee's role and responsibility to address new problems when they arise, and this venue concern is a serious new procedural problem. There is a gap in Rule 41 that may prevent the government from obtaining a warrant because there is no way to identify the court that would have venue to consider the warrant application. The Committee should act to remedy this gap, which will allow the case law on the constitutional issues to develop in an orderly process as courts review warrant applications, rather than after the fact following warrantless searches based on exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant, and it would likely conduct a warrantless search under the exigent search doctrine, without prior judicial review.

Judge Raggi agreed that if the New York Stock Exchange were to be hacked by a computer using anonymizing software, it would be preferable to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting an exigent warrantless search. Concerns that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

A member observed that much of the public response is based, incorrectly, on the view that the amendment itself authorizes remote electronic searches. In fact, courts now issue such warrants under the current rules when the government knows the location of the subject computer. The only question addressed by this rule is how to proceed when anonymizing technology prevents the government from learning the computer's location so that it may go to the proper court to seek a warrant. Judge Raggi agreed, but noted that providing venue when anonymizing technology has been used may increase the number of warrant applications, and we cannot know how many such searches there will be, or how frequently they will be used in various kinds of cases.

Judge Kethledge and another member both noted that commenters who opposed the rule offered no alternative solution to the real venue problem the government has presented. A member noted that some opponents stated candidly that they did not want to provide a forum. This may immunize people who use anonymizing technology to commit serious crimes. Given the serious nature of the criminal threats requiring investigation, it would be irresponsible for the Committee to decline to take action to fill the current gap in the venue provisions. Here, as in many other situations, judges reviewing search warrants in any venue will have the duty to apply the substantive law to new situations.

On behalf of the government, Mr. Bitkower addressed the opponents' privacy concerns. He challenged the apparent assumption of many commenters that digital privacy concerns are greater than traditional privacy concerns. To the contrary, he said, cases such as the Supreme Court's decision in *Riley v. California* (2014) have recognized that the privacy rights in technology may be *on a par with* traditional privacy rights in the physical world. In the

government's view we should apply the same rules, as much possible, to technology as to the physical world: the same probable cause rules, the same particularity rules, and as much as possible the same procedural rules. Remote searches are conducted today, and by themselves do not present new issues. What is new is the ease with which someone can conceal his location by anonymizing technology, and the amendment addresses the venue gap created by that reality. The proposed amendment is privacy enhancing, because it provides a venue in which the government can seek advance judicial authorization of a search, just as it would before conducting a search of someone's home. This process allows the courts to apply the basic principles of the Fourth Amendment to new forms of technology, as they have done, for example, with heat sensors and tracking devices. The government's goal here is to secure a warrant, a privacy enhancing process.

Although several commenters argued that the Committee should follow the precedent of Title III and wait for Congress to act, Professor Beale observed that the history of Title III cuts the other way. Title III was enacted *after* the case law on wiretaps developed, just as the case law is doing now with other forms of technology in cases such as *Riley v. California*. In general, Congress has legislated after a sufficient number of cases have been litigated to shed light on the policy issues. In the case of new technology, the courts are grappling with questions of what information is protected by the Fourth Amendment as well as how requirements such as particularity apply in new contexts. The proposed venue provision would permit the same process to operate with remote electronic searches, allowing the courts to rule on the issues of concern to the commenters. Although it is possible that providing venue will increase the number of remote searches, Professor Beale noted that it may instead increase the number of remote searches reviewed by the courts *ex ante* in the warrant application process, rather than only *ex post* following a search yielding information that the government seeks to introduce at trial.

Judge Sutton complimented the Committee on narrowing the proposed amendment and being responsive to the public concerns. He observed that approving venue for warrant applications is not the same as approving remote electronic searches. Rather, it permits more litigation as to search warrants that will shed light on the process and issues. He emphasized that the Rules Enabling Act tells the judiciary to promulgate rules of procedure, not to wait for Congress to act first. Instead, Congress responds to proposed rules.

The member who had stated opposition to the proposed amendment acknowledged that courts must deal with the issues raised by new technology but remained unable to support the amendment, characterizing it as substantive and reiterating there are many unknowns.

Discussion turned to the question what would be known or unknown in the warrant applications covered by the amendment. Mr. Bitkower noted that to obtain any warrant the government must know what crime it is investigating and what it is looking for. In the anonymizing software cases covered by the amendment, the only new unknown is the physical location of the device to be searched. Because Rule 41 currently provides no venue for a warrant application in such cases, if the government deems a situation serious but not "exigent," it must

now either wait or pursue other investigative techniques that may in some cases be more invasive. In botnet cases, he noted, the problem is the large number of computers, not the lack of information.

A member expressed the view that the most significant unknowns would arise in the botnet cases: what information might be sought from thousands or even millions of computers that had been hacked. Moreover, the technology required for different botnets may vary. He also noted that the Committee was being forward thinking in addressing these issues, since there have been relatively few botnet investigations and only one decision holding that a court cannot issue a warrant when anonymizing software has disguised the location of the device to be searched. It was sensible, he concluded, to address both problems with a narrowly tailored “surgical” amendment.

Agreeing that each criminal botnet is unique, Mr. Bitkower explained that one function of warrants under the proposed amendment could be to map a botnet before seeking to shut it down, collecting the IP addresses of the affected computers to determine the botnet’s size and where the computers are located. In previous botnet investigations, the cumbersome requirement of seeking a warrant in each district played a role in determining the government’s strategy, and civil injunctions were used. He also noted that warrant applications under the amendment would vary widely: in some cases they may be quite simple and narrow (as in the case of a single email account when the government has already obtained the password), but in other cases there will be more significant complications and new issues on which courts will have to rule.

Members compared the procedural options under the current rule and the proposed amendment in the investigation of the hacking of a major corporation or institution such as the New York Stock Exchange. If the NYSE were hacked and anonymizing software disguised the location of a device the government had probable cause to search, members speculated that the government would conduct a search under some legal theory. They identified three possible scenarios under the current rule: (1) the government might persuade a court in the Southern District of New York to grant the warrant, and then claim good faith reliance if the warrant were later invalidated for lack of venue; (2) a court in the Southern District might find probable cause but determine it had no authority to issue a warrant, in which case the government might conduct a warrantless search and argue that the failure to obtain a warrant was harmless error because the search was nevertheless supported by probable cause; or (3) the government might search without a warrant under a claim of exigent circumstances. Members expressed the view that these examples showed why it would be preferable to amend Rule 41 to provide venue for warrant applications, so that courts asked to approve such warrants would be able to focus on the constitutional issues presented by remote computer searches. Concerns about the judiciary’s understanding of the technology could be addressed by judicial education.

In response to the question how frequently the government expects to seek warrants under the proposed amendment, Mr. Bitkower noted the use of anonymizing technology by criminals is likely to become much more common. Until recently only sophisticated criminals employed

anonymizing software, but the technology is now more readily available and easier to use. In the case of botnets, in prior cases the government used non-criminal tools, but the lack of efficient venue provisions skewed the government's choices. So that authority might be employed in future cases.

Judge Raggi then called for a vote on the question whether to move forward with the proposed amendment.

***By a vote of 11 to 1, the Committee voted to approve the amendment for transmission to the Standing Committee (subject to further discussion of the minor revisions proposed by the Subcommittee).***

At Judge Kethledge's request, Professor Beale described the revisions proposed by the Subcommittee. The first revision was to substitute "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This proposal responded to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). These commenters mistakenly viewed the amendment as providing substantive authority for such remote electronic searches, which they strongly opposed.

Beale noted that after the final Subcommittee call agreeing to amend the caption, Professor Kimble, the style consultant, first opposed making any change on the ground that no reasonable reader of Rule 41 as a whole could fail to see the many additional requirements. When advised that much of the opposition to the rule was founded on this misunderstanding, Kimble proposed an alternative caption "District from Which a Warrant May Issue." Professor King suggested that Professor Kimble may have believed this language would be clearer to lay readers than the term "venue."

Discussion focused on the need for a change in the caption, and the difference between the alternative captions. Professor Beale reminded the Committee that if there were no substantive difference, but only a question of style, it would ordinarily accept the style consultant's proposed language.

Judge Kethledge stated his strong support for amending the caption and using the Subcommittee's language. The current caption is overbroad and misleading, seeming to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Although Professor Kimble suggested this reading would be unreasonable, Judge Kethledge asserted that the current caption is unclear and is causing serious public opposition. By retaining the reference to "issu[ing]" warrants, Professor Kimble's language may perpetuate the misunderstanding. "Venue" is much clearer.

Members discussed the impact of different words and phrases. Several expressed support for the use of "venue," though another noted that it may not be known to non-lawyers and "venue" for the filing of a criminal case is defined differently than "venue" for the warrant applications under Rule 41(b). Judge Raggi observed that "venue" would be very clear to the

judges applying the rule. A member who agreed with the Subcommittee's recommendation also noted that other references to "authority" in the existing subsections of Rule 41(b) are also unclear; he observed that at some point it might be helpful for the Committee to revise and clarify all of the subsections.

Professor Coquillet commented that the discussion had made it clear that the Committee was grappling with a question of substance, not mere style.

***The Committee voted unanimously to amend the caption of Rule 41(b) to "Venue for a Warrant Application."***

Professor Beale explained that the Subcommittee also recommended two small changes in the notice provisions, Rule 41(f)(1)(C), both of which are intended to make notice of remote electronic searches parallel to the notice provided for physical searches to the extent possible.

The first change adds the requirement that the government serve a "receipt" for any property taken (as well as the warrant authorizing the search). In drafting the published notice provisions, the Committee had inadvertently omitted this requirement. Since this addition would parallel the requirements Rule 41(f)(1)(C) now imposes when the government makes a physical search and provide an additional protection for privacy, the reporters were confident it would not require republication.

The second change rephrased the obligation to provide notice to "the person whose property was searched or who possessed the information that was seized or copied." Again, the Subcommittee's intent was to parallel the requirement for physical searches. The Subcommittee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" and whoever "possessed the information that was seized or copied," since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches. Discussion followed on how the current notice provisions applied to various hypotheticals.

***The Committee voted unanimously to revise the amendment as published to require the government to serve a "receipt" as well as the warrant, and to provide notice to "the person whose property was searched or who possessed the information that was seized or copied."***

Professor Beale then turned to two proposed revisions to the Committee Note. The first addition explained the new caption:

**Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must also be met.

Members emphasized that the first sentence was not inconsistent with their earlier conclusion that the language of the caption presented a substantive, not merely a style issue. The

point made in the Committee Note is that the change in the caption does not alter the meaning of the existing provisions in Rule 41(b). Rather, it clarifies the effect of the amendment, making clear what the amendment does and does not do. The last sentence responds directly to the many public comments misunderstanding the effect of the amendment, stating that there are also constitutional requirements that must be met. A member suggested that the meaning would be clearer if the last sentence were revised to state that the constitutional requirements must “still” be met, and Judge Kethledge accepted this as a friendly amendment.

*The Committee voted unanimously to add the following language to the Committee Note:*

**Subdivision (b).** The revision to the caption is not substantive. Adding the word “venue” makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Finally, Professor Beale asked for approval of the Subcommittee’s proposed addition to the Committee Note regarding notice. The proposed addition explains the changes after publication, and also responds to the many comments that criticized the proposed notice provisions as insufficiently protective because they required only reasonable efforts to provide notice. The addition draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and then provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioners. Members agreed that the citation “See” is appropriate because at present the statute referenced is the only authority for delayed searches (though other provisions might at some point be added).

*The Committee voted unanimously to add the underlined language to the Committee Note:*

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only “if the delay is authorized by statute.” See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

## **B. Proposed Amendment to Rule 4**

Judge Lawson, chair of the Rule 4 Subcommittee, described the public comments on the proposed amendment and the Subcommittee’s recommendation that the amendment be approved as published and transmitted to the Standing Committee. One speaker at the hearings in November 2014 supported the proposed amendment, and there were six written comments. One comment urged that the proposal be withdrawn. The others supported the amendment, though some suggested modifications in the text or committee note. The Subcommittee met by telephone to consider the comments.

Judge Lawson reminded the Committee that the proposed amendment is intended to fill a



gap in the current rules, which provide no means of service on an institutional defendant that has committed a criminal offense in the United States but has no physical presence here.

Judge Lawson explained the Subcommittee's views on various issues raised by the law firm of Quinn Emanuel Urquhart & Sullivan (which represents a foreign corporation that the Justice Department has been unable to serve) in support of its recommendation that the proposed amendment should be withdrawn. First, Quinn argued, by stating that any means which provides actual notice is sufficient, the rule creates a situation in which any institutional defendant that appears to contest service has in effect admitted it has been served. The Subcommittee agreed with the Justice Department's response: the point of the amendment is to provide a means of service that gives notice, and there is no legitimate interest in allowing a procedure in which an institutional defendant can feign lack of notice. If the amendment were adopted, there would be, however, objections an institutional defendant might assert by a special appearance (such as a constitutional attack on Rule 4, an objection to a retroactive application of the amendment, or a claim that an institutional defendant has been dissolved.) And, Judge Lawson said, the Subcommittee also found unpersuasive the Quinn law firm's reliance on the Supreme Court's decision in *Omni Capital Int'l v. Wolff*. The Court simply required that service be made in compliance with the Rules of Civil Procedure. Here, by amending Rule 4 to provide for service, the amendment will allow the government to make service in a manner provided for in the Rules of Criminal Procedure.

The Subcommittee was not persuaded by comments of the Quinn firm and the National Association of Criminal Defense Lawyers (NACDL) expressing concern about the consequences of not honoring a summons, particularly a concern that this would permit trials in absentia. Judge Lawson noted that Rule 43 generally prohibits trial in absentia. Institutional defendants may appear by counsel, but their counsel must be present. NACDL suggested that the amendment or Committee Note be revised to include a reference to Rule 43. Noting the general principle that the Rules are to be read as a whole, the Subcommittee concluded it would not be wise to cross reference here to a single rule. Indeed, doing so might have negative implications when other provisions are not cross referenced. Judge Lawson also noted that trial in absentia was not among the long list of possible remedies that the Department of Justice identified in the August 2013 memorandum (included on pages 79-84 of the Agenda Book), which included criminal contempt, injunctive relief, the appointment of counsel, seizure and forfeiture of assets, as well as a variety of non-judicial sanctions (such as economic and trade sanctions, diplomatic consequences, and debarment from government contracting).

The Subcommittee also declined to adopt suggestions that the amendment be revised to provide an order of preference among the permitted methods of service. This issue, Judge Lawson noted, had been considered by the full committee, which previously determined that a requirement of this nature could generate burdensome litigation. The Subcommittee agreed.

The Subcommittee declined the Federal Magistrate Judges Association's suggestion that the committee note be revised to state that the manner of service must comply with Due Process. Judge Lawson explained the Subcommittee's view that this was unnecessary, since the Constitution must always be honored.

The Quinn law firm argued that the amendment was unwise because it would lead to reciprocal action by foreign governments against U.S. firms. Judge Lawson reminded the

Committee that it had discussed this issue at length before voting to approve the amendment for publication. As explained by the Justice Department's representatives and described in detail in the Department's August 2013 memorandum, federal prosecutors would be required to consult with the Justice Department's Office of International Affairs (which consults with the Department of State) in effecting international service.

Judge Lawson noted a final suggestion by NADCL fell outside the current proposal.

After considering all of the comments, Judge Lawson said, the Subcommittee voted unanimously to recommend that the proposed amendment be approved as published and transmitted to the Standing Committee. He then called on the Subcommittee members, Judge Rice, Mr. Siffert, and Mr. Wroblewski (representing the Department of Justice) for any additional comments.

Mr. Wroblewski thanked Judge Lawson, the Subcommittee members, and the reporters for their efforts, and he noted that the Justice Department's original proposal had been revised and improved. He commented on the reciprocity concerns, noting that federal prosecutors face reciprocity concerns every day in a variety of contexts, such as arrests and witness interviews. The United States Attorneys' Manual provides that whenever a federal prosecutor attempts to do any act outside the United States relating to a criminal investigation or prosecution or takes any other action with foreign policy implications the prosecutor is required to consult with the Office of International Affairs.

Judge Raggi observed that because that the government cannot try a defendant who has not filed a notice of appearance, the amendment might not result in a significant increase in prosecutions if non-U.S. entities don't file a notice of appearance. In such cases, however, if service has been made the government will be able to take a variety of collateral actions. The amendment is not radical. It simply provides a means of service, filling a gap in the rules.

Professor Coquillette recalled occasions when foreign governments raised objections to proposed amendments for the first time very late in the process (even at the point of Congressional consideration). He was happy to hear that the Departments of Justice and State had already consulted about this rule, and he urged the Department of Justice to do whatever it could to encourage counterparts at the State Department to bring to light now any possible objections from other nations. The Department's representatives agreed this was important, noting there had been long discussions between the Departments of State and Justice before the proposal was submitted, and throughout its consideration.

Judge Lawson added one final observation. The Quinn law firm proposed withdrawing the amendment without providing any alternative, which would mean that it would not be possible to make effective service on entities such as the Pangang Group (which the government has been unable to serve under the current rules). He noted that the Quinn law firm represents the Pangang Group, and in effect was seeking to defend it by preventing the initiation of the prosecution. This case, he said, demonstrates the necessity for the amendment. Without it, foreign entities can violate U.S. law with impunity.

Judge Sutton inquired into the breadth of the language in the proposed amendment to Rule 4(a), allowing the court to take “any action authorized by United States law” if an organization defendant fails to appear after service. Should it be limited to actions against the organizational defendant? Judge Raggi explained that not all appropriate responses would be actions against the organizational defendant itself. Notably, in rem sanctions might be available. And Professor Beale noted that United States law would not authorize sanctions that lacked a sufficient connection to the organizational defendant. Judge Sutton indicated he was satisfied that the broad language was appropriate.

*On Judge Lawson’s motion, the Committee voted unanimously to approve the proposed amendment as published and transmit it to the Standing Committee.*

### **C. Proposed amendment to Rule 45**

Judge Lawson, chair of the CM/ECF Subcommittee, presented the Subcommittee’s recommendations regarding the previously published amendment to Rule 45 that would eliminate the three extra days provided after electronic service. The amendment reflects the view that electronic transmission and filing are now commonplace and no longer warrant additional time for action after service. It was published for comment in the fall of 2014. Similar proposals will be considered at the spring meetings of the other Rules Committees.

Judge Raggi noted that with this and other uniform rule changes being considered by all of the Rules Committees, the Criminal Rules Committee ought to consider whether criminal cases require different treatment. For example, in criminal cases there may have to be more play in the procedural joints, both as a matter of fundamental fairness when someone’s liberty is at stake, and to avoid collateral challenges when convictions are obtained.

Judge Lawson discussed the Subcommittee’s review of the comments received on the amendment to Rule 45. He first noted that the Subcommittee had rejected the Federal Magistrate Judges Association’s suggestion either to eliminate all of the parentheticals in the proposed rule or to revise the rule to refer to “(F) (other means consented to except electronic service).” The Subcommittee concluded that the parentheticals were helpful, not confusing, and that the Committee Note clearly states that no extra time is provided after electronic service.

The Subcommittee recommended one change to the Committee Note that was published for comment and two changes to the text.

Judge Lawson first addressed the Subcommittee’s recommended change to the Committee Note, which responded to concerns raised in the public comments. The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers had opposed the proposed amendment’s elimination of the additional three days because of the difficulty it would cause practitioners and their clients. They emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern

about situations in which service after business hours or from a location in a different time zone, or an intervening weekend or holiday, may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

The Subcommittee recommended that in light of these legitimate concerns, the Committee Note to Rule 45(c) be revised to include language addressing this problem drafted by the Department of Justice:

This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

Judge Lawson noted that the Subcommittee thought added language encouraging judges to be flexible when appropriate and to expand those deadlines would allow judges to address matters on the merits. This was consistent with the position the Committee adopted for Rule 12. Liberality is especially important in the criminal context, he explained, because overly rigid application would inevitably result in Section 2255 motions and other collateral attacks. The note language keeps the text of the rule the same among committees but recognizes the particular need for flexibility in this context.

A member opposed to the amendment objected to this “compromise,” arguing that Note language is not the same as leaving the extra three days in the text of the Rule. A client may be incarcerated and cannot be reached, and if the lawyer learns about it late Friday night, but the judge says no once there is a chance to seek an extension on Monday, three or four days to respond is not enough. Another member noted that local rules may have seven day limitations even if there are no seven day limitations in the Criminal Rules.

Professor Coquillette asked the Committee to focus on why the criminal rule should be different, if the other committees are comfortable with the elimination of the three extra days after electronic service. A member explained that the client in a criminal case is often incarcerated, which restricts counsel’s access, and that responses often must be run by the client face to face in order to be accurate. Another member voiced opposition to eliminating the three days in criminal cases for two reasons. First, it is much more difficult to talk to the client before filing a response because of the distance to the location where the client is incarcerated and second, in some places local rules are interpreted liberally and some not.

Judge Raggi emphasized that there is a strong preference for uniform timing rules, so that a departure for the Criminal Rules must be justified.

After a short break, a member previously expressing opposition to the amendment to the text of the Rule withdrew that opposition based on the expectation that the note language would be included.

*The Committee then unanimously approved adding to the Committee Note as published the additional language concerning extensions that had been proposed by the Department of Justice.*

Professor Beale noted that the chair and reporters might need some latitude in moving forward with the new note language, given that each of the other committees will be considering this in the weeks to come and some tweaks might be necessary to achieve uniformity.

Judge Lawson then presented the Subcommittee's two recommendations to modify the text of the published amendment, each based on comments received during the publication period. The Subcommittee did not believe either change required republication.

The first recommended change was to eliminate the added phrase "Time for Motion Papers" from the caption of Rule 45, and keep the caption as it is now. Rule 12 deals extensively with the time for motions and Rule 45 does not.

The second recommendation was to modify the language of Rule 45(c) to parallel the language used in other sets of rules, referring to action "within a specified time after being served" instead of "after service." There was no reason for different phrasing in the Criminal Rule.

*A motion was made to approve the text of the rule as published, with these two changes, and adopted unanimously.*

#### **D. CM/ECF Subcommittee**

Judge Lawson presented the Subcommittee's recommendation regarding a mandatory electronic filing amendment being considered by the Civil Rules Committee (as well as the Appellate and Bankruptcy Committees). He explained that the proposed Civil amendment is of particular concern to the Criminal Rules Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, changes in the Civil Rules regarding service and filing will be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 Cases and 2255 Cases, and these rules also incorporate Civil Rules.

Judge Lawson explained that the Civil Rules Committee is considering a proposal mandating e-filing that does not exempt as a class pro se filers or inmates. Exemption is allowed either by local rule or by a showing of good cause. There are a number of districts that do not permit pro se e-filing except upon motion, and particularly discourage prisoners from e-filing because of the potential for mischief. There are also issues regarding electronic signatures. The question for the Committee is whether criminal cases warrant a different rule than that being considered by the Civil and Appellate Committees.

Professor King added that the issue is on the agenda now so that the Criminal Rules Committee's views on these issues can be conveyed to the other committees which will be considering this in the weeks to come. Also, she noted that the CM/ECF Subcommittee discussed the pro se issue and was unanimous in rejecting for criminal cases any rule that would require either a local rule or a showing of good cause in order to exempt pro se and prisoner filers. The reporters have conveyed our Subcommittee's view to those working on the rules for the other committees but so far they have not been sympathetic. Professor Beale added that the members of the working group for the Civil Committee preferred allowing districts to handle rules for pro se filers on a district-by-district basis.

The Committee's Clerk of Court Liaison, Mr. Hatten, who had been asked to share his views and experience on this issue with the Committee, presented several concerns raised by a rule that did not include an exception for pro se or inmate filers.

Mr. Hatten noted that because the CM/ECF system is a national platform that individual districts cannot modify, problems raised by extending e-filing to pro se filers will become embedded, and allowing courts to opt out will not avoid those structural problems. He noted various districts have been able to extend e-filing at their own pace, adapting to resource constraints and local challenges, and he knows of no court that extends e-filing to prisoners. Among the variations are differences in whether attorney filers may e-file sealed documents and case initiating documents.

As to pro se electronic filing, Mr. Hatten doubted the system was ready for a mandatory rule. We do not know the number of courts that presently allow this, and the extent of their experience. Many courts, perhaps even a majority, do not allow any electronic filing by pro se litigants. We really don't know how this would work because the experience with it has not been evaluated. He reviewed the history of the development of the CM/ECF system, designed for attorney use, and expressed the concern that many courts may find as a matter of policy that e-filing by pro se litigants is inappropriate or that the system is inadequate. A transition to pro se e-filing, he suggested, would not be facilitated by an opt-out rule, but instead would require further study and adequate resources, including staff resources.

Next, Mr. Hatten reviewed a number of potential problems that might arise. First, the current system anticipates a certain level of legal training and knowledge on the part of the person using the system, including knowledge of the rules as to what to file, when, and in what format. Non-lawyer, untrained filers may incorrectly characterize or describe their filings, tasks that are already a challenge for some lawyers. Pro se filers may file the same thing multiple times, fail to attach required documents, or attach the wrong document. This difficulty would be enhanced if the person is not a recurring user. Judges must use these designations, which may not be clear. Lawyers who must respond to the filing also may experience additional burdens. Court staff review docket entries for accuracy, and if there is an error, the staff must make a separate entry to rename the docket entry; they do not change the original filing. Increased errors would require increased staff resources for review and correction of docket entries. His court has had experience with pro se filers inferring some nefarious motive on the part of court staff when a docket entry is changed. This is in addition to the increased resources needed to train pro se filers.

Judge Raggi asked whether electronic filing or paper filing is a more efficient use of clerk's office staff. Mr. Hatten responded that for attorney filers there is a great advantage in electronic filing, but there will not be the same advantages for pro se filers. Pro se filers will be calling staff with normal questions you would expect from someone with less experience about how to file and other aspects of the system. And the quality control will be a very significant burden because pro se litigants will not understand the significance of what they are filing.

Mr. Hatten continued that in contrast to paper documents which can be screened before entry in the system, there is no ability to pre-screen materials before they are e-filed to identify any pornographic, confidential, libelous, or otherwise offensive or objectionable materials. E-filing results in immediate access via the internet to whatever is filed, through PACER or through subscription services such as Lexis or RSS feeds. There is no filter on the PACER system, which anyone can use. There are services that provide to a subscriber instantaneous access to anything filed in a particular case. Once captured and broadcast by these services, documents cannot be re-captured. This could lead to the release of personal data or materials that should not have been filed. Because electronic filings made late Friday are not reviewed by staff until Monday, there is a period of time when the unreviewed information would be available to anyone. Issues created by a pro se filer's use of the system could be addressed by a court after the fact, but any harm through unretrievable dissemination of offensive, confidential, or sealed materials would already have taken place. If the filing was in paper and screened first, the staff would review the document, then scan it, give it an appropriate name, and docket it.

Additionally, Mr. Hatten raised the potential of the "loss of docket integrity" if login and password information is made available to non-lawyers. Once issued a password in CM/ECF, any individual using that login information may access and file in any case in the system, regardless whether that person is a party to the case or whether the case is open or closed. For example they can file in any defendant's case. That login and password could be used by anyone who obtains it. There are no means to verify the identity of the actual individual accessing the system, if someone were to suggest that the login information was used without authorization. Potentially, with login information, someone unconstrained by the rules governing attorneys could maliciously interfere in unrelated cases. Expanded access by non-attorneys could even lead to denial of service attacks on the system, he noted, emphasizing that this was speculation. He did not know if expanding access would raise the risk of the introduction of malware or other viruses into the system, which until now has been very reliable. He noted that courts can block use of a password, but it would be "shutting the door after the cow's left the barn." Any information, such as information about a victim, or sealed materials that someone had filed electronically after obtaining them in paper form, would have already been released.

Judge Raggi asked if this ability to file in any case has been the subject of previous discussion. Mr. Hatten noted that it hadn't been a problem as far as he knew, because all filers were attorneys. Judge Lawson noted that this was one of the main reasons his district restricted CM/ECF access to attorneys.

Mr. Hatten continued that electronic notice of filing requires an individual email account, and it is not known whether pro se filers filing from an institution will be able to receive such notices, because of capacity limits or spam filters. Even in instances with a good lawyer email address, those email accounts are sometimes so full the court gets a bounce back. Sources a pro se party may use for filing, such as a public library, may be unavailable to receive email. The CM/ECF system requires the ability to contact a filer regarding missing information such as address or phone number. If delivery is not available, a paper notice would be required, which would reduce any advantage from e-filing.

Electronic filing, Mr. Hatten observed, may also require that the filer qualify for electronic payment. Those who lack credit cards, such as inmates, may not be able to file case-initiating documents.

Another concern, Mr. Hatten stated, was that the round-the-clock availability of the e-filing system. Past experience with some pro se paper filings suggests that extending e-filing to pro se litigants would significantly increase the volume of prisoner and pro se filings. Courts have experience measuring the filings of vexatious litigants in pounds not pages. Many examples are readily available. He mentioned two in his district: one, using paper filings only, filed 964 appeals in eleven regional circuits and the Federal Circuit and 2637 civil actions nationwide; another, using paper filings only, filed 76 appeals in four circuits, and 33 civil actions in 17 districts.

Perhaps extending e-filing to pro se filers could overcome some of these issues if the system could be modified to allow pro se filings to drop into a box so that court staff could review them before anybody else would see them. That might be better, but it is not possible in the existing system. Moreover, there are no resources available to court staff to implement a program of this potential magnitude, he said.

Mr. Hatten also raised the concern that if the rule changed to require e-filing unless there was a local rule or a showing of good cause, courts may expect demands by pro se and prisoner filers that they are entitled to access CM/ECF. Finally he raised a concern about the language of the proposed change to the Civil Rule referring to the electronic signature.

Judge Raggi asked the Department of Justice to share its views about extending e-filing to pro se and prisoner filers. Mr. Wroblewski stated that it seems clear the CM/ECF system is just not ready to handle all of the types of cases the Department sees, especially the Section 2255 cases. For example, the courts are in the middle of a retroactive guideline change, and in many districts the prisoners have no attorneys, but all are required to file, and although many have access to email, none have access to the internet. And there are tens of thousands of prisoners who are being held by the Marshal's Service, mostly in county jails, not federal facilities, with no computer access. We are just not ready for this, he stated, and are very concerned that we need to provide access to the courts for all of the pro se litigants, including those incarcerated.

On the electronic signature issue, he noted, there had been concern that it might cause problems with prosecuting bankruptcy fraud, but the Department doesn't see a huge problem with the criminal filings, at this point. But they are not ready to jump to a mandatory system.



In response to a question whether the Department thought the proposed rule provides enough flexibility, Mr. Wroblewski stated they will defer to the courts, but just want to make sure that all criminal litigants, including Section 2254 filers, have a way to access to the courts. If courts want to opt out of a new rule, and guarantee access that way, that is fine, but the courts must be open to these litigants.

Judge Raggi noted that the electronic filing proposal is being advanced with great vigor by the other Committees, but no one has indicated what the fallback plan would be should the system fail, either from an attack on the system itself or some other disaster. There is a real need for courts to operate in times of emergency, such as 9-11 or Hurricane Sandy, but there seems to be no fallback plan should the computers fail. District judges no longer maintain their own dockets, but are subject to the dictates of nationwide technology. She urged that in working with other committees, we should keep in mind that the Criminal Rules' unique concern with liberty. She also observed that requiring e-filing may put more distance between those who use the courts and the courts, and that the added resources needed to allow this to work aggravates these concerns. But the fundamental point is that these are criminal litigants in proceedings about liberty. She encouraged members to think about what is the advantage to them or us of having those papers filed electronically as opposed to hard copy.

In response to her request for input from members about whether this could be handled at the local level, one member related that in his district 10% of pro se filings are being filed electronically. As to pro se filers, this member reported, they have not had any problems. If a pro se filer does not want to file in CM/ECF, it is simple to opt out, and 90% of pro se's do opt out and file with paper. They file a form requesting they not have to file electronically and the magistrate routinely grants it. The good cause is usually "I don't have access to the Internet."

His district also has two state prisons, the member continued, and the state department of corrections has a very new limited pilot program allowing prisoners to file electronically in Section 1983 cases, not habeas actions. This is a good thing, he reported, because it has cut down the many, many pages of hard to decipher handwriting. Prisoners use a computer station to file these documents, so they come in typed in a standard format. Prisoners have time allotted to go to that location and file that document. He noted that there were so many prisoner filings, more than half of the docket, and the program was driven by that volume. He reiterated that the program is in "an infant stage," and that it could go sideways.

Another member noted that her district allows pro se filing in civil cases but requires training first, and she thought that a few districts were working on pilot projects allowing persons in custody to make filings. But this member could not imagine how this could possibly be required in habeas cases because state facilities don't give access.

Another member noted that if there is a top-down rule that says e-filing is required but you can opt out, at least 92 districts will opt out. Those who are detained but not yet convicted are in county jails in his district, with no computers. The state doesn't even have electronic filing for lawyers, and his district doesn't allow pro se e-filing, for some of the reasons stated before. There are ways to work toward this gradually, but having a top-down rule that everyone opts out of is not

good process, and reflects badly on the credibility of the rules process.

Professor Coquillette noted that local rules have been a matter of concern for Congress for decades, because they don't have the oversight provided by the Rules Enabling Act. Sometimes, however, there is a national rule that says go out and make local rules. This occurs in two situations: where there are real differences district to district, and where the subject matter is so premature it requires experimentation. Both of those conditions may apply here.

Another member noted that in 90% of situations the mandatory e-filing rule is ill advised and out of touch for people in county jails. His state has a tremendous budget crisis, won't fund providing prisoners with facilities to file electronically, and prisoners would file suits alleging denial of access to the courts. It is a top-down rule to fix a problem that doesn't exist. Already there are functioning local rules, and no need for this massive energy to change a system that seems to be working. This member was not aware of any reason that providing internet access to prisoners would be a priority, or that prisoner filings should be lock step with filings in civil cases.

Professor Beale suggested that we could amend Rule 49 in various ways to accommodate a different rule for criminal cases if the Civil Rules Committee proceeds with the existing draft. However, the Civil Rules Committee might put their proposed rule on hold, and study it more, or decide it is ready to publish something now, but agree to slow down later.

Professor Coquillette stated that the Standing Committee would want to hear what the Criminal Rules Committee thinks is best for criminal cases.

Judge Raggi asked the Subcommittee to meet again before the Standing Committee meets to consider what sections might be amended to deal with these concerns as to Rule 49 and also the 2254 and 2255 Rules to the extent we are responsible for them.

A member added that our goal would be to have our own amendment to Rule 49 take effect before 92 districts had to opt out of a mandate.

Judge Lawson expressed appreciation for Mr. Hatten's contribution. He noted the Subcommittee was comfortable with requiring e-filing for lawyers, and had not addressed prisoner filings in 1983 cases. The Subcommittee opposed a Civil Rules amendment that provided no carve out for pro se or prisoner filers. He agreed with the many concerns discussed, and noted that not all of those who file in criminal cases are parties. Witnesses, law enforcement, and third party owners would not necessarily have CM/ECF access. Most importantly, he argued, the rule implicates constitutional rights that do not arise in civil cases, and requiring pro se prisoner filers to demonstrate good cause before they can access the courts would probably raise constitutional issues. He asked the Committee to convey its preference for an approach that carves out pro se filers from any mandatory rule.

A member noted that he is in favor of that motion, that in his district this is not done, and that a top-down rule is a bad idea if clerks and local committees in almost every district wonder how out of touch this is. On the ground, pro se litigants are not filing through CM/ECF.

Judge Raggi agreed we can make these suggestions to the Civil Rules Committee, and she favored doing so, noting that a litigant who wants to go into every case in a judge's docket could cause a fair amount of trouble. But she also urged that the Criminal Rules Committee should also have an alternative plan in reserve.

A member said our alternative should be to work on delinking our rule from the Civil Rules. Another member noted the Committee may have to recommend amendments to 49(b) and (d), and a third noted that 49(e) may need work as well.

There was discussion about whether the Committee favored retaining current Rule 49(e), to preserve status quo. Judge Lawson thought there may need to be different treatment for those who are incarcerated and those who are not, and said that his initial proposal was not to preserve status quo.

A member stated he was unprepared to vote on specifics. He did not favor going beyond conveying the Committee's concerns to the other Committee at this point. He specifically did not agree with any rule stating pro se or prisoners may have CM/ECF access.

Judge Lawson agreed with Judge Raggi's suggestion that the committee vote on whether to inform the other committees that the Criminal Rules Committee has reservations about requiring mandatory electronic filing for pro se litigants and pro se criminal litigants, because we predict that almost every district would create an exception.

A member agreed that if a Rules Committee gets out in front of what is happening on the ground in 92 of 94 districts, that's a problem. Now Rule 49 allows local rulemaking, and all districts have local rules that are working well. It doesn't make sense to require the local rules committees in all of these districts to reconvene and do something else.

*The resolution of the sense of the Committee was adopted unanimously.*

Judge Raggi stated that she would voice these concerns,<sup>3</sup> and our Subcommittee will continue to look at our own rule.

#### **E. Proposed Amendment to Rule 35 (15-CR-A)**

In a law review article submitted to the Committee in February, Professor Kevin Bennardo urged that Rule 35 be amended to bar appeal waivers before sentencing. Judge Dever, the chair of

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<sup>3</sup> Following the meeting, the reporters and chair conveyed these concerns. The chairs, reporters, and members working on the proposed Civil Rule and parallel changes in the Bankruptcy and Appellate Rules were very responsive to the Advisory Committee's concerns, and a revised version of the proposed Civil Rule excluding persons not represented by counsel was presented to the Advisory Committee on Civil Rules. Representatives of all committees will continue to collaborate as the rules on electronic service, filing, and signature move forward.

the subcommittee that reviewed another recent proposal to amend Rule 35, was asked to comment on Professor Bennardo's proposal.

Judge Dever concluded that the proposal is trying to solve a nonexistent problem by creating a second Rule 11 process that will not save the appellate courts any time. He recommended that the proposal not be referred to a subcommittee and that it not be pursued further. He noted several problems with the assumptions underlying the proposal. First, the circuits uniformly accept waivers of appeal in plea agreements, rejecting one of the article's central premises, namely that there cannot be a knowing waiver of appeal until the sentence is imposed. Second, the article erroneously assumes that judges do not consider the Section 3553(a) factors if there is an appellate waiver. Finally, the proposal is intended to save the appellate courts time, because it assumes that the appeal would be stayed while the government negotiates an appeal waiver after sentencing, after which there would be a new process in the trial court by which the defendant will receive a lower sentence. The article also asserted that this will lead to fewer defendants who breach the appeal waiver by asking their lawyer to file the notice of appeal.

Judge Raggi asked for members to comment. Hearing no comment, she called for a vote on the recommendation not to pursue this further.

*The motion not to pursue the proposal passed unanimously.*

#### **F. Other Business**

Judge Raggi stated that if the Rule 41 changes are adopted, that would be a good time to help the Federal Judicial Center work on a primer on how electronic searches work. She stated that Judge Kethledge, Chair of the Rule 41 Subcommittee, Professor Kerr, the Department of Justice, Mr. Siffert and she would work with the FJC on this project.

Finally, Judge Raggi noted the next meeting of the Committee will be September 28-29 in Seattle, Washington.

The meeting was adjourned.

# TAB 2C

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\***

1   **Rule 4. Arrest Warrant or Summons on a Complaint**

2   **(a) Issuance.** If the complaint or one or more affidavits  
3       filed with the complaint establish probable cause to  
4       believe that an offense has been committed and that  
5       the defendant committed it, the judge must issue an  
6       arrest warrant to an officer authorized to execute it.  
7       At the request of an attorney for the government, the  
8       judge must issue a summons, instead of a warrant, to a  
9       person authorized to serve it. A judge may issue more  
10      than one warrant or summons on the same complaint.  
11     If an individual defendant fails to appear in response  
12     to a summons, a judge may, and upon request of an  
13     attorney for the government must, issue a warrant. If

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

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14 an organizational defendant fails to appear in response  
15 to a summons, a judge may take any action authorized  
16 by United States law.

17 \* \* \* \* \*

18 (c) **Execution or Service, and Return.**

19 (1) **By Whom.** Only a marshal or other authorized  
20 officer may execute a warrant. Any person  
21 authorized to serve a summons in a federal civil  
22 action may serve a summons.

23 (2) **Location.** A warrant may be executed, or a  
24 summons served, within the jurisdiction of the  
25 United States or anywhere else a federal statute  
26 authorizes an arrest. A summons to an  
27 organization under Rule 4(c)(3)(D) may also be  
28 served at a place not within a judicial district of  
29 the United States.



30 (3) *Manner.*

31 (A) A warrant is executed by arresting the  
32 defendant. Upon arrest, an officer  
33 possessing the original or a duplicate  
34 original warrant must show it to the  
35 defendant. If the officer does not possess  
36 the warrant, the officer must inform the  
37 defendant of the warrant's existence and of  
38 the offense charged and, at the defendant's  
39 request, must show the original or a  
40 duplicate original warrant to the defendant  
41 as soon as possible.

42 (B) A summons is served on an individual  
43 defendant:

44 (i) by delivering a copy to the defendant  
45 personally; or

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46 (ii) by leaving a copy at the defendant's  
47 residence or usual place of abode with  
48 a person of suitable age and discretion  
49 residing at that location and by  
50 mailing a copy to the defendant's last  
51 known address.

52 (C) A summons is served on an organization in  
53 a judicial district of the United States by  
54 delivering a copy to an officer, to a  
55 managing or general agent, or to another  
56 agent appointed or legally authorized to  
57 receive service of process. ~~A copy~~If the  
58 agent is one authorized by statute and the  
59 statute so requires, a copy must also be  
60 mailed to the organization~~organization's~~  
61 ~~last known address within the district or to~~

62 ~~its principal place of business elsewhere in~~  
63 ~~the United States.~~

64 (D) A summons is served on an organization  
65 not within a judicial district of the United  
66 States:

67 (i) by delivering a copy, in a manner  
68 authorized by the foreign  
69 jurisdiction's law, to an officer, to a  
70 managing or general agent, or to an  
71 agent appointed or legally authorized  
72 to receive service of process; or

73 (ii) by any other means that gives notice,  
74 including one that is:

75 (a) stipulated by the parties;

76 (b) undertaken by a foreign authority  
77 in response to a letter rogatory, a  
78 letter of request, or a request

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79 submitted under an applicable  
80 international agreement; or  
81 (c) permitted by an applicable  
82 international agreement.  
83 \* \* \* \* \*

**Committee Note**

**Subdivision (a).** The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

**Subdivision (c)(2).** The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

**Subdivision (c)(3)(C).** The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer, managing, or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

**Subdivision (c)(3)(D).** This new subdivision states that a criminal summons may be served on an

organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

**Subdivision (c)(3)(D)(i).** Subdivision (i) notes that a foreign jurisdiction’s law may authorize delivery of a copy of the criminal summons to an officer, to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction’s law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

**Subdivision (c)(3)(D)(ii).** Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that “gives notice.”

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the

parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase “applicable international agreement” refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

#### **Changes after publication**

No changes were made after publication.

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## Public Comments – Rule 4

**CR-2014-0004-0006. Robert Anello, Federal Bar Council (letter).** Supports amendment, stating it fairly addresses gaps that currently prevent effective prosecution of foreign corporations that commit crimes in the U.S. but have no physical presence here, provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and gives courts appropriate discretion to fashion remedies.

**CR-2014-0004-0015. Robert Anello, Federal Bar Council (prepared testimony).** Supports amendment, stating it fairly addresses gaps that currently prevent effective prosecution of foreign corporations that commit crimes in the U.S. but have no physical presence here, provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and gives courts appropriate discretion to fashion remedies.

**CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association.** The FMJA “endorses” the proposed amendment, which addresses a gap in the rules and responds to a growing need in a global economy, but suggests that the committee note expressly state that the means of service must satisfy constitutional due process.

**CR-2014-0004-0017. Kyle Druding.** Supports amendment, noting that although an amendment is needed to close a gap in the current rule, Due Process concerns require reasonably limited means of service under Rule 4 and the responsible exercise of prosecutorial discretion.

**CR-2014-0004-0028. Robert Feldman, Quinn Emanuel Urquhart & Sullivan, LLP.** Opposes the amendment, stating that it “could foreclose judicial review at any stage in the process, leaving the supposed validity of service entirely in the hands of the executive”; argues that it will be impossible to challenge service for lack of actual notice, because “the very act of challenging service might be said to conclusively establish the notice that would make service complete”; argues that the system of special appearances “may be effectively eviscerated,” placing responsible corporate defendants who wish to contest service with “a Hobson’s choice.” Also notes that other governments may respond with a similar regime.

**CR-2014-0004-0031. Peter Goldberger, National Ass'n of Criminal Defense Lawyers.** Supports amendment with several revisions (1) adding clarification to Rule 4(a) that the court’s actions must be “consistent with Rule 43(a)”; (2) providing that service within the United States under Rule 4(c)(3)(C) is preferred if likely to give actual notice; and (3) providing that service under Rule 4(c)(3)(D)(i) is preferred over service under (c)(3)(D)(i).

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# TAB 2D

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\***

1           **Rule 41. Search and Seizure**

2   \* \* \* \* \*

3   **(b) ~~Authority to Issue a Warrant~~ Venue for a Warrant**

4           **Application.**   At the request of a federal law  
5           enforcement officer or an attorney for the  
6           government:

7   \* \* \* \* \*

8           **(6) a magistrate judge with authority in any district**  
9   where activities related to a crime may have  
10    occurred has authority to issue a warrant to use  
11    remote access to search electronic storage media  
12    and to seize or copy electronically stored

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

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13 information located within or outside that district

14 if:

15 (A) the district where the media or information

16 is located has been concealed through

17 technological means; or

18 (B) in an investigation of a violation of

19 18 U.S.C. § 1030(a)(5), the media are

20 protected computers that have been

21 damaged without authorization and are

22 located in five or more districts.

23 \* \* \* \* \*

24 **(f) Executing and Returning the Warrant.**

25 **(1) *Warrant to Search for and Seize a Person or***

26 ***Property.***

27 \* \* \* \* \*

28 **(C) *Receipt.*** The officer executing the warrant

29 must give a copy of the warrant and a

30 receipt for the property taken to the person  
31 from whom, or from whose premises, the  
32 property was taken or leave a copy of the  
33 warrant and receipt at the place where the  
34 officer took the property. For a warrant to  
35 use remote access to search electronic  
36 storage media and seize or copy  
37 electronically stored information, the  
38 officer must make reasonable efforts to  
39 serve a copy of the warrant and receipt on  
40 the person whose property was searched or  
41 who possessed the information that was  
42 seized or copied. Service may be  
43 accomplished by any means, including  
44 electronic means, reasonably calculated to  
45 reach that person.

46 \* \* \* \* \*

**Committee Note**

**Subdivision (b).** The revision to the caption is not substantive. Adding the word “venue” makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

**Subdivision (b)(6).** The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of “botnets”) may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous



districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms “protected computer” and “damage” have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only “if the delay is authorized by statute.” See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

### **Changes after publication**

The revised caption including the term “venue” makes clear the limited function of the amendment, which determines only which courts may consider warrant applications, not the standards for the approval of remote electronic search warrants. The notice provision for remote electronic searches was revised to parallel more closely the

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notice presently required for physical searches. As revised, the government must provide not only a copy of the warrant but also a receipt for any property seized or copied in a remote search. It must provide notice to either the person whose property was searched or who possessed the information that was seized or copied. The Committee notes were revised to explain these changes, and to draw attention to restrictions on delayed notice in Rule 41(f)(3).

## Public Comments Proposed Amendment to Rule 41

**CR-2014-0004-0003. Keith Uhl.** Raises a question: If a warrant approved in one district is served on a computer in a second district, must the defense travel to the first district to challenge the warrant.

**CR-2014-0004-0004. Mr. Anonymity.** Opposes the amendment, stating that anonymous speech serves an important constitutional purpose, protecting unpopular people from retaliation; perfect anonymity technology would be widely adopted, facilitating routine communications and financial transactions; attempts to surreptitiously install malware will generate retaliatory responses.

**CR-2014-0004-0005. Former Federal Agent.** Opposes the amendment, stating many law-abiding people employ anonymizing technology, and the amendment will be read expansively, allowing the government to pierce their anonymity and distribute malware to them.

**CR-2014-0004-0006. Robert Anello, Federal Bar Council (letter).** Supports the proposal, stating it is “necessary and will be effective in permitting law enforcement to properly investigate crimes involving computers and electronic information”; constitutional questions “can and will be addressed by the courts in due course.”

**CR-2014-0004-0007. Carolyn Atwell-Davis.** Ms. Atwell-Davis, who previously worked for the National Center for Missing & Exploited Children, supports the amendment, stating it provides a necessary and constitutionally valid tool allowing law enforcement to stop the sexual exploitation of children by persons who use technology to evade detection.

**CR-2014-0004-0008. Amie Stephanovich, Access and the Electronic Frontier Foundation.** Opposes the amendment, stating that allowing a single warrant application for damaged computers in five or more districts would effectively expand investigations of the overbroad Computer Fraud and Abuse Act to victim computers, would give the state access to the personal data of journalists, dissidents, whistleblowers, and world leaders, and would subject victims to a wide range of potentially harmful measures that may interfere with the operation of their computers or their communication with other devices.

**CR-2014-0004-0009. Joseph Lorenzo Hall, The Center for Democracy & Technology.** Opposes the amendment, stating that the proposal “would make policy decisions about important questions of law that are not currently settled and would best be resolved through legislation”; legal issues include the Fourth Amendment particularity requirement and the effect of treaties and international law on extraterritorial searches; policy issues include implications for users of common technology (such as virtual private networks, or VPNs) and the potential for damage to devices, data, or independent systems.

**CR-2014-0004-0010. Alan Butler, Electronic Privacy Information Center (epic.org).** Opposes the amendment, stating that the proposed amendment “would authorize searches beyond the scope permissible under the Fourth Amendment,” by allowing “surreptitious searches without the required showing of necessity,” and not requiring that “notice be served within a

reasonable time after the search.”

**CR-2014-0004-0011. Kevin S. Bankston, New America's Open Technology Institute.** Opposes the amendment, stating that “the proposed amendment authorizes searches that are unconstitutional for lack of adequate procedural protections tailored to counter those searches’ extreme intrusiveness.”

**CR-2014-0004-0012. Steven Bellovin, Matt Blaze and Susan Landau.** Opposes the amendment as circulated, stating that the proposal raises serious concerns that require further study and perhaps legislative action: the use of malware in botnet investigations may cause unanticipated damage to the victim computers and is indistinguishable from a general search; the amendment authorizes searches of legitimate users of VPNs as well as foreign searches; courts must be better informed regarding search techniques; chain of custody and preservation issues will necessarily arise; notice for remote searches is problematic; and computer vulnerabilities should be disclosed to vendors for corrective action, not withheld to provide a means for remote searches. If the proposal is adopted, significant changes are recommended, including greater specification of the area of the computer that is to be searched, requiring cooperation of the host country for most international searches, more explicit guidance regarding the conditions when notice can be omitted, and reworking of authorization to use malware to investigate victims’ computers.

**CR-2014-0004-0013. Nathan Wessler, American Civil Liberties Union.** Opposes the amendment, stating the proposal “raises myriad technological, policy, and constitutional concerns,” and constitutes a “dramatic expansion of investigative power.” Argues that the proposal should be authorized only by legislation because the use of zero day malware may constitute an unreasonable search; some searches authorized by the amendment require Title III wiretap orders; authorized searches will violate the particularity requirement and result in searches of individuals for whom there is no probable cause; the notice requirement is insufficient; and the courts will not address and resolve these constitutional issues in the foreseeable future.

**CR-2014-0004-0014. Duplicate comment.** Withdrawn.

**CR-2014-0004-0015. Robert Anello, Federal Bar Council (prepared testimony).** Supports the amendment, stating the proposal is “necessary and will be effective in permitting law enforcement to properly investigate crimes involving computers and electronic information”; constitutional questions “can and will be addressed by the courts in due course.”

**CR-2014-0004-0016. Nathan Wessler, American Civil Liberties Union.** Letter of April 4, 2014, “recommends that the Advisory Committee exercise extreme caution before granting the government new authority to remotely search individuals’ electronic data,” stating that “the proposed amendment would significantly expand the government’s authority to conduct searches that raise troubling Fourth Amendment, statutory, and policy questions” for consideration at the Advisory Committee’s April 2014 meeting.

**CR-2014-0004-0018. Anonymous.** Opposes the amendment stating that the government should

not be able to conduct warrantless searches of private computers merely because someone is using a VPN.

**CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association (FMJA).** The FMJA “endorses” the amendment because it fills a significant gap in authority, noting that the meaning of “remote access” and “reasonable efforts” will be developed as specific cases arise.

**CR-2014-0004-0020. Anonymous.** Opposes the amendment, stating that the government should not spy on everyone and should mind its own business.

**CR-2014-0004-0021. Dan Teshima.** Opposes the amendment stating that it will “weaken” the Fourth Amendment.

**CR-2014-0004-0022. George Orwell.** Opposes the amendment, stating it will allow the government to “hack into our computers for practicing internet privacy,” and reflects the view that the “Government must know all, must see all.”

**CR-2014-0004-0024. Ladar Levison.** Opposes the amendment because he believes it permits the issuance of a warrant whenever an individual has used encryption tools that are common, legal, and in some cases industry standards, such as the Payment Card Industry Data Security Standards. Additionally, he states, it “[c]ould be used to legalize the practice of infiltrating service provider networks to ex-filtrate private user data that was previously intercepted as it traveled along trunk lines, but has since been protected by a VPN.”

**CR-2014-0004-0027. Robert Gay Guthrie/ Bruce Moyer, National Association of Assistant United States Attorneys.** Supports the amendment because of “the need to improve Rule 41’s territorial venue limitations”; states that increasingly sophisticated technologies pose challenges to law enforcement investigations of offenses such as financial fraud, child pornography, and terrorism, which often require remote electronic searches when sophisticated technology or proxy servers have been used to hide the true IP addresses; supports the change in venue requirements for botnet investigations to avoid wasting judicial and investigative resources and delays.

**CR-2014-0004-0029. Richard Salgado, Google Inc.** Opposes the amendment; states that it is a substantive expansion of the government’s search capabilities that should be left to Congress; asserts that the government cannot seize evidence outside the U.S. pursuant to a search warrant that permits remote access of servers abroad; argues that the amendment “alters constitutional rights and violates the Rules Enabling Act” and “is vague and fails to specify how searches may be conducted and what may be searched”; states that case law addressing the constitutional issues will be slow to develop; contends that proposed (b)(6)(B) would extend beyond botnet searches and reach “millions of computers.”

**CR-2014-0004-0030; Pennsylvania Bar Association.** Opposes the amendment; states that it “substantively expand the government’s investigative powers,” conferring authority for “a category of searches that the government is currently barred from conducting”; asserts that these

issues should be addressed by Congress.

**CR-2014-0004-0032. Edward Mulcahy.** Opposes the amendment; states that “[t]he government's power is already too vast and secret,” and asserts that the amendment “would make using a VPN or TOR sufficient evidence of wrongdoing to justify a search warrant.”

**CR-2014-0004-0033. Kati Anonymous.** Opposes the amendment; states that “The government or who ever has no right to enter someone's home without a warrant therefore entering a private space on a citizens electronic devices is also out of the question and without the owners permission or warrant unlawful.”

**CR-2014-0004-0034. Jeff Cantwell.** Opposes the amendment; states that the government may not “spy on” communications “just from the fact that I try to enforce my right to privacy,” which he likens to “saying the government has a right to read my mail just because I've sealed the envelope.”

**CR-2014-0004-0035. Benoit Clement.** Opposes the amendment; states that it is “yet again another move to infringe upon the privacy and freedoms of citizens,” and “an unfair practice.”

**CR-2014-0004-0036. Yani Yancey.** Opposes the amendment; states that the federal government “funded development of TOR and encourages people to use both it and VPN for legitimate security reasons,” but now “seeks to paint their use as criminals and strip away the 4th amendment rights of people without any real suspicion of wrongdoing”; states that “[a]ttempting to safeguard your personal information and online activity is not a criminal or suspicious act.”

**CR-2014-0004-0037. Jeffrey Adzima.** Opposes the amendment; states that it “appears to be in direct conflict with our current Constitutional protections, specifically, amendment 4 against unwarranted search and seizure of private property,” which states that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

**CR-2014-0004-0038. Peter Goldberger, National Ass'n of Criminal Defense Lawyers.** Opposes the amendment “because it overreaches the authority of judicial branch, which is limited in its rulemaking authority to purely procedural matters – a limitation that calls for particularly sensitive attention in the area of search and seizure – and because it would upset the appropriate balance that must be struck between law enforcement methods and the protection of privacy in a civil society now become digital”; argues that “the rule dismisses the foundational principle that due process has a “place” dimension”; argues that a restriction to the “district where activities related to a crime may have occurred” is too broad and promotes forum shopping; suggests why “reliance on later litigation is not a solution” to the amendment’s constitutional infirmities; urges that if the amendment is not rejected, it at least be “revised to ensure that other computers connected to the anonymized computer cannot be within the scope of a warrant specially authorized under Rule 41(b)(6)(A),” and that the warrant be limited to “ascertaining the concealed location” of the media to be searched.

**CR-2014-0004-0039. Tadeas Liska.** Notes his business routinely uses and accesses VPN's for

data transfer and meeting sessions to provide confidentiality and privacy, and urges that using this technology should not be treated as suspicious activity.

**CR-2014-0004-0040. Jonathan Wroblewski, U.S. Department of Justice.** Supports amendment; discusses how remote search warrants can satisfy the Fourth Amendment's particularity requirement, describing investigative scenarios and explaining how warrants can be drafted in those scenarios to satisfy the Fourth Amendment; states that amendment "does not modify the delayed-notice statute," 18 U.S.C. § 3103a; explains that there may be unusual difficulty in providing appropriate notice in cases where the district in which the computer is located is unknown, but when government can provide notice using reasonable efforts, it must do so; states that notice requirements are "consistent with Rule 41's existing requirements for both standard search warrants and for tracking device warrants"; states that search warrants do not permit law enforcement to intercept wire, oral, or electronic communications (unless one of several statutory exceptions), and amendment would make no change in relevant law; notes that some commentators misunderstand reference to concealment by technological means, which is the basis for venue but does not by itself provide a basis for a search warrant; argues that Department is committed to balancing risks involved in technical measures against the importance of the objectives of an investigation in stopping crime and protecting public safety," accordingly its remote searches "have not resulted in the types of collateral damage that the commenters hypothesize," and "careful consideration of any future technical measures will continue."

**CR-2014-0004-0041. Martin MacKerel.** Opposes amendment; states it dramatically expands law enforcement powers and "should be subject to robust public debate in the appropriate legislative forum," rather than the subject of an administrative rule change.

**CR-2014-0004-0042. Timothy Doughty.** Opposes amendment; argues that it is "the digital equivalent of "your front door is locked, therefore, you're under suspicion of being a criminal," despite the fact that VPNs are widely used for many legitimate purposes; argues the amendment will drive the tech companies out of the U.S.

**CR-2014-0004-0043. Stephen Argen.** Opposes amendment; argues that it is "an unconstitutional overreaching," noting that many businesses rely on VPN's for encrypted communication to protect trade secrets and journalists using Tor to protect their identities whilst abroad.

**CR-2014-0004-0044. Weymar Osborne.** Opposes amendment; states that "[u]sing a VPN or some other way is not a sufficient reason to authorize the warrant."

**CR-2014-0004-0045. Anonymous Anonymous.** Opposes amendment; states that the amendment violates Fourth Amendment prohibitions against unreasonable searches and general warrants; argues that protecting one's privacy does not create probable cause for a search.

**CR-2014-0004-0046. Ryan Hodin.** Opposes amendment; notes that the U.S. government has funded research into, and supported the use of, TOR and VPNs, which have many legitimate and wholly legal uses; urges that their use is not illegal and does not constitute "probable cause."

**CR-2014-0004-0047. Hannah Bloch-Wehba, Reporters Committee for Freedom of the Press.** Opposes amendment; argues that it implicates the constitutional and statutory rights of journalists in multiple ways that should be addressed by Congress if they are to be altered.

**CR-2014-0004-0048. Cormac Mannion.** Opposes amendment; states that technology such as Tor or VPN encryption to engage in private communications is used by many innocent people and should not be treated as misconduct or suspicious behavior.

**CR-2014-0004-0049. Raul Duke.** Opposes amendment; states it is “an infringement on first, fourth, and fifth amendment grounds, if not illegal in other ways.”

**CR-2014-0004-0050. Michael Boucher.** Opposes amendment; argues that because anyone’s computer can become the victim of a botnet, anyone’s computer would become “subject to sweeping new surveillance”; contends that common activities such as the use of cloud computing services conceal the location of media or information not be sufficient to obtain a warrant; contends that procedural safeguards for searches under the amendment are far less protective than those applicable to wiretaps, despite the potential for access to intimate personal information and ability to obtain ongoing surveillance by a camera or recording device.

**CR-2014-0004-0051. Staff, Clandestine Reporters Working Group, LLC.** Opposes amendment; states that it improperly treats “secret” or “hidden” activity as ipso facto “illicit” activity.

**CR-2014-0004-0052. Andrew Gordon.** Opposes amendment; states that “[t]he use of software and/or hardware readily available to anyone in order to create a more safe and secure online environment should not be grounds for issuing a warrant.”

**CR-2014-0004-0053. Ahmed Ghappour.** Opposes amendment; states that issuance of remote warrants when location is disguised by technological means “will necessarily result in extraterritorial cyber operations”; contends that such extraterritorial operations would be “a radical shift” that “constitutes an enlargement of law enforcement’s substantive authority to conduct investigative activities overseas”; if rule is amended, proposes limiting measures: (1) allowing Network Investigative Techniques to return only country information first, prompting the executing FBI agent to utilize the appropriate protocols and institutional devices,” (2) requiring a preliminary showing that less intrusive investigative methods have failed or are unlikely to succeed, (3) limiting the range of techniques that are permitted to law enforcement trickery and deception that result in target-initiated access, and (3) limiting search capabilities to monitoring and duplication of data on the target.

**CR-2014-0004-0054. Brett Remsen.** Opposes amendment in strong general terms.

**CR-2014-0004-0055. David Bitkower, U. S. Department of Justice.** Supports the amendment. States that it “has no effect on the FBI’s authorities outside the United States,” and “would not authorize the government to undertake any search or seizure, use any remote search technique, or



restrict any required notice in a manner not already permitted under current law”; notes that “[i]n cases where the Fourth Amendment’s warrant requirement applies, the procedures for obtaining a warrant in Rule 41 effectively limit the FBI’s ability to conduct searches and seizures”; emphasizes that “the Fourth Amendment’s warrant requirement does not apply to searches outside of the United States, even searches of United States persons,” which are evaluated under the Fourth Amendment’s reasonableness requirement. States that “[n]othing in the proposal changes the government’s foreign policy considerations, which are also not governed by Rule 41,” but rather are followed by the Department “because they are good policy.”

**CR-2014-0004-0056. David Bitkower, U. S. Department of Justice.** Supports the amendment. States that search warrants authorizing remote searches can satisfy the Fourth Amendment’s particularity requirement, and provides sample warrant language for three scenarios to demonstrate how particularity can be established; states proposal, like the present requirement for physical searches, “would require that officers either give notice of the warrant when it is executed or seek judicial approval to delay notice under the procedures of 18 U.S.C. § 3103a”; states that “when investigators seek to conduct surveillance that requires a Title III wiretap order, they will need to obtain such an order, whether or not the proposal is adopted”; explains that “proposed rule would not allow the government to obtain a warrant merely because someone is using anonymization techniques,” rather “as with all warrants, the issuing court must find that there is probable cause to search for or seize evidence, fruits, or instrumentalities of crime”; states that “Department is mindful of the potential impact of remote search techniques on computer systems and is careful to avoid collateral damage when executing remote searches.”

**CR-2014-0004-0057. David Bitkower, U. S. Department of Justice.** Supports the amendment. Argues that the Rules Committee is an appropriate forum to address venue for warrant applications; the language of the proposed rule is not vague; the botnet amendment is appropriate; and the proposed amendment does not conflict with the Privacy Protection Act.

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1 **Rule 41. Search and Seizure**

2 \* \* \* \* \*

3 **(b) Authority to Issue a Warrant.** At the request of a  
4 federal law enforcement officer or an attorney for the  
5 government:

6 \* \* \* \* \*

7 (6) a magistrate judge with authority in any district  
8 where activities related to a crime may have  
9 occurred has authority to issue a warrant to use  
10 remote access to search electronic storage media  
11 and to seize or copy electronically stored  
12 information located within or outside that district  
13 if:

14 (A) the district where the media or information  
15 is located has been concealed through  
16 technological means; or

17 (B) in an investigation of a violation of  
18 18 U.S.C. § 1030(a)(5), the media are  
19 protected computers that have been  
20 damaged without authorization and are  
21 located in five or more districts.

22 \* \* \* \* \*

23 **(f) Executing and Returning the Warrant.**

24 **(1) *Warrant to Search for and Seize a Person or***  
25 ***Property.***

26 \* \* \* \* \*

27 (C) *Receipt.* The officer executing the warrant  
28 must give a copy of the warrant and a  
29 receipt for the property taken to the person  
30 from whom, or from whose premises, the  
31 property was taken or leave a copy of the  
32 warrant and receipt at the place where the  
33 officer took the property. For a warrant to

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34 use remote access to search electronic  
35 storage media and seize or copy  
36 electronically stored information, the  
37 officer must make reasonable efforts to  
38 serve a copy of the warrant on the person  
39 whose property was searched or whose  
40 information was seized or copied. Service  
41 may be accomplished by any means,  
42 including electronic means, reasonably  
43 calculated to reach that person.

44 \* \* \* \* \*

**Committee Note**

**Subdivision (b)(6).** The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of “botnets”) may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms “protected computer” and “damage” have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice

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of the search, seizure, or copying to the person whose information was seized or copied or whose property was searched.

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# TAB 2E

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE\***

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** ~~service~~ and service is made  
6 under Federal Rule of Civil Procedure 5(b)(2)(C)  
7 (mailing), (D) (leaving with the clerk), ~~(E)~~, or (F)  
8 (other means consented to), 3 days are added after the  
9 period would otherwise expire under subdivision (a).

**Committee Note**

**Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil

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

## 2 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the

occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means of delivery” under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

### **Changes After Publication**

The phrase “Time for Motion Papers” was deleted from the caption as unnecessary, and the phrase “after being served” was substituted for “after service” to parallel the language of Fed. R. Civ. P. 6(d), FRAP 26(c), and Fed. R. Bank. P. 9006(f). Finally, the Committee Note was revised to note that in some circumstances the elimination of the three added days may result in prejudice warranting an extension of time.

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## Public Comments – Rule 45

**CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association.** The FMJA “generally endorses the change,” but expresses concern that the interplay with existing Civil Rules 5(b)(2)(E) and 5(b)(2)(F) may engender confusion; it suggests eliminating the parentheticals in the proposed rule or revising them to refer to “(F) (other means consented to except electronic service)”.

**CR-2014-0004-0023. Cheryl Siler, Aderant.** Suggests the existing language of Rule 45(c) be revised to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f), which require action “within a specified time after being served” or “within a prescribed period after being served.” Is concerned practitioners may interpret the current rule to mean the party serving a document as well as the party being served are entitled to 3 extra days.

**CR-2014-0004-0030; Pennsylvania Bar Association.** Opposes the amendment; states that “the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times.”

**CR-2014-0004-0031. Peter Goldberger, National Ass'n of Criminal Defense Lawyers.** Opposes the amendment; states that eliminating three additional days for response to electronic filing will “provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners”; states that many defense counsel are solo practitioners or in very small firms, with little clerical help, and they may not see their ECF notices the day they are received; also questions change in the caption, suggesting it may lead to confusion.

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1 **Rule 45. Computing and Extending Time; Time for**  
2 **Motion Papers**

3 \* \* \* \* \*

4 (c) **Additional Time After Certain Kinds of Service.**

5 Whenever a party must or may act within a specified  
6 time after service and service is made under Federal  
7 Rule of Civil Procedure 5(b)(2)(C) (mailing), (D)  
8 (leaving with the clerk), ~~(E)~~,—or (F) (other means  
9 consented to), 3 days are added after the period would  
10 otherwise expire under subdivision (a).

**Committee Note**

**Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means of delivery” under subparagraph (F).

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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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CHAIR

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CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

**MEMORANDUM**

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

**FROM:** Honorable David G. Campbell, Chair  
Advisory Committee on Civil Rules

**DATE:** May 2, 2015

**RE:** Report of the Advisory Committee on Civil Rules

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*Introduction*

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on April 9, 2015. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2014. Each deals with distinctive topics presented separately as I.A., Rule 4(m); I.B., Rule 6(d); and I.C., Rule 82.

Part II presents information about pending and possible future Civil Rules work. The first topic explores amendments to Rule 5 addressing electronic filing, electronic service, and electronic certificates of service. Because continuing expansion of electronic communication

binds these issues together, these drafts are presented as one package. These drafts emerged from the April meeting as recommendations for publication. Prolonged exchanges of messages with the Reporters for the other advisory committees, however, have shown the wisdom of delaying action until all committees have moved as far as possible toward uniform language for parallel rules. The other topics presented as information items are not as far advanced.

## I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

### I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

#### Rule 4. Summons

\* \* \* \* \*

**(m) Time Limit for Service.** If a defendant is not served within 90<sup>1</sup> days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

\* \* \* \* \*

#### COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States “in any manner prescribed

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<sup>1</sup> This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Invoking service “in the manner prescribed by Rule 4(f)” could easily be read to mean that service under Rule 4(h)(2) is also service “under” Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

#### Gap Report

No changes were made in the published rule text or Committee Note.

#### **I.B. RULE 6(d)**

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service “made under Rule 5(b)(2)(C), (D), (E), or (F).” The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: “(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to).” Parallel proposals to delete electronic service from the 3-added days provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. “No one goes home until after midnight.” Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an “other means consented to” under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading,

moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

#### **Rule 6. Computing and Extending Time; Time for Motion Papers**

\* \* \* \* \*

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served<sup>2</sup> and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), (~~E~~), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

#### COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

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<sup>2</sup> This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means” of delivery under subparagraph (F).

#### Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

### **I.C. RULE 82**

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

**Rule 82. Jurisdiction and Venue Unaffected**

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 not a civil action for purposes of 28 U.S.C. §§ 1391-1392.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

Clean Rules Text

*Rule 4(m)*

**Rule 4. Summons**

\* \* \* \* \*

**(m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

\* \* \* \* \*

*Rule 6(d)*

**Rule 6. Computing and Extending Time; Time for Motion Papers**

\* \* \* \* \*

**(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

*Rule 82*

**Rule 82. Jurisdiction and Venue Unaffected**

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.

**REPORTER'S SUMMARY OF COMMENTS, AUGUST, 2014 PUBLICATION**

The scheduled public hearings on the proposals published in August, 2014 were cancelled for lack of interested witnesses.

*Summary of Comments Rule 4(m)*

CV-2014-0009, Federal Magistrate Judges Association: Supports the proposal. Experience shows that “significant delays can often occur in effecting service in a foreign country, and that the rules governing service should be uniform and apply equally to individuals, foreign states, corporations, partnerships, and associations.”

CV-2014-0010, Association of the Bar of the City of New York: The Association had suggested this amendment in commenting on the 2013 proposal to shorten the presumptive time for service, and agrees with the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: “[S]upports this clarification, which appears to comport with the intent of the rule as originally written.” The importance of this amendment will increase if the Supreme Court adopts the proposal to shorten to 90 days the presumptive time for service set by Rule 4(m).

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: “The Department supports this proposal.”

*Summary of Comments Rule 6(d)*

CV-2014-0003, Auden L. Grumet, Esq.: Opposes the proposal. (1) Response times throughout the Civil Rules are too restrictive. They should not be shortened further. (2) The idea that this will “simplify” time counting “is absurd and illogical.” (a) The 3-added-days provision will continue to apply to some other modes of service, generating opportunities for confusion. (b) Calculating time is far less complex than “the much more convoluted aspects of being a practitioner in federal court.” (c) The value of the added 3 days far outweighs any putative confusion. (d) The value of counting days in increments of 7 would be better served by adding 7 days after service.

CV-2014-0004, Deanne Upson: “Being pro se, I completely agree [with Auden L. Grumet, 0003] that more time is warranted and wise, not less.”

CV-2014-0007, Jolene Gordo, Esq.: This comment focuses on Rule 5(b)(2)(A) as the place to “make it absolutely clear that using the ECF system is considered ‘personal’ service.” But it ties to the concern that e-filing may be deliberately delayed to 11:59 p.m. The idea is that if e-service



is treated as “personal service,” it will have to be made by the standard close of business, 5:00 or 6:00 p.m.

CV-2014-0008, Bryan Neal: Disagrees with the proposal. (1) When e-service is made directly between the parties, not through the ECF system, problems still occur with incompatible systems and spam filters. (2) More importantly, filing may be deliberately delayed to as late as 11:59 p.m. There should be more time to respond than is allowed when personal service is made by hand delivery during business hours. (3) E-service may be made on weekends and holidays: If it is made on Saturday, does Sunday count as Day 1? So if filing and service are made at 11:59 p.m. on Friday, that can effectively shave 2 days off the response time. (4) Why is there any need to shorten time periods? It just makes modern litigation more difficult. (5) Discovery response times typically are set at 30 days, so the advantages of 7-day increments do not apply. It would make more sense to reset the times to 28 days, plus 7 days for anything but personal service. Or, still better, to provide a flat 35 days regardless of the method of service.

Separately, suggests that service by commercial carrier should be allowed under Rule 5 without requiring consent of the person to be served.

CV-2014-0009, Federal Magistrate Judges Association: “[G]enerally endorses” the proposal. But is concerned that the drafting creates a potential confusion that will not be dispelled by the explicit statement in the Committee Note. As published, parentheticals are used to describe the enumerated modes of service that continue to allow 3 added days: “(mail),” “(leaving with the clerk),” and “(other means consented to).” Simply looking at the new rule text will not reveal that e-service, covered by Rule 5(b)(2)(E), has been omitted. An incautious reader may look back to Rule 5(b)(2), discover that consent is required for service by electronic means, and conclude that this is “other means consented to” and continues to allow 3 added days. The confusion could be eliminated by deleting the parenthetical descriptions, or by amending the last one to read: “(F)(other means consented to except electronic service).”

2014-CV-0010, Association of the Bar of the City of New York: Agrees that advances in technology, along with greater sophistication in using electronic communication, “have substantially alleviated concerns over delays and other difficulties in receiving, opening, and reviewing electronic documents.” Supports the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: New York courts treat electronic service in the same way as in-hand service; this has not caused any problems. Generally counsel work out briefing schedules, and can address the timing of electronic service in their agreements. The dissenters in the Committee point to problems that are not serious. To be sure, it is possible to effect electronic service at 11:59 pm on Friday, and time is required to print out lengthy filings. A party who needs more time because of such practices will almost invariably get the needed time. (The dissenters believe that the prospect of gamesmanship requires that the present 3-added days provision be retained.)

CV-2014-0012, Cheryl Siler, for Aderant CompuLaw: Endorses elimination of the 3 added days. But suggests that Rule 6 should be further amended to provide that a document served electronically after 6:00 p.m. is considered served on the next day. As a practical matter, that will make e-service equivalent to in-hand service. In addition, it will establish a uniform national practice that displaces local rules that establish similar but variable provisions — a document filed or served after 5:00 p.m., or after 6:00 p.m., is treated as filed the next day. It also would affect the many local rules that require filing and service by 11:59 p.m. in the court’s time zone.

CV-2014-0013, Pennsylvania Bar Association: Opposes the amendment. “[T]he additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times.” With one dissent, arguing that service at inconvenient times is not a problem.

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: Expresses concerns about the consequences of eliminating the 3 added days. “Unlike personal service, electronic distribution does not assure actual receipt by a party.” Prejudice is particularly likely when local rules require a response within 14 or fewer days. A filing in a different time zone can mean that e-service reaches a computer in the Eastern Time zone as late as 3:00 a.m., or even later. And the service may be made on a Friday, or the day before a holiday weekend. A 10-day period could become, in effect, 5 business days. “It is foreseeable that some attorneys will try to take advantage of the elimination of the three additional days \* \* \*.” But if the Committee decides to go ahead with the proposal, the Department recommends language for the Committee Note to recognize the need for additional time to respond in appropriate cases. This language is quoted above.

(Largely similar comments have been made in response to the parallel proposals published by the Appellate, Bankruptcy, and Civil Rules Committees.)

*Summary of Comments Rule 82*

CV-2014-0009, Federal Magistrate Judges Association: Notes but does not comment on the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: “[E]ndorses these proposed amendments.”

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: “The Department supports the proposal.”

## **II. INFORMATION ITEMS**

### **II.A. e-RULES: CIVIL RULE 5**

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating 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 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; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But, as noted in the Introduction, continuing exchanges with the other advisory committees show that further work is needed to achieve as much uniformity as possible in language, and at times in meaning. The drafts presented here have gone through several variations, but cannot yet be regarded as the assuredly final recommendations to approve for publication. There is no urgent need to publish now, and good reason for delay. Criminal Rule 49(b) now directs that "service must be made in the manner provided for a civil action." The Criminal Rules Committee hopes to move free from this cross-reference, adopting a self-contained provision that will avoid the need to consult another set of rules. And the familiar problems with signing an electronic filing continue to resist confident drafting resolution.

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. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter — the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

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.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing. The draft Rule 5(d)(3) does provide that the user name and password of an attorney of record serves as the attorney's signature. And some issues may remain in drafting even that proposal.

#### ***Rule 5(d)(3): Electronic Filing***

The draft Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without 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 proceeding without an attorney may file electronically only if permitted by court order or local rule. And the user name and password of an attorney of record serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. 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 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.

## **RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS**

### **(d) Filing \* \* \***

#### *(3) Electronic Filing and Signing, ~~or Verification.~~*

*(A) When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

*(B) Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

*(C) Electronic 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. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

#### 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 a person proceeding without 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 a person proceeding without 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 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.

Clean Rule Text

(3) *Electronic Filing and Signing.*

(A) *When Required or Allowed; Paper Filing.* All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic 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. 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 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.

Although consent remains important when it is required, the Committee recommends deletion of the requirement that consent be in writing. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.

## **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 through the court's electronic transmission facilities to a registered user or by other electronic means ~~if that the person consented to in writing—in which event.~~ Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or \* \* \*

#### COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on 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 through the court's electronic transmission facilities to a registered user or by other electronic means that the person consented to. Electronic service is complete upon transmission, 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)***

As noted above, this package of drafts includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service through the court's facilities on a registered user 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 through the court's facilities 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 through the court's transmission facilities. 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 through the court's transmission



facilities. 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 filing was made and also identifies the parties who were not authorized users of the court's electronic transmission facilities, 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.

## **Rule 5. Serving and Filing Pleadings and Other Papers**

### **(d) Filing.**

#### *(1) Required Filings: Certificate of Service.*

(A) Papers after the Complaint. Any paper after the complaint that is required to be served ~~—together with a certificate of service—~~ 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 party<sup>3</sup> served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

**Rule 5. Serving and Filing Pleadings and Other Papers**

**(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.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service — a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed \* \* \*.

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<sup>3</sup> We have yet to resolve the question whether this should change to "person." The Civil Rules participants report that persons who are not yet formal parties are treated as if parties for filing purposes. "Party" in rule text could — and should — be read to include anyone who is asking the court to do something. Opening a miscellaneous docket to enforce a discovery subpoena in aid of litigation pending in another district would be an example. The applicant-movant would count as a party.

## **II.B. RULE 68**

The offer-of-judgment provisions of Rule 68 have stirred controversy for many years. Proposals for dramatic amendments were published in 1983 and then again, with many changes, in 1984. They were withdrawn after encountering vigorous protests. Rule 68 was taken up again in the early 1990s. That effort was abandoned without advancing to publication of any proposals. Successive drafts had become increasingly complex in attempts to address the uncertainties that continued to compound as specific difficulties were examined. There also was some doubt about the nature of the Rule 68 enterprise.

If Rule 68 has proved difficult to manage in the rulemaking process, it has continued to be a popular subject of proposals requesting that the Committee amend it. The proposals rest on the shared perception that Rule 68 is not much used, even in cases where it can cut off a statutory right to attorney fees if a plaintiff wins a judgment less favorable than a rejected Rule 68 offer. And most of the proposals advance a common suggestion that Rule 68 should be invigorated by requiring a party who rejected an offer to pay post-offer attorney fees incurred by the offeror if the judgment is not more favorable than the offer.

Discussion at the October, 2014 meeting concluded that Rule 68 should not be put aside again without attempting to learn something more about possible revisions. The first avenue of inquiry will examine state practices to see whether actual experience shows good results from working under a different model. The Administrative Office has done preliminary work in identifying state rules that correspond to Rule 68 and in assembling a bibliography of secondary literature, some of it empirical. Resources were not available to delve deeper into these materials in time for the Committee's April, 2015 meeting. Rule 68 remains on the agenda

The Committee remains eager to receive information about experience with Rule 68 or similar state-court rules, and for suggestions whether Rule 68 should be developed to become more "effective," left alone, or studied for abrogation.

## **II.C. RULE 23 SUBCOMMITTEE**

The Rule 23 Subcommittee has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. For the Advisory Committee's April, 2015, meeting, it submitted for discussion a series of preliminary sketches of possible amendment ideas, designed to prompt more concrete discussion than presentation of the issues alone would stimulate. A copy of the Subcommittee's memorandum, including the sketches, is attached to this report as Appendix I.

In order to broaden its appreciation of the issues presented, the Subcommittee has undertaken to send representatives to a variety of meetings and conferences convened by a variety of groups. The groups include bar organizations regarded as both plaintiff- and defense-side, ABA conferences, and law professor conferences. The day before the Advisory Committee's April meeting, the George Washington Law School arranged an extremely

informative roundtable discussion involving prominent judges, lawyers, and law professors. The Subcommittee is also planning to hold a mini-conference to address pending Rule 23 issues on Sept. 11, 2015, and hopes to have draft rule ideas and some Committee Note language available for review by participants in that mini-conference. A complete listing of those events is contained in Appendix I.

The Subcommittee's "outreach" efforts have already borne fruit. Nearly 20 submissions to the Advisory Committee from various groups and individuals have endorsed consideration of various issues. These submissions can be found on the A.O. website via the link for "Archived Rules Suggestions" for the Civil Rules Committee.

The suggestions received so far range from fundamental reformulation of Rule 23 to more focused attention to specific issues. The Subcommittee is not presently inclined to favor major structural changes to the rule.

Instead, the Subcommittee's focus has been on more limited amendment ideas, as presented in Appendix I. In developing these ideas, it has been much aided by the American Law Institute's Principles of Aggregate Litigation (2010). The "front burner" ideas can generally be grouped into seven categories, which are summarized below.

As it has worked forward, the Subcommittee has invited suggestions about additional topics that seem to warrant serious attention, as well as suggestions about removing issues it had identified from the "front burner" list. As noted below, one result of the April Advisory Committee meeting and the George Washington University roundtable has been to identify two additional issues that the Subcommittee intends to examine carefully in the coming months.

### ***"Front burner" issues***

1. Settlement Approval Criteria: Until 2003, Rule 23(e) said nothing about how a court was to decide whether to approve the settlement or dismissal of a class action. Every circuit developed criteria, largely during the 1970s, for performing that task. As the ALI put it, this case law "is in disarray" because courts of appeals have "articulate[d] a wide range of factors to consider," leaving district judges with long lists of "checkoff" factors but little guidance on how to weigh those factors. ALI, Principles of Aggregate Litigation § 3.05, Comment a at 205 (2010).

In 2003, Rule 23(e) was amended to specify that the criterion for settlement approval is whether the proposed settlement is "fair, reasonable, and adequate." The ALI proposed substituting a set of four criteria for the long and divergent lists of factors in many circuits, adapted by the Subcommittee as follows in its sketch:

- (i) the class representatives and class counsel have been and currently are adequately representing the class;

- (ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;
- (iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
- (iv) the settlement was negotiated at arm's length and was not the product of collusion.

The Subcommittee's sketch permits settlement approval only if the court finds all four of these criteria satisfied, but it also would permit the court to reject a settlement that supports all four findings on the basis of any other matter pertinent to approval. During the Advisory Committee meeting, it was suggested that the Subcommittee reconsider recognizing authority to reject a settlement that satisfies all four listed criteria, and it will reexamine that question.

The goal of this approach would be to substitute the above four criteria for the variety of additional factors identified in decisions from the various circuits, thus fostering both national uniformity and more focused settlement review. At least some of the criteria used in some circuits — support for the settlement from the lawyers who negotiated it is a recurrent example — seem not to be helpful. But one might argue that the elasticity of the rule sketch may leave courts free to consider most or all of the factors on a given circuit's checklist in determining what is fair, reasonable, and adequate.

The discussions in April focused particular attention on the court's decision whether a proposed settlement has enough apparent merit to justify sending notice to the class. The Subcommittee intends to focus on this subject as it moves forward. The topic is introduced under the heading "additional possible issues" at the end of this section of the agenda book. It is possible that a more focused set of criteria for final approval of a settlement, like the ideas above, might assist both the court and the lawyers in making that initial decision about whether to give notice to the class.

2. Settlement class certification: In 1996, the Committee published a proposal to add a new Rule 23(b)(4), permitting certification for purposes of settlement in a Rule 23(b)(3) class action even though the proposed class might not meet all the certification requirements for purposes of trial. At that time, some prominent cases had stated that, to be certified for settlement, cases had to satisfy the same certification criteria as for certification for trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), ruled that those seeking certification for settlement need not satisfy everything that is required of certification for trial. But uncertainty remained — particularly about the role of predominance — and there followed a move toward use of MDL procedures to achieve settlements in situations that might also be suitable for class-action treatment.

The Subcommittee's sketches of a new Rule 23(b)(4) concept have focused attention on several issues. The first is whether present obstacles to achieving settlement class certification actually justify serious consideration of a new category of class action. A related question is whether a new Rule 23(b)(4) should be limited (like the 1996 proposal) to cases seeking certification under Rule 23(b)(3). On that subject, it has been suggested that Rule 23(b)(2) class actions for injunctive relief may often be settled. That still leaves open the question whether a settlement class should be certified for (b)(2)-type relief when the same class could not be certified for trial. Another question is whether a settlement should require satisfaction of all Rule 23(a) factors or only some of them.

Some of the ideas under consideration diverge from the Supreme Court's analysis in *Amchem*. One is to remove predominance as a critical factor in approving settlement certification. Because predominance is required only for Rule 23(b)(3) classes, downplaying it would fit with opening up settlement certification approval for Rule 23(b)(2) class actions. It might be that separate settlement class certification rules could be designed for (b)(2) and (b)(3) cases, but that possibility seems cumbersome and could involve intricate drafting. And there is also the question whether settlement class certification should be available for "mandatory" Rule 23(b)(1) class actions.

Another issue is whether to place primary emphasis on Rule 23(e) review of the fairness of the proposed settlement rather than the Rule 23(a) and (b) factors. In *Amchem*, the Court said that Rule 23(e) is not a substitute for vigorous application of the Rule 23(a) and (b) requirements (even in the settlement context), except to the extent that the Rule 23(b)(3) manageability factor may play a reduced role.

(3) Addressing *cy pres* settlement provisions in the rule: It may be that *cy pres* provisions are becoming more frequent in proposed settlements. Chief Justice Roberts reflected concerns about this practice in his statement in *Marek v. Lane*, 134 S. Ct. 8 (2013), that the Supreme Court "may need to clarify the limits on the use of such remedies." More recently, the court in *In re BankAmerica Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), noted a concern about "the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns." *Id.* at 1064.

Sketches prepared by the Subcommittee have attempted to address these concerns; the present effort is not designed to expand authority for using *cy pres* provisions so much as to develop criteria and guidelines for using them. One recurrent reality is that any claims procedure creates a possibility that a residue will be left once distributions are made in accordance with settlement guidelines to all class members who seek compensation through the claims process. Unless this residue is to revert to the settling defendant, some alternative provision should be made for it. This concern might support vigorous Committee Note admonitions (or even rule provisions) regarding reverter provisions and/or simplified settlement claims processes (to ward off the risk that reverter provisions might tempt defendants to insist on unreasonably demanding claims processes). At the same time, the existence of a possibility there will be a residue may

justify including *cy pres* provisions in a significant number of settlements, given the possibility that notice might have to be sent to the class a second time (concerning such *cy pres* treatment) if the possibility were not included in the original settlement agreement.

Issues that have been identified in the discussions so far include whether the rule should affirmatively authorize the court to approve *cy pres* provisions. The Subcommittee has not embraced amending the rule to create new authority; as the Eighth Circuit noted (quoted above), it seems that many courts presently are exercising such authority. Instead, the focus of the Subcommittee (building on the proposal of the ALI Principles of Aggregate Litigation, which has already been adopted by some courts) is to provide guidelines for what is already going on. Accordingly, the Subcommittee's current sketch articulates limits on use of *cy pres*:

- (A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds must be distributed directly to individual class members;
- (B) If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;
- (C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a *cy pres* approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that individual distributions are not viable for sums of less than \$100.] [If no such recipient can be identified, the court may approve payment to a recipient whose interests do not reasonably approximate the interests being pursued by the class if such payment would serve the public interest.]

This sketch raises questions. A basic one is whether to permit *cy pres* provisions only “if authorized by law.” Some states have such statutory authorizations, but it is likely that not many do. More importantly, this is a settlement, and settlements are not usually limited to relief “authorized by law.” To the contrary, they may be attractive because they include features (such as an apology) that cannot be obtained by a court judgment. At the same time, settlement by a class representative may differ in important ways from settlement by a participating party. It is not obvious that defendant’s agreement, elicited by the desire for *res judicata*, justifies surrender of class members’ interests.

Bracketed language above identifies further questions. The Subcommittee has been informed that class action settlement administration has improved to a point that makes excusing distributions smaller than \$100 (suggested by a proposed uniform class-action law for states) inappropriate. And the question whether to affirmatively authorize distribution to “public service” organizations whose interests do not correspond to the claims asserted in the action may be a step too far.

(4) Issues about objectors: In 2003, Rule 23(e)(5) was added, providing that any class member may object to a settlement submitted for the court’s approval, and that any such objection “may be withdrawn only with the court’s approval.”

The starting point is that objectors play a valuable role for the court, which is ordinarily called upon to evaluate a proposed resolution that is supported by all the lawyers and parties with whom the court has been dealing. The refinement of the factors to be considered in approving such proposed settlements (Issue (1) above), and the possible additional focus on what must be submitted at the outset when the court is asked to direct notice to the class (mentioned below), may make more useful information available to class members in deciding whether to raise questions about the proposed settlement.

But another starting point is that repeated reports indicate that some objectors seek to exploit the process to extract unjustified tribute. The requirement of court approval for withdrawing objections added in 2003 was designed to curtail such activity. Reports indicate that it has worked reasonably well. The problem has been that the Rule 23(e)(5) requirement ceases to constrain objectors after a notice of appeal is filed. And the time necessary to resolve an appeal means that a bad-faith objector gets considerable additional leverage from filing a notice of appeal, while also seemingly escaping from the requirement for court approval to withdraw the appeal.

The problem has drawn suggestions to the Appellate Rules Committee that it amend the FRAP to provide that withdrawal of the appeal also require court approval, and to direct further that the appellate courts may not approve such a withdrawal if anything of value is provided to the objector or the objector’s counsel in return for withdrawing the appeal.

Absolutely forbidding any consideration for dropping the appeal might unduly limit the ability to resolve appeals asserting that the objector’s special situation justifies special treatment. But permitting some withdrawals to be approved despite consideration could produce further difficulties. Much might be said in favor of having such a decision made, at least initially, by the district court (which is very familiar with the case) rather than by the appellate court (which is not). Moreover, assuming that the appellate court has motions panels to rule on such matters that are constituted separately from merits panels, the issue might be presented to a panel of appellate judges who would never be involved in passing judgment on the underlying settlement approval, imposing a possibly substantial burden on the appellate court when the district court would be entirely up to speed.



The Rule 23 Subcommittee stands ready to collaborate with the Appellate Rules Committee in addressing methods of achieving the desired goal.

Meanwhile, the Rule 23 Subcommittee has sketched two possible ideas for changing Rule 23. One would add a requirement that “side agreements” be submitted along with a request for permission to withdraw an objection before the district court. The other would add to Rule 23 some sanction authority for bad-faith objections. It is uncertain whether either of these ideas would make productive additions to the rule.

(5) Mootness and Rule 68 offers of judgment: In recent years, Rule 68 offers of judgment have been used with some frequency in efforts to moot proposed class actions by offering “full” relief to the individual plaintiff who brings the suit. They may become more common due to a recent Supreme Court decision in a Fair Labor Standards Act collective action, although the Court was at some pains to say that collective actions and class actions are different in this regard. The Subcommittee has developed various ideas about how to address this issue, seeking a simple solution. The question whether rulemaking is justified by this problem remains also.

(6) Issue Classes: Rule 23(b)(3) says that a court may certify a class only on finding that common questions predominate and that class treatment is superior to individual litigation. Rule 23(c)(4) says that, “if appropriate,” a court may certify with regard only to “particular issues.” Whether there is an inherent tension between these two provisions can be debated. At least at a point in time, the Fifth and Second Circuits seemed at loggerheads about whether a court could resort to issue certification under (c)(4) only in cases that already have been found certifiable under (b)(3). The Fifth Circuit said that “nimble use” of (c)(4) could not circumvent the predominance requirement of (b)(3). But it may be that more recent Fifth Circuit decisions show that issue certification is (at least sometimes) approved by that court.

The Subcommittee has developed a sketch of a change to Rule 23(b)(3) designed to show that a court may resort to issue certification under (c)(4) even though it cannot conclude that, overall, common issues predominate. That leaves unresolved the question what happens next after the common issues are resolved, since that would not ordinarily lead to entry of a judgment. The Subcommittee therefore has also developed a sketch of an amendment to Rule 23(f) that would permit discretionary court of appeals review of the resolution of the common issue before further (and possibly burdensome) proceedings in the district court or elsewhere to resolve remaining issues. One variation of that provision would require that the district court find that immediate review would be desirable before a petition to the appellate court would be allowed.

(7) Notice: In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court said that in (b)(3) actions individual notice (seemingly by first class mail) was required for every class member who could be identified with reasonable effort. Requiring snail mail seems inappropriate in the 21st century. It also seems that courts have moved to embrace more modern methods of giving notice to class members. See, e.g., *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 941 (9th Cir. 2015): “Initial e-mail notice of the settlement was

provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice ‘bounced back.’ \* \* \* The notice encourages class members to visit the class website for more details.”

The Subcommittee sketch would add the phrase “by electronic or other means” to Rule 23(c)(2)(B) to take account of improvements in methods of communication.

In addition, the Subcommittee has had some discussions about whether some notice requirement should exist for litigated (b)(1) and (b)(2) actions. At present, the rule does not require any notice in those cases, although Rule 23(c)(2)(A) does say that “the court may direct appropriate notice to the class.” But it is possible that a fully litigated (b)(2) case would proceed to judgment without any notice at all to class members. (If a settlement were proposed, Rule 23(e) would require “notice in a reasonable manner to all class members who would be bound by the settlement.”) In 2001, a proposal to direct some notice to class members was published for comment, but then not pursued after adverse public comment, which focused on the cost of giving such notice. Whether technological development since then has changed the situation is uncertain.

#### *Additional possible issues*

As noted above, the April Advisory Committee meeting and the George Washington roundtable brought to the fore two additional issues that the Subcommittee expects to examine as it moves forward:

(1) Specifics necessary for decision to order notice to class about proposed settlement: Recent discussions have emphasized the importance of the initial decision whether to direct that notice be sent to the class about the proposed settlement (thereby triggering the time to object). Although the rule does say that notice should be sent to the class, it does not address the standards a court should use in making that decision or the showing that the settling parties should make to support giving notice to the class. In some cases, it may be that the court does not get a full picture of the proposed settlement until later, when the matter is presented for final approval. Similarly, it may be that full information about the proposed settlement would be beneficial to class members in making decisions whether to object, so that having that information before the court from the outset could have the additional advantage of making it available to class members trying to evaluate the proposed resolution.

The Subcommittee expects to examine these issues as it moves forward, with an eye to the possibility of adding something to the rule. The ALI Principles of Aggregate Litigation caution against regarding the decision to send notice as a “preliminary approval” of the settlement, on the ground that class members have not even had a chance to evaluate the settlement and that the court should not already be taking a position in favor of it. But if information roughly identical to that required at the final approval stage must be provided before notice is authorized, it may appear that the decision to give notice should assume even more importance.

A related potential problem is that, as one increases the information available at this stage, one also strengthens arguments for immediate appellate review under Rule 23(f), even before the class members get a chance to object. If a “preliminary approval” includes approval of settlement class certification, that might arguably fit within Rule 23(f), which authorizes immediate review of “an order granting or denying class-action certification.” In *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014), the court held that such approval for purposes only of giving notice is not an event that supports immediate Rule 23(f) appeal. If the Subcommittee goes forward on this issue, that potential problem will be kept in mind; the Subcommittee’s current thinking is not to multiply the occasions for interlocutory review.

(2) Ascertainability: Recently there has been much concern about what must be shown to demonstrate that a proposed class is “ascertainable,” largely resulting from Third Circuit decisions. This concern seems to be limited to Rule 23(b)(3) class actions. See *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2014) (ascertainability is not required in a class action seeking only injunctive relief). And the Third Circuit treatment of the issue may be evolving. See, e.g., *Byrd v. Aaron’s Inc.*, \_\_\_ F.3d \_\_\_, 2015 WL 3887938 (3d Cir., April 16, 2015), in which the panel stated that “it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated” and added that “[w]e seek here to dispel any confusion.” (Judge Rendell, concurring in reversal of the district court’s denial of certification, suggested that “it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23.”)

The Subcommittee intends to examine this issue; it is not certain at present whether a rule change might be indicated.

\* \* \* \* \*

The Subcommittee continues to seek input on whether the issues listed above should be pursued, and whether others should be considered as well.

#### **II.D. DISCOVERY: REQUESTER-PAYS**

The Discovery Subcommittee continues to have the “requester pays” topic on its agenda. The Advisory Committee had an initial discussion of these issues at its November, 2013, meeting, but the full Committee was occupied thereafter addressing the public commentary on the amendment package published for public comment in August, 2013. On April 29, 2015, the Supreme Court adopted rule changes resulting from that effort.

In early 2015, the Discovery Subcommittee had two conference calls about these issues. At its April, 2015, meeting the Advisory Committee had a further discussion. The issues appear both difficult and contentious, and the Advisory Committee is not recommending any rulemaking action at this time.

One reason for caution in proceeding along this line is that the package of amendments approved by the Supreme Court on April 29, 2015, includes changes designed to address the problems some seek to solve with requester pays rules. Those amendments go into effect on Dec. 1, 2015, unless Congress takes action to defer their effective date. Time will be needed to gauge their effects, but knowing about those effects would be important in determining whether to proceed with requester pays ideas.

Another reason for proceeding gradually is the difficulty of predicting the changes that would result from a requester pays system. There are presently a number of provisions that authorize something like requester pays under some circumstances. Examples include:

Rule 26(g)(1)(B) & (3) say that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose, such as increasing the cost of litigation, and that the request is not unduly burdensome or expensive. If there is an unjustified certification, the court “must impose an appropriate sanction” on the violator, which may include “the reasonable expenses, including attorney’s fees, caused by the violation.”

Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party. [The amendments adopted by the Supreme Court on April 29 move this provision up into Rule 26(b)(1), on the scope of discovery, and also revise it a bit.]

Rule 26(c) now authorizes a protective order to protect a party from “undue burden or expense.” In *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978), the Supreme Court recognized that Rule 26(c) provided authority for “orders conditioning discovery on the requesting party’s payment of the costs of discovery.” *See id.* at 358.

Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.

Rules 37(a)(5) & 37(b)(2)(C) require the court to impose the expenses incurred in relation to a discovery motion on the losing party on the motion, unless that party’s position was “substantially justified.”

28 U.S.C. § 1927 authorizes the court to impose “the excess costs, expenses, and attorneys’ fees” on any attorney or party that “multiplies the proceedings in any case unreasonably and vexatiously.”

It is not certain how often these provisions are employed, but some assert that the number of such provisions already in existence shows that there is really no need for more such provisions. It may be that abusive discovery that would warrant shifting costs from the producer

to the requester is not commonplace in civil litigation in federal court, and so adopting across-the-board requester pays rules would be dubious. But it also seems to be true that there are cases in which disproportionate discovery is a serious problem. It will be very difficult to draft a rule that will help courts and litigants distinguish discovery requests that justify imposing on the requester part or all of the cost of responding from those that do not.

Some other legal systems — particularly the UK — have loser pays provisions that might be compared. But it is possible that such a system could even encourage disproportionate expenditures on case preparation if that preparation significantly increased the likelihood of success, which would make the cost of the preparation recoverable. Difficult questions could arise about whether a requester who had to pay for discovery should be able to recoup those costs upon prevailing in the action.

In the UK, the “full indemnity” approach to recovery of litigation costs makes necessary an extensive regime of judicial officers whose job is to assess the propriety of recovery of certain costs. Any effort to calibrate more precisely the cost of responding to specific discovery requests might prove even more challenging. Making such costs recoverable might also prompt responding parties not to be frugal in expenditures on their discovery responses. It might, in addition, raise difficult questions about whether expenditures were actually prompted by the discovery requests or instead trial preparation activities that would have happened in any event.

The UK comparison also suggests another direction in which this discussion could lead — looking again at disclosures as an alternative to formal discovery. In 1991, the Committee published a proposed initial disclosure rule designed to require each side to disclose the “core information” seemingly involved in the case to the other side at the outset. That approach might be a model that would hold some promise, but initial disclosure caused a firestorm of protest when proposed in 1991. Eventually, the 1993 amendments added an initial disclosure requirement that directed disclosure of witnesses and documents with information relevant to disputed facts alleged with particularity in the pleadings, but allowed district courts to opt out of this disclosure requirement. Many districts did opt out, and the rule was amended in 2000 to its current form, which applies nationwide and directs disclosure only of material the disclosing party may use to prove its claim or defense. The possibility of focusing again on initial disclosure was raised during the Advisory Committee discussion of these issues in April.

Something like initial disclosure may already be resulting from adoption by many judges of the protocols for individual employment discrimination actions developed by a committee made up of leading plaintiff- and defense-side lawyers under the guidance of Judge Koeltl over the period of more than a year. The hope is that having this basic information on the table at the outset could obviate much wasted motion that now occurs. But whether a similarly tailored set of disclosures could be designed for other sorts of cases is uncertain.

Yet another comparison may be to various provisions in “patent troll” bills introduced in Congress. Some of those bills call for the requester to pay after “core information” is disclosed.

It is possible that, if directed by Congress, the Committee will find itself called upon to attempt to draft rules that implement core discovery and requester pays for patent cases.

The whole area is thus beclouded by uncertainties. The prospect that disproportionate discovery costs will cause parties to settle meritless claims or abandon meritorious claims is very troubling. But it is important to appreciate that proceeding with requester pays could generate passionate opposition. In 1998, a proposed amendment to Rule 34 would have permitted the court to order discovery otherwise forbidden under Rule 26(b)(2)(C) as disproportionate if the requesting party had to pay part or all of the cost of responding. Even though that amendment was limited to disproportionate discovery (which the rule said the court was required to forbid entirely), and did not invariably require full payment for it, the proposal drew considerable criticism, and eventually did not go forward.

It is important to appreciate, therefore, that strong access-to-justice concerns bear on any requester pays proposal. Proceeding would likely depend on having a solid empirical basis for identifying the problem and, perhaps, the solution. Yet it is not clear how solid empirical work could be done to provide that information base.

The Committee will undertake further information-gathering efforts. Any suggestions about where or how to obtain useful information would be welcome. Among the questions addressed by the Subcommittee, which it called to the attention of the Advisory Committee, were the following:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be “transsubstantive,” applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud. Is there a workable way for a rule to identify “problem” or “contentious” cases? [Note that, as mentioned above, “patent troll” legislation may call for rules specific to some or all patent cases.]

(b) Since discovery regarding electronically stored information has assumed such great importance, should a “requester pays” idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is similarly limited,

as is current Rule 37(e). Even more pertinent, current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Would it be useful to consider broadening initial disclosure if requester pays changes are actively studied? As amended in 2000, Rule 26(a)(1) only requires disclosure of information the disclosing party may use to prove its claims or defenses. Some question the utility of the current rule. It could be that broadening initial disclosure would be a useful adjunct to adding requester pays provisions.

(5) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from “inaccessible” sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest “discovery about discovery,” something that may be unnerving.

(6) Would requester pays provisions have a significant effect on judicial workload? It is likely such provisions would focus on something like “reasonable expenses.” Determining what is “reasonable” could be an effort for the court. But perhaps that inquiry is sufficiently implicated in the basic proportionality analysis -- balancing the cost of proposed discovery against its apparent value -- so that there would not be significant added effort for the court.

## **II.E. MANUFACTURED FINALITY**

The two projects of the Appellate-Civil Subcommittee reported here began in the Appellate Rules Committee. As often happens, potential solutions to problems identified by the Appellate Rules Committee seem to lie as much in the Civil Rules as in the Appellate Rules. Joint subcommittees have proved invaluable in focusing the work of both committees.

Both of the present topics have lingered for some time. Manufactured finality was considered in some depth by an earlier Subcommittee. The provisions of Rule 62 addressing stays of execution pending post-judgment motions and appeal have been considered in the

Appellate Rules Committee and then transferred to the Subcommittee. Manufactured finality is discussed here. Rule 62 comes next.

"Manufactured finality" refers to attempts to accelerate the time when an appeal can be taken following an interlocutory ruling that is not independently appealable under any other elaboration of the final decision requirement of 28 U.S.C. § 1291 or under the statutes that permit interlocutory appeals.

Many circumstances may lead a party to prefer an immediate appeal to test an interlocutory order that is not appealable without more. A few common illustrations set the stage. A plaintiff may have several demands for relief. An order dismissing some of them may leave only fragments that, standing alone, do not seem to warrant the costs and uncertainties of continuing litigation. Even if the plaintiff can afford to litigate the rest of the way to a final judgment, banking on the prospect that the interlocutory order will be reversed, the cost may be high, and can easily be wasted whether the result on appeal is reversal or affirmance. And delay is an inevitable cost. So too, the court may dismiss some theories that support a single claim, leaving only theories that the plaintiff thinks weaker either as a matter of law or as a matter of available evidence. Or the court may enter an in limine order excluding the most important — and perhaps indispensable — parts of the plaintiff's evidence.

Faced with these, and often enough more complicated circumstances, an attempt may be made to "manufacture" finality by arranging voluntary or stipulated dismissal of all, or substantial parts, of what otherwise remains to be done in the trial court.

Three rough categories of manufactured finality can be identified. Most decisions agree that most of the time a final judgment cannot be manufactured by dismissing without prejudice everything that remains unfinished in the action. Most decisions agree that most of the time a dismissal with prejudice of all unfinished parts of an action does establish finality. And most circuits reject the approach of "conditional prejudice" that has been accepted in the Second Circuit and apparently the Federal Circuit. This tactic dismisses all unfinished parts of the action with prejudice, subject to the condition that they can be revived — the prejudice dissolves — if the interlocutory orders thus made final are reversed on appeal.

The question whether to propose rules provisions addressing manufactured finality is beset by two major concerns.

One major concern is that the cases have recognized circumstances in which a dismissal without prejudice does achieve appealable finality. At times finality is found by finding "de facto prejudice" in circumstances that would bar a new action. A rule that rejects finality for all dismissals without prejudice might come at significant cost.

A related concern is that a rule recognizing that a dismissal with prejudice can achieve finality accomplishes nothing useful. Courts understand that now. A rule that states that only a



dismissal with prejudice can achieve finality, on the other hand, runs into the same problems as a rule that rejects finality for all dismissals without prejudice.

Discussions of conditional prejudice have tended to divide practicing lawyers from judges. It may be that the division is more accurately described as between practicing lawyers and trial judges on one side and appellate judges on the other. Practicing lawyers believe that a dismissal with conditional prejudice can be a valuable means of achieving finality. Since most appeals lead to affirmance, the opportunity to revive the parts of the action that were dismissed with conditional prejudice will not cause as much risk of repeated appeals in the same action as might be feared. The party who is willing to risk all that remains in the action on the opportunity to win reversal of the interlocutory orders made before the dismissal will be able to continue only if there is reversible error. If the alternative is to persist in litigating to a true final judgment the parts that would be dismissed with conditional prejudice, both the trial court and the opposing party pay a price that is not redeemed even if the eventual appeal leads to affirmance. And those proceedings are likely to become pure waste on reversal of the interlocutory orders that would have been reviewed on a conditional-prejudice appeal.

Judges (at least appellate judges), on the other hand, fear that dismissals with conditional prejudice will threaten the core values of the final-judgment rule. As with an avowedly interlocutory appeal, the result may be added cost and delay and a risk that the appellate court will have to revisit familiar terrain on a subsequent appeal.

One way of viewing the conditional-prejudice issue is to ask whether there is a real need to address it by rules amendments. There is no indication that the Second Circuit regrets its approach. Apart from the Federal Circuit, the other circuits that have confronted the question refuse to allow manufactured finality on these terms. Is there a need to adopt a rule that prohibits reliance on conditional prejudice by the courts that find it a useful adjustment of the final-judgment rule?

The Subcommittee, building on work by an earlier subcommittee, discussed these issues at length. The competing arguments on all sides continue to defy confident resolution. Failing to achieve consensus, the Subcommittee reported four alternatives for Committee consideration.

The first alternative is to do nothing. The reasons for doing nothing are easily summarized. Most situations are governed by two clear rules that are generally recognized. A voluntary dismissal without prejudice, even if it sweeps away an entire action, does not achieve finality. A voluntary dismissal with prejudice that sweeps away an entire action does achieve finality. Little would be accomplished by adopting a rule that states either or both of these points. And so simple a rule would create a risk of undoing decisions that now recognize finality in circumstances that would not seem to fit within the new rule. The most obvious example is conditional prejudice, discussed further below. Other examples were described in a memorandum discussing the choices between simple rules, complex rules, or no rules and providing a welter of examples of complex finality theory.

The argument for going ahead with simple rules is direct. It is important to have clear rules of appeal jurisdiction. And uniformity across the circuits is an important component of clarity — no matter how clear the rules may seem within any particular circuit, disuniformity will encourage attempts to manufacture finality that backfire against sloppy or risk-taking lawyers. This argument, however, is subject to challenge on the ground that no rule text will be so perfect as to exclude all opportunities for interpretation and thus for disuniform interpretation.

The second alternative is to adopt a rule that says only that a plaintiff — or perhaps any party asserting a claim for relief — can achieve appeal finality by dismissing with prejudice all claims and parties that remain in the action. Although this rule is accepted as a general matter now, recognition in rule text would provide guidance for lawyers who are not expert in the complexities of the final-judgment rule. It also would provide reassurance for lawyers who are familiar with the idea, but feel pressure to confirm their understanding by expensive research.

This simple rule would leave ambiguities at the margin. The clearest example is a dismissal with conditional prejudice. Is that with prejudice or without prejudice? Other examples occur in cases that, on one theory or another, recognize de facto prejudice. One illustration is a dismissal without prejudice in circumstances that seem to preclude any new action because the applicable limitations period has run. Litigants and lawyers would face new uncertainties in the attempt to reconcile existing decisions with the new rule text.

The third alternative is to adopt a rule that says that only a dismissal with prejudice achieves finality. This rule would actually do something, as compared to a rule that recognizes finality on a dismissal with prejudice but that does not expressly foreclose other means of manufacturing finality. But the ambiguities would remain, and expressly foreclosing all but dismissals with prejudice would raise the stakes of uncertainty.

A fourth alternative is to adopt a rule that recognizes or requires that a voluntary dismissal be with prejudice and that also expressly addresses conditional prejudice. Either answer could be given. Conditional prejudice could be recognized as a valid path to finality. This answer might be adopted in a form that would defer to courts that recognize conditional prejudice now, and leave the choice open for courts that have not expressly rejected it, without requiring other circuits to change their views. That path would leave disuniformity. Instead, the rule might require all courts to recognize conditional prejudice. That path likely would stir significant opposition. Or conditional prejudice could be rejected, not so much because of any sense that it has proved undesirable when recognized as because of a desire to achieve national uniformity. A clear majority of the decisions that address the question reject conditional prejudice. There is no indication that it is frequently used in circuits that do recognize it. Uniformity, on this view, would be achieved at little cost, and indeed would be an added benefit if conditional prejudice is in fact a bad means of achieving finality.

A choice among these alternatives will be influenced by a more general sense of the need to prevent further erosion of the final-judgment rule. The rule is far more complicated than the initial statement that finality requires complete disposition of an entire case, leaving nothing to

be done in the trial court apart from execution of a judgment that provides relief. Expansions, exceptions, and occasional evasions are familiar in practice. The complication reflects case-specific, or at times more general, rebalancing of the competing needs that allocate jurisdiction between trial courts and appellate courts. An openly ad hoc approach that allows a court of appeals to assert jurisdiction whenever a present appeal seems a good idea would destroy the balance achieved by a general requirement of finality. But many more restricted qualifications are recognized by statute, court rule, and interpretation of 28 U.S.C. § 1291 itself. The choices are seldom easy. But it may be difficult to identify any general practical losses incurred by ongoing and somewhat divergent approaches to manufactured finality. If so, the more abstract desire for more precise rules in this particular corner of appeal jurisdiction may not be enough to justify the potential costs of more precise rules.

Discussion of these four alternatives explored the competing pressures that have expanded appeal finality beyond the paradigm judgment that leaves nothing more to be done in the trial court. The best-known example is the collateral-order doctrine, which itself has an uneven history. It does not seem possible to craft a court rule that would accurately identify the circumstances that justify an appeal before the trial court has completely finished its work. At the least, it does not seem possible to craft a rule that would embody the actual and often conflicting decisions on finality. Any clear rule would be bought at the price of sacrificing some desirable, at times important, opportunities to appeal.

In the end, the Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as “manufactured finality.” The Reporter for the Appellate Rules Committee has reported that, at least for the time being, they do not intend to pursue further the effort to develop rule text that would address manufactured finality.

#### **II.F. RULE 62: STAYS PENDING APPEAL**

Discussion of Rule 62 stays of execution began in the Appellate Rules Committee. The initial focus was on the fit of Rule 62 with a convenient practice adopted by some appellate lawyers. Rather than arrange separate bonds to secure a stay pending post-judgment proceedings and then to secure a stay pending appeal, they arrange a single bond designed to secure a stay until completion of all appeal proceedings. It has not been clear how this strategy fits Rule 62.

Rule 62 is presented for discussion to guide further work in the Subcommittee and the Appellate and Civil Rules Committees. The work has focused on money judgments. The present provisions addressing injunctions, receiverships, and an order for an accounting in an action for patent infringement are carried forward unchanged, at least for the time being.

A particular twist on the single-bond question arises from the fit between the 14-day automatic stay provided by Rule 62(a) and the Rule 62(b) provision for a stay “pending disposition of” post-judgment motions that may be made up to 28 days after entry of judgment.

Before the Time Calculation Project the Rule 62(a) automatic stay lasted for 10 days, and 10 days also was the period for making the post-judgment motions. The automatic stay was redefined as 14 days (the prior conventions for counting meant that a 10-day period was always at least 14 days, and might run longer). The times for the post-judgment motions, however, were extended to 28 days because experience had shown that more time was needed in many complex cases. The result is an apparent “gap.” A district judge wrote to the Civil Rules Committee that the gap creates uncertainty whether the court can order a stay after expiration of the automatic stay but before a post-judgment motion is made. The Committee concluded that a court has inherent power to stay its own judgment, and that there was no need to revise Rule 62(b) unless practice should show persistent confusion.

Consideration of these initial questions led to other questions. Successive sketches of possible Rule 62 revisions have taken on ever more possible changes. Should the court be able to dissolve the automatic stay before it expires of its own force? Should it be able to require that the judgment creditor post security as a condition of dissolving a stay or refusing to grant one? Should it be able to recognize security other than a bond? To set the amount of security less than the judgment? And is it wise to carry forward the supersedeas bond provision of Rule 62(d) that many understand to create a right to a stay pending appeal? And, to return to the questions that launched the inquiry, why not recognize that a single security may be accepted for a stay that continues from expiration (or supersession) of the automatic stay through issuance of the appellate mandate and disposition of proceedings on a petition for certiorari?

Subcommittee consideration of these questions is in mid-stream. It has been supported by detailed memoranda prepared by Professor Struve, Reporter for the Appellate Rules Committee. These memoranda reach beyond the questions that have been actively considered. The Subcommittee has yet to determine whether to recommend that consideration of Rule 62 extend beyond subdivisions (a) through (d).

One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the “gap” between expiration of the automatic Rule 62(a) stay and the time allowed to make the motions that support a stay under Rule 62(b). Rule 62(b) speaks of a stay “pending disposition” of these post-judgment motions. Are courts receptive to ordering a stay before a motion is filed under Rules 50, 52, 59, or 60, either in general or after an express representation that a motion will be, or is quite likely to be, filed? Would problems arise from extending the automatic stay to 28 or 30 days? Would the problems be reduced if Rule 62 is amended to make clear the court’s authority to modify or dissolve the automatic stay?

How often do problems arise in agreeing on the form of security, whether a bond or something else? Are there practical difficulties in arranging a convenient and seamless form of security that runs from expiration of the automatic stay through final disposition of an appeal?

More generally, would it be desirable to amend Rule 62 to provide more explicit recognition of the district court’s authority to modify, dissolve, or deny any stay? And its

authority to set appropriate terms both for the form and amount of security? And to exact security as a condition of allowing immediate execution of part or all of a judgment?

These questions are set against the background of Appellate Rule 8(a)(1), which directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. When the court of appeals does act, Rule 8(a)(2)(E) says blandly that it “may condition relief on a party’s filing a bond or other appropriate security in the district court.” The combination of district-court primacy and appellate-court flexibility suggest the possible value of recognizing a full range of district-court discretion in Rule 62.

Discussion of these issues in the Committee focused on the more adventuresome of two initial drafts presented to illustrate possible approaches to revising Rule 62. This draft aims at explicit statement of the district court’s several responsibilities. The automatic stay remains, and is extended to 30 days to reach beyond the 28-day limit for post-judgment motions under Rules 50, 52, and 59. The district court, however, has authority to dissolve the automatic stay or to supersede it during the 30-day period. The district court, further, has authority to order a stay, during or after the period set for the automatic stay, that may last until issuance of the mandate on appeal. The court has discretion as to the form and amount of security. It can modify or dissolve a stay. And it can require security as a condition of refusing or dissolving a stay. The right to obtain a stay on posting a supersedeas bond is tentatively retained, but flagged as a question for further deliberation; if it is retained, the revised rule might direct that the amount be set at 125% of the judgment.

The central point made in Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money judgments pending appeal. Ordinarily the parties work out a reasonable solution, albeit with occasional “power struggles.” Still, the draft set out below was addressed by some members as a clear and useful reformulation.

The Subcommittee will continue work on Rule 62.

### **Rule 62. Stay of Proceedings to Enforce a Judgment.**

**(a) STAY OF JUDGMENT TO PAY MONEY.** Execution on a judgment to pay money, and proceedings to enforce it, are stayed as follows:

**(1) *Automatic Stay.*** Unless the court orders otherwise, for 30 days after the judgment is entered.<sup>4</sup>

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<sup>4</sup> The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

(2) *By Court Order.* The court may at any time order a stay until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(3) *By Supersedeas Bond.*<sup>5</sup> If an appeal is taken, the appellant may obtain a stay by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment]. The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond or other security.

**(b) TERMS [OF STAY].**

(1) *Terms.* The court may set appropriate terms for the opposing party's security<sup>6</sup> for any<sup>7</sup> stay or on denying or terminating a stay.<sup>8</sup>

(2) *Dissolving or Modifying a Stay.* The court may[, for good cause,] dissolve the stay or modify [the terms set under Rule 62(b)(1)] [its terms].

**(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.**

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

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<sup>5</sup> This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

<sup>11</sup> Wright, Miller & Kane, *Federal Practice & Procedure: Civil 3d*, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

<sup>6</sup> Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

<sup>7</sup> “any” rather than “a” to emphasize that the court can terminate the automatic stay.

<sup>8</sup> This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

- (B) a judgment or order that directs an accounting in an action for patent infringement.
- (2) While an appeal is pending from an interlocutory order or final judgment that grants,<sup>9</sup> dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
- (A) by that court sitting in open session; or
- (B) by the assent of all its judges, as evidenced by their signatures.

## II.G. PILOT PROJECTS

The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure.

Rule 83, reflecting 28 U.S.C. § 2071(a), directs that a local rule must be consistent with Enabling Act rules. A proposal to amend Rule 83 to allow experimentation with local rules inconsistent with the national rules, upon approval by the Judicial Conference and with a 5-year time limit, was studied and abandoned more than 20 years ago. The Committee agreed that attention must be paid to the problem of inconsistency when a pilot project is implemented through local court rules, but recognized that many of the national rules are sufficiently flexible to avoid inconsistency with a more directive local rule. Often the pilot project rule will simply prescribe something that could be ordered under the national rule.

Several possible subjects for pilot projects were discussed.

One subject, often identified in the past, is to expand the scope of initial disclosures under Rule 26(a)(1). The project might simply recreate the original version of Rule 26(a)(1) that took effect in 1993, only to be scaled back in 2000 in order to win support for eliminating the provision that allowed districts to opt out by local rule. Or it might test a rule demanding still greater disclosures, perhaps modeled on part or all of Arizona Rule 26.1. In a different direction, developing experience with the protocols for initial discovery in individual employment actions may provide useful empirical data.

Discussion of initial disclosure pointed to an issue that may prove common to many possible pilot projects. Implementing a project on initial disclosure in the District of Arizona

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<sup>9</sup> Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should “denies” become “refuses” to parallel § 1292(a)(1)?

would provide a much quicker start up because most lawyers in the federal court would be accustomed to state-court disclosure requirements. On the other hand, information on how a rule would work in a system populated by lawyers with two decades of experience in a similar regime may not be as valuable as information gathered in courts where broad initial disclosure would come as a “shock to the system.”

Discussion of docket practices designed to speed cases toward conclusion, including “rocket docket” practices, branched out into discussion of the tracking systems used by some federal courts to assign cases to different procedural regimes depending on general characteristics. These systems might be developed into more formal means to identify simplified procedures that could be adopted more generally. This discussion led to still other means to expedite litigation, including such matters as summary jury trials, e-discovery neutrals, and e-discovery experts on the court’s staff. Means of facilitating disposition of cases that require review and decision on an administrative record or an employee-benefit record also were mentioned.

The Committee will develop the opportunities for advancing pilot projects through a newly appointed Subcommittee on Pilot Projects. The Subcommittee has begun its work. It will look for guidance in both state courts and federal courts. Experience with actual pilot projects will be one target. Examples of state rules or practices, and of local federal rules and practices, also may provide inspiration for innovations that might profitably be tested through formal pilot projects in the federal courts.



# APPENDIX

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## **RULE 23 SUBCOMMITTEE REPORT**

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016)  
[Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016,

date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

- (1) Settlement Approval Criteria
- (2) Settlement Class Certification
- (3) Cy Pres Treatment
- (4) Dealing With Objectors
- (5) Rule 68 Offers and Mootness
- (6) Issue Classes
- (7) Notice

Appendix I: Settlement Review Factors -- 2000 Draft Note

Appendix II: Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

### **(1) Settlement Approval Criteria**

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.<sup>1</sup>

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].

Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

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<sup>1</sup> From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)  
Amendment Idea

1 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a  
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's  
3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or  
4 compromise:

5  
6 \* \* \* \* \*

7  
8 (2) If the proposal would bind class members,

9  
10 *Alternative 1*

11  
12 (A) the court may approve it only after a hearing and on finding that it is fair,  
13 reasonable, and adequate. The court may make this finding only on finding  
14 that:

15  
16 *Alternative 2*

17  
18 (A) the court may approve it only after a hearing and on finding that: ~~it is fair,~~  
19 ~~reasonable, and adequate.~~

20  
21 (i) the class representatives and class counsel have been and currently are  
22

- 23                                    adequately representing the class;  
24  
25                                    (ii) the relief awarded to the class (taking into account any ancillary  
26                                    agreement that may be part of the settlement) is fair, reasonable, and  
27                                    adequate given the costs, risks, probability of success, and delays of  
28                                    trial and appeal;  
29  
30                                    (iii) class members are treated equitably (relative to each other) based on  
31                                    their facts and circumstances and are not disadvantaged by the  
32                                    settlement considered as a whole; and  
33  
34                                    (iv) the settlement was negotiated at arm's length and was not the product of  
35                                    collusion.  
36  
37                                    (B) The court may also consider any other matter pertinent to approval of the  
   proposal, and may refuse to approve it on any such ground.

#### Conceptual Sketch of Committee Note Ideas

1                                    In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal  
2                                    in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based  
3                                    in large measure on judicial experience with settlement review. Since 2003, the courts have gained  
4                                    more experience in settlement review.  
5

6                                    Before 2003, many circuits had developed lists of "factors" that bore on whether to approve  
7                                    proposed class-action settlements. Although the lists in various circuits were similar, they differed  
8                                    on various specifics and sometimes included factors of uncertain utility in evaluating proposed  
9                                    settlements. The divergence among the lists adopted in various circuits could sometimes cause  
10                                    difficulties for counsel or courts.  
11

12                                    This rule is designed to supersede the lists of factors adopted in various circuits with a  
13                                    uniform set of core factors<sup>2</sup> that the court must find satisfied before approving the proposal. Rule  
14                                    23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors  
15                                    satisfied before it may approve the proposal.  
16

17                                    But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter  
18                                    pertinent to evaluating the fairness of the proposed settlement.<sup>3</sup> The rule makes it clear that the court

---

<sup>2</sup> Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

<sup>3</sup> It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

19 may disapprove the proposal on such a ground even though it can make the four findings required  
20 by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily  
21 not to be, however. For example, the fact that counsel for the class and the class opponent support  
22 the proposal would ordinarily not provide significant support for a court's approval of the proposal.  
23 Somewhat similarly, particularly in cases involving relatively small individual relief for class  
24 members, the fact the court has received only a small number of objections may not provide  
25 significant support for a finding the settlement is fair.<sup>4</sup>

26  
27 [Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary  
28 evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for  
29 possible approval, the court may decline to order notice. But a decision to order notice should not  
30 be treated as a "preliminary approval" of the proposal, for the required findings and the decision to  
31 approve a proposal must not be made until objections are evaluated and the hearing on the proposal  
32 occurs.]<sup>5</sup>

33  
34 The first factor calls for a finding that the class representatives and class counsel have  
35 provided adequate representation. This factor looks to their entire performance in relation to the  
36 action. One issue that may be important in some cases is whether, under the settlement, the class  
37 representatives are to receive additional compensation for their efforts.<sup>6</sup> Another may in some  
38 instances be the amount of any fee for class counsel contemplated by the proposed settlement.<sup>7</sup> In

---

<sup>4</sup> Is this discussion of "suspect" factors sufficient?

<sup>5</sup> This paragraph attempts to introduce something endorsed by the ALI Principles – that preliminary authorization for notice to the class not become "preliminary approval." Whether saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

(1) The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

<sup>6</sup> This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

<sup>7</sup> This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to \$X. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).



39 some instances, the court has already appointed class counsel under Rule 23(g).<sup>8</sup> The court would  
40 then need only review the performance of counsel since that time. In making this determination  
41 about the performance of class counsel in connection with the negotiation of the proposal, the court  
42 should be as exacting as Rule 23(g) requires for appointment of class counsel.  
43

44 The second factor calls for the court to assess the relief awarded to the class under the  
45 proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In  
46 connection with this factor, it may often be important for counsel to provide guidance to the court  
47 about how these considerations apply to the present action. For example, the prospects for success  
48 on the merits, and the likely dimensions of that success, should be evaluated. It may also be  
49 important for the court to attend to the degree of development of the case to determine whether the  
50 existing record affords a sufficient basis for evaluation of these factors. There is no "minimum"  
51 amount of discovery, or other work, that must be done before the parties reach a proposed  
52 settlement, but the court may seek assurance that it has a firm foundation for assessing the  
53 considerations listed in the second factor.<sup>9</sup>  
54

55 The third factor requires the court to find that the proposed method of allocating the benefits  
56 of the settlement among members of the proposed class is equitable. A pro rata distribution is not  
57 required, but the court may inquire into the proposed method for allocating the benefits of the  
58 settlement among members of the class. [It is possible that this inquiry may suggest the need for  
59 subclassing.]<sup>10</sup>  
60

61 The fourth factor partly reinforces the first factor, and may take account of any agreements  
62 identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the  
63 manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged  
64 from the negotiations deserve scrutiny. These inquiries may shed light on the second and third  
65 factors as well.  
66

67 Any other factors that are pertinent to whether to approve the proposed settlement deserve  
68 attention in the settlement-review process. The variety of factors that might bear on a given  
69 proposed settlement is too large for enumeration in a rule, although some that have been mentioned  
70 by some courts – such as support from the counsel who negotiated the settlement – would ordinarily  
71 not be entitled to much weight.  
72

73 This rule provides guidance not only for the court, but also for counsel supporting a proposed

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<sup>8</sup> This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

<sup>9</sup> This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

<sup>10</sup> Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

74 settlement and for objectors to a proposed settlement. [The burden of supporting the proposed  
75 settlement falls initially on the proponents of the proposal. As noted above, the court's initial  
76 decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a  
77 "preliminary" approval of the proposal's terms.]<sup>11</sup>

78  
79 [As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may  
80 decline to approve a proposed settlement unless it is modified in certain particulars. But it may not  
81 "approve" a settlement significantly different from the one proposed by the parties. Modification  
82 of the proposed settlement may make it necessary to give notice the class again pursuant to Rule  
83 23(e)(1) to permit class members to offer any further objections they may have, or (if the  
84 modifications increase significantly the benefits to class members) for class members who opted out  
to opt back into the class.]<sup>12 13</sup>

## (2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation

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<sup>11</sup> This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

<sup>12</sup> This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

<sup>13</sup> The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

1 (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied  
2 and if:

3 \* \* \* \* \*

4  
5  
6  
7 (4) the parties to a settlement request certification under subdivision (b)(3) for  
8 purposes of settlement, even though the requirements of subdivision (b)(3) might not  
be met for purposes of trial.

\* \* \* \* \*

The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

1 Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3)  
2 for settlement purposes, even though the same class might not be certified for trial. Many  
3 courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v.*  
4 *Kendrick*, 698 F.2d 61, 72-73 (2d Cir.1982); *In re Beef Industry Antitrust Litigation*, 607  
5 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated  
6 that a class cannot be certified for settlement purposes unless the same class would be  
7 certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d  
8 Cir.1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d  
9 Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.<sup>14</sup>

10  
11 Although subdivision (b)(4) is formally separate, any class certified under its terms  
12 is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights  
13 to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the  
14 question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).<sup>15</sup>

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<sup>14</sup> Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

<sup>15</sup> Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present

15 As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be  
16 satisfied to support certification of a (b)(4) settlement class.<sup>16</sup> In addition, the predominance  
17 and superiority requirements of subdivision (b)(3) must be satisfied.<sup>17</sup> Subdivision (b)(4)  
18 serves only to make it clear that implementation of the factors that control certification of  
19 a (b)(3) class is affected by the many differences between settlement and litigation of class  
20 claims or defenses. Choice-of-law difficulties, for example, may force certification of many  
21 subclasses, or even defeat any class certification, if claims are to be litigated.<sup>18</sup> Settlement  
22 can be reached, however, on terms that surmount such difficulties. Many other elements are  
23 affected as well. A single court may be able to manage settlement when litigants would  
24 require resort to many courts. And, perhaps most important, settlement may prove far  
25 superior to litigation in devising comprehensive solutions to large-scale problems that defy  
26 ready disposition by traditional adversary litigation.<sup>19</sup> Important benefits may be provided  
27 for those who, knowing of the class settlement and the opportunity to opt out, prefer to  
28 participate in the class judgment and avoid the costs of individual litigation.

29  
30 For all the potential benefits, settlement classes also pose special risks. The court's  
31 Rule 23(e) obligations to review and approve a class settlement commonly must surmount  
32 the information difficulties that arise when the major adversaries join forces as proponents  
33 of their settlement agreement.<sup>20</sup> Objectors frequently appear to reduce these difficulties, but

---

challenges in such cases. But it may be that recognizing that settlements are available options in such cases  
as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any  
sort to the class in (b)(2) actions unless they are settled.

<sup>16</sup> On this score, the application of (a)(2) in *Wal-Mart Stores, Inc. v. Dukes* may be of particular  
importance.

<sup>17</sup> This sentence was written before *Amchem* was decided; the Supreme Court fairly clearly said that  
predominance remained important, but that manageability (a factor in making both the predominance and  
superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class  
actions is open to discussion and raised by an alternative possible rule change explored below in text.

<sup>18</sup> Choice-of-law challenges might be precisely the sort of thing that could preclude settlement  
certification under a strong view of the predominance requirement. As *Sullivan v. DB Investment* suggests,  
differing state law may be accommodated in the settlement context.

<sup>19</sup> Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The  
Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide  
solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the  
vision of 'efficiency' underlying this class certification is the model of the central planner. \* \* \* The central  
planning model – one case, one court, one set of rules, one settlement price for all involved – suppresses  
information that is vital to accurate resolution." In *re Bridgestone/Firestone*, 288 F.3d 1012, 1020 (7th  
Cir.2002).

<sup>20</sup> It should be noted that when this draft Note was written Rule 23(e) was relatively featureless,  
directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics,  
and part (1) of this memorandum offers a proposal to refine and focus those specifics.

34 it may be difficult for objectors to obtain the information required for a fully informed  
35 challenge. The reassurance provided by official adjudication is missing. These difficulties  
36 may seem especially troubling if the class would not have been certified for litigation, or was  
37 shaped by a settlement agreement worked out even before the action was filed.  
38

39 These competing forces are reconciled by recognizing the legitimacy of settlement  
40 classes but increasing the protections afforded to class members. Certification of a  
41 settlement class under (b)(4) is authorized only on request of parties who have reached a  
42 settlement. Certification is not authorized simply to assist parties who are interested in  
43 exploring settlement, not even when they represent that they are close to agreement and that  
44 clear definition of a class would facilitate final agreement.<sup>21</sup> Certification before settlement  
45 might exert untoward pressure to reach agreement, and might increase the risk that the  
46 certification could be transformed into certification of a trial class without adequate  
47 reconsideration.<sup>22</sup> These protections cannot be circumvented by attempting to certify a  
48 settlement class directly under subdivision (b)(3) without regard to the limits imposed by  
49 (b)(4).  
50

51 Notice and the right to opt out provide the central means of protecting settlement  
52 class members under subdivision (b)(3),<sup>23</sup> but the court also must take particular care in  
53 applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study  
54 suggests that notices of settlement do not always provide the clear and succinct information  
55 that must be provided to support meaningful decisions whether to object to the settlement

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<sup>21</sup> Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

<sup>22</sup> This comment seems designed to make the point in ALI § 3.06(d) – that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

<sup>23</sup> Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

56 or – if the class is certified under subdivision (b)(3) – whether to request exclusion.<sup>24</sup> One  
57 of the most important contributions a court can make is to ensure that the notice fairly  
58 describes the litigation and the terms of the settlement. Definition of the class also must be  
59 approached with care, lest the attractions of settlement lead too easily to an over-broad  
60 definition. Particular care should be taken to ensure that there are not disabling conflicts of  
61 interests among people who are urged to form a single class. If the case presents facts or law  
62 that are unsettled and that are likely to be litigated in individual actions, it may be better to  
63 postpone any class certification until experience with individual actions yields sufficient  
information to support a wise settlement and effective review of the settlement.

### Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those – typicality, for example – don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

1 **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied  
2 and if:

3 \* \* \* \* \*

4 *Alternative 1*

5  
6  
7  
8  
9 (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),]  
10 request certification and the court finds that the action satisfies Rule 23(a), that the

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<sup>24</sup> Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

11 proposed settlement is superior to other available methods for fairly and efficiently  
12 adjudicating the controversy, and that it should be approved under Rule 23(e).

13  
14 *Alternative 2*

15  
16 (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),]  
17 request certification and the court finds that significant common issues exist, that the  
18 class is sufficiently numerous to warrant classwide treatment, and that the class  
19 definition is sufficient to ascertain who is and who is not included in the class. The  
20 court may then grant class certification if the proposed settlement is superior to other  
21 available methods for fairly and efficiently adjudicating the controversy, and that it  
should be approved under Rule 23(e).<sup>25</sup>

This approach seems clearly contrary to *Amchem*, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in *Amchem*. Particularly if this authority were extended beyond (b)(3),<sup>26</sup> and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas  
[Limited to Alternative 1]

1 Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for  
2 public comment. That new subdivision would have authorized certification of a (b)(3) class for  
3 settlement in certain circumstances in which certification for full litigation would not be possible.  
4 One stimulus for that amendment proposal was the existence of a conflict among the courts of  
5 appeals about whether settlement certification could be used only in cases that could be certified for  
6 full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v.*

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<sup>25</sup> ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

<sup>26</sup> On this score, note that ALI § 3.06(c) said:

In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

7 *Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4)  
8 amendment proposal was not pursued after that decision.  
9

10 Rule 23(f), also in the package of amendment proposals published for comment in 1996, was  
11 adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable  
12 body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was  
13 amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and  
14 (h) were added to the rule to govern the appointment of class counsel, including interim class  
15 counsel, and attorney fees for class counsel. These developments have provided added focus for the  
16 court's handling of the settlement-approval process under Rule 23(e).  
17

18 Concerns have emerged about whether it might sometimes be too difficult to obtain  
19 certification solely for purposes of settlement. Some reported that alternatives such as multidistrict  
20 processing or proceeding in state courts have grown in popularity to achieve resolution of multiple  
21 claims.  
22

23 This amendment is designed to respond to those concerns by clarifying and, in some  
24 instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this  
25 subdivision is available only after the parties have reached a proposed settlement and presented it  
26 to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to  
27 represent the interests of the putative class.  
28

29 [Subdivision (b)(4) is not limited to Rule 23(b)(3) class actions. It is likely that actions  
30 brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but  
31 foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems  
32 unwarranted. At the same time, it must be recognized that approving a class-action settlement is a  
33 challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the  
34 judge and the role of the parties in connection with review of a proposed settlement.<sup>27</sup>]  
35

36 Like all class actions, an action certified under subdivision (b)(4) must satisfy the  
37 requirements of Rule 23(a).<sup>28</sup> Unless these basic requirements can be satisfied, a class settlement  
38 should not be authorized.  
39

40 Increasing confidence in the ability of courts to evaluate proposed settlements, and tools  
41 available to them for doing so, provide important support for the addition of subdivision (b)(4). For  
42 that reason, the subdivision makes the court's conclusion under Rule 23(e) an essential component

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<sup>27</sup> This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

<sup>28</sup> This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that *Wal-Mart Stores, Inc. v. Dukes* has raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).



43 to settlement class certification. Under amended Rule 23(e), the court can make the required  
44 findings to approve a settlement only after completion of the full Rule 23(e) settlement-review  
45 process. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the  
46 Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).<sup>29</sup>  
47

48 Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for  
49 settlement certification – that the court must also find that resolution through a class-action  
50 settlement is superior to other available methods for fairly and efficiently adjudicating the  
51 controversy. Unless that finding can be made, there seems no reason for the court or the parties to  
52 undertake the responsibilities involved in a class action.  
53

54 Subdivision (b)(4) does not require, however, that common questions predominate in the  
55 action. To a significant extent, the predominance requirement, like manageability, focuses on  
56 difficulties that would hamper the court's ability to hold a fair trial of the action. But certification  
57 under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in  
58 cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality  
59 needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have  
60 struggled to determine how predominance should be approached as a factor in the settlement  
61 context. This amendment recognizes that it does not have a productive role to play and removes it.<sup>30</sup>  
62

63 Settlement certification also requires that the court conclude that the class representatives  
64 are typical and adequate under Rule 23(a)(3) and (4).<sup>31</sup> Under amended Rule 23(e), the court must  
65 also find that the settlement proposal was negotiated at arms length by persons who adequately  
66 represented the class interests, and that it provides fair and adequate relief to class members, treating  
67 them equitably.  
68

69 In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will  
70 give appropriate attention to adequacy of representation and the fair treatment of class members  
71 relative to each other and the potential value of their claims. At the same time, it avoids the risk that  
72 a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial  
73 scenario that the settlement is designed to avoid.  
74

75 [Should the court conclude that certification under subdivision (b)(4) is not warranted –  
76 because the proposed settlement cannot be approved under subdivision (e) or because the  
77 requirements of Rule 23(a) or superiority are not met – the court should not rely on the parties'  
78 statements in connection with proposed (b)(4) certification in relation to later class certification or

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<sup>29</sup> Without exactly saying so, this sentence is meant to counter the assertion in *Amchem* that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

<sup>30</sup> This material attempts to address *Amchem*'s assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in *Amchem*, perhaps by citing the passage in the decision where the court discussed superiority?

<sup>31</sup> As at other points, adopting Alternative 2 would change this.

merits litigation.]<sup>32</sup>

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<sup>32</sup> The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004). *Carnegie* was a rather remarkable case. It first came to the Seventh Circuit in *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other \* \* \* litigation against them." *Id.* at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (*id.* at 663):

The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. \* \* \* But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original *Reynolds* appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

### (3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but measures to "compensate" them can be devised. The famous California case of *Daar v. Yellow Cab*, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing – because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in *Marek v. Lane*, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." *Id.* at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

- 1 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a  
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's

3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or  
4 compromise:

5 \* \* \* \* \*

6  
7  
8 **(3)** The court may approve a proposal that includes a cy pres remedy [if authorized by  
9 law]<sup>33</sup> even if such a remedy could not be ordered in a contested case. The court  
10 must apply the following criteria in determining whether a cy pres award is  
11 appropriate:

12  
13 **(A)** If individual class members can be identified through reasonable effort, and the  
14 distributions are sufficiently large to make individual distributions  
15 economically viable, settlement proceeds must<sup>34</sup> be distributed directly to  
16 individual class members;

17  
18 **(B)** If the proposal involves individual distributions to class members and funds  
19 remain after distributions, the settlement must provide for further  
20 distributions to participating class members unless the amounts involved are  
21 too small to make individual distributions economically viable or other  
22 specific reasons exist that would make such further distributions impossible  
23 or unfair;

24  
25 **(C)** The proposal may provide that, if the court finds that individual distributions are  
26 not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be  
27 employed if it directs payment to a recipient whose interests reasonably  
28 approximate those being pursued by the class. [The court may presume that

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<sup>33</sup> This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's recent opinion in *In re BankAmerica Corp. Securities Lit.*, 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because – like many other agreements included in settlements – cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

<sup>34</sup> The ALI uses "should," but "must" seems more appropriate.

29 individual distributions are not viable for sums of less than \$100.]<sup>35</sup> [If no  
30 such recipient can be identified, the court may approve payment to a recipient  
31 whose interests do not reasonably approximate the interests being pursued by  
32 the class if such payment would serve the public interest.]<sup>36</sup>  
33

(43) The parties seeking approval \* \* \*

As noted above, the ALI proposal has received considerable support from courts. A recent example is *In re BankAmerica Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

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<sup>35</sup> There have been reports that in a significant number of cases distributions of amounts less than \$100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

<sup>36</sup> This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on *cy pres* treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to *cy pres* treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved *cy pres* arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

#### Sketch of Draft Committee Note ideas

1           When a class action settlement for a payment of a specified amount is approved by the court  
2 under Rule 23(e), there is often a claims process by which class members seek their shares of the  
3 fund. In reviewing a proposed settlement, the court should focus on whether the claims process  
4 might be too demanding, deterring or leading to denial of valid claims.<sup>37</sup> Ideally, the entire fund  
5 provided will be used (minus reasonable administrative costs) to compensate class members in  
6 accord with the provisions of the settlement.

7  
8           On occasion, however, funds are left over after all initial claims have been paid. Courts  
9 faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres*  
10 to support distribution of at least some portion of the settlement proceeds to persons or entities not  
11 included in the class. In some instances, these measures have raised legitimate concerns.

12  
13           Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the  
14 settlement funds belong to the class members and do not serve as a resource for general "public  
15 interest" activities overseen or endorsed by the court.<sup>38</sup> Nonetheless, the possibility that there will

---

<sup>37</sup> It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

<sup>38</sup> Is this too strongly worded, or too much a bit of "political" justification?

16 be a residue after the settlement distribution program is completed makes provision for this  
17 possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the  
18 issue should be included in the initial settlement and evaluated by the court along with the other  
19 provisions of that proposal.<sup>39</sup> [If no such provision is included in the initial proposal but a residue  
20 exists after initial distribution to the class, the court may address the question at that point, but then  
21 should consider whether a further notice to the class should be ordered regarding the proposed  
22 disposition of the residue.<sup>40</sup>]

23  
24 Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be  
25 available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not  
26 authorize such a remedy for a litigated class action. The cy pres provision is something the parties  
27 have included in their proposal to the court, and the court is therefore called upon to decide whether  
28 to approve what the parties have agreed upon to resolve the case.

29  
30 Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres  
31 provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can  
32 be identified through reasonable effort when the distributions are large enough to be to make  
33 distribution economically viable. It is not up to the court to determine whether the class members  
34 are "deserving," or other recipients might be more deserving.<sup>41</sup> Thus, paragraph (A) makes it clear  
35 that cy pres distributions are a last resort, not a first resort.

36  
37 Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first  
38 distribution is completed there must be a further distribution to class members of any residue if a  
39 further distribution is economically viable. This provision applies even though class members have  
40 been paid "in full" in accordance with the settlement agreement. Settlement agreements are  
41 compromises, and a court may properly approve one that does not provide the entire relief sought  
42 by the class members through the action. Unless it is clear that class members have no plausible  
43 legal right to receive additional money, they should receive additional distributions.<sup>42</sup>

---

<sup>39</sup> Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

<sup>40</sup> Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

<sup>41</sup> This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

<sup>42</sup> This is an effort to deal with the "paid in full" or "overcompensation" point.

45 Paragraph (C), therefore, deals only with the rare case in which individual distributions are  
46 not viable. The court should not assume that the cost of distribution is prohibitive unless presented  
47 with evidence firmly supporting that conclusion.<sup>43</sup> It should take account of the possibility that  
48 electronic means may make identifying class members and distributing proceeds to them  
49 inexpensive in some cases.<sup>44</sup> [The rule does provide that the court may so assume for distributions  
50 of less than \$100.<sup>45</sup>] When the court finds that individual distributions would be economically  
51 infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's  
52 interests "reasonably approximate those being pursued by the class." In general, that determination  
53 should be made with reference to the nature of the claim being asserted in the case. [Only if no such  
54 recipient can be identified may the court authorize distribution to another recipient, and then only  
if such distribution would serve the public interest.<sup>46</sup>]

#### (4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to

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<sup>43</sup> If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

<sup>44</sup> This assertion is based on a hunch.

<sup>45</sup> Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than \$100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

<sup>46</sup> This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.



review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In *Tennille v. Western Union Co.*, 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over \$1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at \$25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be \$5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

1 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a  
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's  
3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or  
4 compromise:

5 \* \* \* \* \*

6  
7  
8 *Alternative 1*

9  
10 (5) Any class member may object to the proposal if it requires court approval under this  
11 subdivision (e); the objection may be withdrawn only with the court's approval, and  
12 the parties must file a statement identifying any agreement made in connection with  
13 the withdrawal.

14  
15 *Alternative 2*

16  
17 (5) Any class member may object to the proposal if it requires court approval under this

18 subdivision (e); the objection may be withdrawn only after the filing of a statement  
19 identifying any agreement made in connection with the withdrawal, and court  
approval of the request to withdraw the objection with the court's approval.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

### Objector sanctions

§ 3.08(d) of the ALI Principles says:

If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

### *Alternative 1*

- 1 (5) Any class member may, subject to Rule 11, object to the proposal if it requires court  
2 approval under this subdivision (3); the objection may be withdrawn only with the  
3 court's approval.  
4

5 *Alternative 2*  
6

- 7 (5) Any class member may object to the proposal if it requires court approval under this  
8 subdivision (e); the objection may be withdrawn only with the court's approval. If the  
9 court finds that an objector has made objections that are insubstantial [and] {or} not  
10 reasonably advanced for the purpose of rejecting or improving the settlement, the  
11 court [should] {may} impose sanctions on objectors or their counsel {under  
applicable law}.

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs – "should" or "may" – seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

It seems worthwhile to mention another question that might arise if sanctions on objectors were considered – should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation – odious to the core – should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

### **(5) Rule 68 Offers and Mootness**

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

#### First Sketch: Rule 23 Moot (Cooper approach)

- 1 (x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a  
2 tender of relief only if  
3 (A) the court has denied class certification and  
4 (B) the court finds that the tender affords complete relief on the representative's  
5 personal claim and dismisses the claim.  
6 (2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to  
appeal the order denying class certification.

#### Committee Note

1 A defendant may attempt to moot a class action before a certification ruling is made by  
2 offering full relief on the individual claims of the class representative. This ploy should not be  
3 allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on  
4 class certification.  
5

6 If a class is certified, it cannot be mooted by an offer that purports to be for complete class  
7 relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class  
8 representative and approval by the court under Rule 23(e).  
9

10 Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the  
11 representative's claim to moot the action after a first ruling that denies class certification. The tender

12 must be made on terms that ensure actual payment. The court may choose instead to hold the way  
13 open for certification of a class different than the one it has refused to certify, or for reconsideration  
14 of the certification decision. The court also may treat the tender of complete relief as mooted the  
15 representative's claim, but, to protect the possibility that a new representative may come forward,  
16 refuse to dismiss the action.

17  
18 If the court chooses to dismiss the action, the would-be class representative retains standing  
19 to appeal the denial of certification. [say something to explain this?]

20  
21 [If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or  
compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

### **Rule 68. Offer of Judgment**

\* \* \* \* \*

1 **(e) Inapplicable in Class and Derivative Actions.** This rule does not apply to class or  
derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at  
433.

This might solve a substantial portion of the problem, but does not seem to get directly at the  
problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot  
anything. It may be that an offer of judgment strengthens an argument that the case is moot, because  
what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers.  
Those judgments do not guarantee actual payment, as the Cooper approach above seems intended  
to do with its tender provisions. But a Committee Note to such a rule might be a way to support the  
conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984  
Committee Note said:

The last sentence makes it clear that the amended rule does not apply to class or  
derivative actions. They are excluded for the reason that acceptance of any offer would be  
subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden  
a named representative-offeree with the risk of exposure to potentially heavy liability that  
could not be recouped from unnamed class members. The latter prospect, moreover, could  
lead to a conflict of interest between the named representative and other members of the  
class. See, *Gay v. Waiters & Dairy Lunchmen's Union, Local 30*, 86 F.R.D. 500 (N.D. Cal.  
1980).

### **Alternative Approach in Rule 23**

Before 2003, there was a considerable body of law that treated a case filed as a class action

as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

1     **(e) Settlement, Voluntary Dismissal, or Compromise.**

2  
3     **(1) Before certification.** An action filed as a class action may be settled, voluntarily  
4     dismissed, or compromised before the court decides whether to grant class-action  
5     certification only with the court's approval. The [parties] {proposed class  
6     representative} must file a statement identifying any agreement made in connection  
7     with the proposed settlement, voluntary dismissal, or compromise.

8  
9     **(2) Certified class.** The claims, issues, or defenses of a certified class may be settled,  
10     voluntarily dismissed, or compromised only with the court's approval. The following  
11     procedures apply to a proposed settlement, voluntary dismissal, or compromise:

12     **(A)†** The court must direct notice in a reasonable manner \* \* \* \* \*

13  
14  
15     **(3) Settlement after denial of certification.** If the court denies class-action  
16     certification, the plaintiff may settle an individual claim without prejudice to seeking  
   appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval

may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

#### (6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not  
a prerequisite to 23(c)(4) certification

- 1           **(3)**    the court finds that the questions of law or fact common to class members  
2                    predominate over any questions affecting only individual members, subject to  
3                    Rule 23(c)(4), and that a class action is superior to other available methods for fairly  
4                    and efficiently adjudicating the controversy. The matters pertinent to these findings  
                  include: \* \* \* \*

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

Allowing courts of appeals to review  
decision of the common issues  
immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to \* \* \* (2) any class-wide determination of a common issue on the merits \* \* \* ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

1           **(f) Appeals.** A court of appeals may permit an appeal from an order granting or  
2           denying class-action certification under this rule, or from an order deciding an issue  
3           with respect to which [certification was granted under Rule 23(c)(4)] {a class action  
4           was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly  
5           determines that there is no just reason for delay], if a petition for permission to  
          appeal is filed with the circuit clerk within 14 days after the order is entered. \* \* \*

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) – "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue? Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted



time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

### **(7) Notice**

#### Changing the notice requirement in (b)(3) cases

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court observed (*id.* at 173-71, emphasis in original):

Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members who not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort.*" We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Schroeder v. City of New York*, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]

Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1           **(2)     Notice**

2  
3   \* \* \* \* \*

4  
5           **(B)**   *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct  
6           to class members the best notice that is practicable under the circumstances,  
7           including individual notice by electronic or other means to all members who can be  
          identified through reasonable effort. \* \* \* \* \*

It is an understatement to say that much has changed since *Eisen* was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the *cy pres* discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than \$100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods

will continue to evolve. The likely suggestion will be that courts should not (as Eisen seemed to do) embrace one method as required over the long term.

#### Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

## Appendix I

### Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

- (A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;
- (B) the probable time, duration, and cost of trial;
- (C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

- (D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;
- (E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;
- (F) the number and force of objections by class members;
- (G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);
- (H) the existence and probable outcome of claims by other classes and subclasses;
- (I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;
- (J) whether class or subclass members are accorded the right to opt out of the settlement;
- (K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
- (L) whether the procedure for processing individual claims under the settlement is fair and reasonable;
- (M) whether another court has rejected a substantially similar settlement for a similar class; and
- (N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

## Appendix II

### **Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit**

#### **First Circuit**

No "single test." See: *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

"There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

#### **Second Circuit**

"*Grinnell* Factors"

*City of Detroit v. Grinnell*, 495 F.2d 448, 463 (2d Cir. 1974):

". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

#### **Third Circuit**

"*Girsh* Factors" (adopts *Grinnell* factors)

*Girsh v. Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975)

## **Fourth Circuit**

### *"Jiffy Lube Factors"*

*In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 158-159 (4th Cir. 1991):

"In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See *In re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .

The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in *Montgomery*: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

## **Fifth Circuit**

### *"Reed Factors"*

*Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983):

"(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

## **Sixth Circuit**

### *"UAW Factors"*

*Int'l Union, United Auto. Workers, etc. v. General Motors Corp.*, 497 F.3d 615 (Sixth Cir. 2007):

"Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See

*Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983).

### **Seventh Circuit**

"*Armstrong Factors*"

*Armstrong v. Jackson*, 616 F.2d 305, 315 (7th Cir. 1980):

"Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:

Among the factors which the Court should consider in judging the fairness of the proposal are the following:

- "(1) " \* \* \* the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';
- "(2) "(T)he defendant's ability to pay';
- "(3) "(T)he complexity, length and expense of further litigation';
- "(4) "(T)he amount of opposition to the settlement';"

Professor Moore notes in addition the factors of:

- "(1) \* \* \*
- "(2) Presence of collusion in reaching a settlement;
- "(3) The reaction of members of the (class to the settlement;
- "(4) The opinion of competent counsel;
- "(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

### **Eighth Circuit**

"*Grunin Factors*"

*Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975):



"The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

### **Ninth Circuit**

"*Hanlon* Factors"

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998):

"Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

### **Tenth Circuit**

"*Jones* Factors"

*Jones v. Nuclear Pharmacy*, 741 F.2d 322 (10th Cir. 1984):

"In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:

- (1) whether the proposed settlement was fairly and honestly negotiated;
- (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
- (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
- (4) the judgment of the parties that the settlement is fair and reasonable."

### **Eleventh Circuit**

"*Bennett* Factors"

*Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (quoting *Cotton v. Hinton*, 559 F.2d at 1330-31 (5th Cir. 1977):

"Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

### **D.C. Circuit**

No "single test." Courts consider factors from other jurisdictions.

See *In re LivingSocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

"There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

### **Federal Circuit**

*Dauphin Island Property Owners Assoc. v. United States*, 90 Fed. Cl. 95 (2009):

"The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:

(1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:

(a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;

(2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the

class;

(3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;

(4) The fairness of the settlement to the entire class;

(5) The fairness of the provision for attorney fees;

(6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity. . . .

Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

## **California**

*Kullar v. Foot Locker Retail Inc.*, 168 Cal. App. 4th 116, 128 (Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

## **Principles of Aggregate Litigation (ALI 2010)**

### **§ 3.05 Judicial Review of the Fairness of a Class Settlement**

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their

facts and circumstances and are not disadvantaged by the settlement considered as a whole;  
and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

# TAB 3B

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

1 The Civil Rules Advisory Committee met at the Administrative Office of the United States  
2 Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April  
3 10, but all business was concluded by the end of the day on April 9.) Participants included Judge  
4 David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth  
5 Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.;  
6 Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C.  
7 Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A.  
8 Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended.  
9 Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated  
10 as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor  
11 Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris  
12 participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk  
13 representative, also participated. The Department of Justice was further represented by Theodore  
14 Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy  
15 Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens  
16 (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D.  
17 Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil  
18 Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela  
19 Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll,  
20 Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil  
21 Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of  
22 Consumer Advocates).

23 Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney  
24 General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted  
25 the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of  
26 the meeting.

27 This is the last meeting for Committee members Grimm and Diamond. Deep appreciation  
28 was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in  
29 Committee discussions, and has taken on a variety of special tasks, including the task of working  
30 with the Internal Revenue Service and the Administrative Office to establish means of paying taxes  
31 on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge  
32 Grimm chaired the Discovery Subcommittee through arduous work, especially including the  
33 revision of Rule  
34 37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from  
35 the loss of electronically stored information. His contributions in guiding this work were invaluable.

36 Judge Campbell further noted that Judge Bates has been named by the Chief Justice to  
37 become the next chair of this Committee. Judge Bates has recently been Director of the  
38 Administrative Office. He also has served as a member of an important parallel committee of the  
39 Judicial Conference, the Court Administration and Case Management Committee.

40 Judge Campbell also reported on the meeting of the Standing Committee in January. The  
41 Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a

42 stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

43 Judge Sutton said that this Committee did great work on the Duke Rules package. It will be  
44 important to support educational efforts that will guide lawyers and judges toward effective  
45 implementation of the new rules. He also noted that the Standing Committee is enthusiastic about  
46 the prospect that carefully designed pilot projects will help further advance the goals of good  
47 procedure.

48 Judge Campbell reminded the Committee that the Supreme Court had asked whether a  
49 couple of changes might be made in the Committee Notes to the amendments now pending before  
50 the Court. The changes were approved by an e-mail vote of the Committee, and were approved by  
51 the Judicial Conference without discussion. If the Court approves the amendments and transmits  
52 them to Congress, it will be important that the Committee find ways to educate people to use the  
53 rules and to encourage all judges to engage in active case management. These efforts are not a sign  
54 that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme  
55 Court. Instead they will just begin the process of preparing people to implement them effectively.  
56 Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The  
57 Committee can help to prepare educational materials that can be used in Judicial Conferences in  
58 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a  
59 parallel effort. This work can be advanced by designating a Subcommittee of this Committee.  
60 Members who are interested in participating should make their interest known.

61 A member noted that a package of CLE materials "available for free" would be seized by  
62 many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center  
63 "really wants to collaborate with this Committee." The Center has two TV studios, and does many  
64 video productions. Videos, webinars, and like means can be used to get the word out.

65 Judge Campbell suggested that it will be good to use Committee alumni to get the word out,  
66 especially those who were involved in shaping the proposals. One important need is to say what is  
67 intended, to forestall use of the new rules in ways not intended. The Committee Notes were changed  
68 in light of the public comments to dispel several common misunderstandings, but ongoing efforts  
69 will be important.

70 *October 2014 Minutes*

71 The draft minute of the October 2014 Committee meeting were approved without dissent,  
72 subject to correction of typographical and similar errors.

73 *Legislative Report*

74 Rebecca Womeldorf provided the legislative report for the Administrative Office. Two  
75 familiar sets of bills have been introduced in this Congress.

76 The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by reinstating the essential  
77 aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe  
78 harbor would be removed. In 2013 Judge Sutton and Judge Campbell submitted a letter urging  
79 respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly.

80 H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed  
81 in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been  
82 introduced in the Senate, or are likely to be introduced. There are some indications that a bipartisan



83 bill will be introduced in the Senate.

84 A participant observed that informal conversations suggest that some form of patent  
85 legislation will pass this year. The President agrees with the basic idea. The question for Congress  
86 is to reach agreement on the details.

87 Judge Campbell noted that H.R. 9 directs the Judicial Conference to prepare rules. Logically,  
88 the Conference will look to the rules committees. But the bill does not say anything of the Enabling  
89 Act process; the simple direction that the Judicial Conference act seems to eliminate the roles that  
90 the Supreme Court and Congress play in the final stages of the Enabling Act process.

91 Parts of H.R. 9 adopt procedure rules directly, without adding them to the Civil Rules.  
92 Discovery, for example, is initially limited to issues of claim construction in any action that presents  
93 those issues. Discovery expands beyond that only after the court has construed the claims.

94 Other parts of H.R. 9 direct the Judicial Conference to adopt rules that address specific  
95 points. The rules should distinguish between discovery of "core documents," which are to be  
96 produced at the expense of the party that produces them, and other documents that are to be  
97 produced only if the requester pays the costs of production and posts security or shows financial  
98 ability to pay. These rules also are to address discovery of "electronic communications," which may  
99 or may not embrace all electronically stored information. The party requesting discovery can  
100 designate 5 custodians whose electronic communications must be produced; the court can order that  
101 the number be expanded to 10, and there is a possibility for still more.

102 A participant suggested that Congressional interest in these matters is inspired by the Private  
103 Securities Litigation Reform Act.

104 Experience with the Bankruptcy Abuse Prevention and Consumer Protection Act was  
105 recalled. The Bankruptcy Rules Committee was responsible for adopting interim rules on a truly  
106 rush basis, and then for adopting final rules on a somewhat less pressed schedule. The press of work  
107 was incredible.

108 It was agreed that it will be important to keep close track of these bills in order to be  
109 prepared to act promptly if urgent deadlines are set.

110 A matter of potential interest also was noted. The Litigation Section of the American Bar  
111 Association will present a resolution on diversity jurisdiction to the House of Delegates this August.  
112 The recommendation will be to amend 28 U.S.C. § 1332 to treat any entity that can be sued in the  
113 same way as a corporation. Partnerships, limited partnerships, limited liability companies, business  
114 trusts, unions, and still other organizations would be treated as citizens of any state under which they  
115 are organized and also of the state where they have their principal place of business. The effect  
116 would be to expand access to diversity jurisdiction because present law treats such entities as  
117 citizens of any state of which any member is a citizen. The reasons for this recommendation include  
118 experience with the difficulty of ascertaining the citizenship of these organizations before filing suit,  
119 the costs of discovery on these issues if suit is filed, and the particularly onerous costs that may  
120 result when a defect in jurisdiction is discovered only after substantial progress has been made in  
121 an action.

122 Discussion noted that in the Judicial Conference structure, primary responsibility for issues  
123 affecting subject-matter jurisdiction lies with the Federal-State Jurisdiction Committee. The Civil  
124 Rules Committee cannot speak to these questions as a committee.

125 One question was asked: How would a court determine the citizenship of a law firm — for  
126 example a nationwide, or international firm, with offices in many different places. Can a "nerve  
127 center" be identified in the way it may be identified for a corporation?

128 The conclusion was that if individual Committee members have thoughts about this proposal,  
129 they can be taken to the Litigation Section.

130 *Rules Recommended for Adoption*

131 Proposals to amend Rules 4(m), 6(d), and 82 were published for comment in August, 2014.  
132 This Committee now recommends that the Standing Committee recommend them for adoption, with  
133 a possible change in the Committee Note for Rule 6(d).

134 **RULE 4(m)**

135 Rule 4(m) sets a presumptive limit on the time to serve the summons and complaint. The  
136 present rule sets the limit at 120 days; the Duke Package of rule amendments now pending in the  
137 Supreme court would reduce the limit to 90 days as part of a comprehensive effort to expedite the  
138 initial phases of litigation.

139 It has long been recognized that more time is often needed to serve defendants in other  
140 countries. Rule 4(m) now recognizes this by stating that it does not apply to service in a foreign  
141 country under Rule 4(f) or Rule 4(j)(1). These cross-references create an ambiguity. Service on a  
142 corporation in a foreign country is made under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service  
143 outside any judicial district of the United States on a corporation, partnership, or other  
144 unincorporated association "in any manner prescribed by Rule 4(f) for serving an individual," except  
145 for personal delivery. It can be argued that by invoking service "in any manner prescribed by Rule  
146 4(f)," Rule 4(h)(2) service is made under Rule 4(f). But that is not exactly what the rule says. At the  
147 same time, it is clear that the reasons that justify exempting service under Rules 4(f) and 4(j)(1) from  
148 Rule 4(m) apply equally to service on corporations and other entities. At least most courts manage  
149 to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule  
150 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service  
151 on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

152 There were only a few comments on the proposal. All supported it.

153 The proposed amendment is commended to the Standing Committee with a recommendation  
154 to recommend it for adoption as published.

155 **RULE 6(d)**

156 Under Rule 6(d), "3 days are added" to respond after service is made in four described ways,  
157 including electronic service. The proposal published last August removes service by electronic  
158 means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk,  
159 or other means consented to, so as to relieve readers of the need to constantly refer back to the  
160 corresponding subparagraphs of Rule 5(b)(2).

161 The 3-added days provision has been the subject of broader inquiry, but it has been decided  
162 that for the time being it is better to avoid eliminating the 3 added days for every means of service.

163 For service by electronic means, however, the conclusion has been that the original concerns

164 with imperfections in electronic communication have greatly diminished with the rapid expansion  
165 of electronic technology and the growing numbers of people who can use it easily.

166 This conclusion was challenged by some of the comments. One broad theme is that the time  
167 periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every  
168 concession they can get. More specific comments repeatedly complained of "gamesmanship."  
169 Electronic filing is delayed until a time after the close of the ordinary business day and after the  
170 close of the clerk's office. Many comments invoked the image of filings at 11:59 p.m. on a Friday,  
171 calculated to reach other parties no earlier than Monday.

172 A more specific concern was expressed by the Magistrate Judges Association. As published,  
173 the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)."  
174 They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic  
175 service only with the consent of the person served, and conclude that 3 days are added because  
176 service by electronic means is an "other means consented to." This is an obvious misreading of Rule  
177 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s  
178 provision for service by electronic means. Nonetheless, the magistrate judges have great experience  
179 with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same  
180 time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical  
181 descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F). These  
182 descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they seem  
183 useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means  
184 consented to, except electronic service.)" One reason to resist these suggestions is that it seems  
185 unlikely that serious consequences will be imposed on a party who manages to misread the rule. A  
186 3-day overrun in responding is likely to be treated leniently. More important is that the proposals  
187 to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered  
188 users of the court's electronic system. The Committee agreed that neither of the recommended  
189 changes should be made.

190 The Department of Justice has expressed concerns about the 3-added days provision, and  
191 particularly about the prospect of gamesmanship in filing just before midnight on the eve of a  
192 weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these  
193 concerns and to state expressly that courts should accommodate those situations and provide  
194 additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version  
195 was prepared by the Reporter to illustrate possible economies of language: "The ease of making  
196 electronic service outside ordinary business hours may at times lead to a practical reduction in the  
197 time available to respond. Eliminating the automatic addition of 3 days does not limit the court's  
198 authority to grant an extension in appropriate circumstances."

199 Discussion began with the statement that the Department of Justice feels strongly about  
200 adding an appropriate caution to the Committee Note. Some changes might be made in the initial  
201 Department draft — the list of examples of filing practices that may shorten the time to respond  
202 could be expanded by adding a few words to one example: "or just before or during an intervening  
203 weekend or holiday \* \* \*." Their longer language is more helpful than the more compact version.  
204 "Our attorneys are often beset by gamesmanship."

205 A member asked whether there really will be difficulties in getting appropriate extensions  
206 of time. His experience is that this is not a problem, and problems seem unlikely. In any event, the  
207 shorter version seems better. The second sentence respects what most courts do.

208 Another member was "not keen on adding admonitions to judges to be reasonable." This is

209 not a general practice in Committee Notes. If we are to go down this road, it might be better to have  
210 a single general admonition in a Note attached to one rule.

211 A lawyer member reported that he recently had encountered a problem in delivering an  
212 electronic message. The recipient's firm had recently installed a new system and the message was  
213 sorted out by the spam filter. "Consent comforted me." It took a few days to clear up the difficulty.  
214 That leads to the question: when does the clock start? The sensible answer is not from the time of  
215 the transmission that failed, but from the time of sending a transmission that succeeded. On the  
216 broader question of gamesmanship, "I'm always served Friday afternoon at the end of the day."

217 A judge member "shares the ambivalence." Does a judge really need to be told to be  
218 reasonable? Should Committee Notes go on to suggest reasonable accommodations for extenuating  
219 family circumstances, or clinical depression?

220 Another lawyer member observed that "Judges are busy. They do not notice the abuses I see  
221 all the time." Adding to the Committee Note as the Department suggests serves a useful purpose  
222 because it implicitly condemns the abuses that judges do not — and should not — see on a regular  
223 basis.

224 Still another judge member suggested that the Department's draft language is opaque. The  
225 first sentence says the amended rule is not intended to discourage judges from granting additional  
226 time. The final sentence directs them that they should do so. Whatever else can be said, it needs  
227 editing.

228 A judge suggested that "Much of what we do here is to write rules for colleagues who do not  
229 do their jobs. Too often this is simply writing more rules for them to ignore. I do keep aware of  
230 counsel's behavior." The Duke Rules Package served the need to encourage judges to manage their  
231 cases. "We know this already."

232 The concern with preaching to judges in a Committee Note was addressed by suggesting that  
233 the Note could instead address advice to lawyers that they should not be diffident about seeking  
234 extensions in appropriate circumstances.

235 One more judge suggested that the kinds of gamesmanship feared by the Department "is  
236 obviously bad conduct, easily brought to the court's attention." The response for the Department was  
237 that "we try not to be whiners about bad lawyers." And the reply was that it can be done without  
238 whining.

239 The Department renewed the suggestion of the member who thought an addition to the Note  
240 would be a reminder to lawyers to behave decently. "At least the more economical version is  
241 helpful."

242 Actual practice behavior was described by another member. "Whether or not it's sharp  
243 practice, the routine filing is at 11:59 p.m. on Friday, unless the court directs a different time. No  
244 one gets to go home until after midnight." It would help to amend the rule to set 6:00 p.m. as the  
245 deadline for filing.

246 This observation was seconded by observing that sometimes late-night filing is bad behavior.  
247 Sometimes it is routine habit, or a simple reflection of routine procrastination. Adding something  
248 to the Note may be appropriate, but it should be more neutral than the reference to "outside ordinary  
249 business hours" in the compact sketch.

250 Judge Campbell summarized the discussion as showing that three of four practicing lawyers  
251 on the Committee say late filing is a common event. The Department says the same. Other advisory  
252 Committees are working on the same issue. Rather than work out final Note language in this  
253 Committee, it would be good to delegate to the Chair and Reporter authority to work out common  
254 language with the other committees, as well as to resolve with them whether anything at all should  
255 be added to the Committee Note.

256 The Committee voted unanimously to recommend the published text of Rule 6(d) for  
257 adoption. And it agreed to delegate to the Chair and Reporter responsibility for working with the  
258 other committees to adopt a common approach to the Committee Notes.

259 RULE 82

260 The published proposal to amend Rule 82 responds to amendments of the venue statutes. It  
261 has long been understood that admiralty and maritime actions are not governed by the general  
262 provisions for civil actions. When the admiralty rules were folded into the Civil Rules, this  
263 understanding was embodied in Rule 82 by providing that an admiralty or maritime claim under  
264 Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory  
265 amendments repeal § 1392. They also add a new § 1390. Section 1390(b) excludes from the general  
266 venue chapter "a civil action in which the district court exercises the jurisdiction conferred by  
267 section 1333" over admiralty or maritime claims.

268 The proposed amendment provides that an admiralty or maritime claim under Rule 9(h) is  
269 governed by 28 U.S.C. § 1390, and deletes the statement that the claim is "not a civil action for  
270 purposes of 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after publication.

271 The Committee voted unanimously to recommend the published Rule 82 proposal for  
272 adoption.

273 *Rules Recommended for Publication*

274 The rules recommended for publication deal with aspects of electronic filing and service.  
275 Judge Solomon and Clerk Briggs were this Committee's members of the all-Committees  
276 Subcommittee for matters electronic, and have carried forward with the work after the Subcommittee  
277 suspended operations at the beginning of the year. The choice to suspend operations may have been  
278 premature. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all working on  
279 parallel proposals. It is desirable to frame uniform rule text when there is no reason to treat common  
280 questions differently, recognizing that different sets of rules may operate in circumstances that create  
281 differences in what might have seemed to be common questions. But the process of seriatim  
282 preparation for the agendas of different committees meeting a different times has impeded the  
283 benefits of simultaneous consideration. For the Civil Rules, the result has been that worthy ideas  
284 from other Committees have had to be embraced in something of a hurry, and have been presented  
285 to the Civil Rules Committee in a posture that leaves the way open for accommodations for  
286 uniformity with the other Committees. The Committee Note language issue for Rule 6(d) is an  
287 illustration. The e-filing and e-service rules provide additional illustrations.

288 These proposals emerge from a process that winnowed out other possible subjects for e-rules.  
289 The Minutes for the October 2014 meeting reflect the decision to set aside rules that would equate  
290 electrons with paper. Filing, service, and certificates of service remain to be considered.

291 E-FILING: RULE 5(d)(3)

292 Rule 5(d)(3) provides that a court may allow papers to be filed, signed, or verified by  
293 electronic means. It further provides that a local rule may require e-filing only if reasonable  
294 exceptions are allowed. Great progress has been made in adopting and becoming familiar with e-  
295 filing systems since Rule 5(d)(3) was adopted. The amendment described in the original agenda  
296 materials directed that all filings must be made by electronic means, but further directed that paper  
297 filing must be allowed for good cause and that paper filing may be required or allowed for other  
298 reasons by local rule. This approach reflected the great advantages of efficiency that e-filing can  
299 achieve for the filer, the court, and other parties. Those advantages accrue to an adept pro se party  
300 as well as to represented parties. Indeed the burdens of paper filing may weigh more heavily on a  
301 pro se party than on a represented party.

302 The Criminal Rules Committee considered similar questions at its meeting in mid-March.  
303 Criminal Rule 49 incorporates the Civil Rules provisions for filing. Their discussion reflected grave  
304 doubts about the problems that could arise from requiring pro se criminal defendants and prisoners  
305 to file by electronic means. Access to e-communications systems, and the ability to use them at all  
306 are the most basic problems. In addition, training pro se litigants to use the court system could  
307 impose heavy burdens on court staff. Means must be found to exact payment for filings that require  
308 payment. There are risks of deliberate misuse if a court is unable to limit a defendant or prisoner's  
309 access by blocking access to all other cases. Constitutional concerns about access to court would  
310 arise if exceptions are not made. This array of problems could be met by adopting local rules, but  
311 the burden of adopting new local rules should not be inflicted on the many courts whose local rules  
312 do not now provide for these situations.

313 It was recognized that the problems facing criminal defendants and prisoners may be more  
314 severe than those facing pro se civil litigants, but questions were asked whether the differences are  
315 so great as to justify different provisions in the Criminal and Civil Rules. The Criminal Rules  
316 Committee asked that these issues be considered in addressing Civil Rule 5, and that if this  
317 Committee continues to prefer that adjustments for pro se litigants be made by local rules or on a  
318 case-by-case basis it consider deferring a recommendation to publish Rule 5 amendments while the  
319 Criminal Rules Committee further considers these issues.

320 A conference call was held by the Chair of the Criminal Rules Committee, the immediate  
321 past and current chairs of their subcommittee for e-issues, their Reporters, and the Civil Rules e-  
322 rules contingent. Thorough review of the Criminal Rules Committee concerns led to a revised Rule  
323 5(d)(3) proposal. The revised proposal was circulated to the Committee as a supplement to the  
324 agenda materials, and endorsed by Judge Campbell, Judge Oliver, and Clerk Briggs.

325 The version of Rule 5(d)(3) presented to the Committee mandates e-filing as a general  
326 matter, except for a person proceeding without an attorney. E-filing is permitted for a person  
327 proceeding without an attorney, but only when allowed by local rule or court order. This approach  
328 is designed to hold the way open for pro se litigants to seize the benefits of e-filing as they are  
329 competent to do so. It well may be that these advantages will become more generally available to  
330 pro se civil litigants than to criminal defendants or prisoners filing § 2254 or § 2255 proceedings,  
331 but that event will not interfere with adopting local rules that reflect the differences.

332 Judge Solomon endorsed the revised approach. Although the Civil Rule draft started in a  
333 different place, the Criminal Rules Committee's concerns were persuasive. The pro se problem is  
334 greater in the criminal arena, but there also are problems in the civil arena. The new approach does  
335 no harm in the short run, and it is likely that we can live with it longer than that. And it is an  
336 advantage to have rules that are as parallel as can be.

337 Clerk Briggs agreed. It will not be burdensome to address pro se civil filings through local  
338 rules or by court order. For now, there will not be many pro se litigants that will be trusted with e-  
339 filing. But it should be noted that the present CM/ECF system can be used to ensure that a pro se  
340 litigant is able to file and access files only in his own case. And the system screens for viruses. And  
341 yes, there is a disaster recovery plan — everything is replicated on an essentially constant basis and  
342 stored in distant facilities.

343 A specific drafting question was raised: is there a better way to refer to pro se parties than  
344 "a person proceeding without an attorney"? It was agreed that this language seems adequate. One  
345 advantage is that it includes an attorney who is proceeding without representation by another  
346 attorney — such an attorney party may not be a registered user of the system, and may not be  
347 admitted to practice as an attorney in the court.

348 Another question is whether the rule should continue to say that a paper may be signed by  
349 electronic means, or whether it is better to provide only for e-filing, adding a statement that the act  
350 of filing constitutes the signature of the person who makes the filing. The reasons for omitting a  
351 statement about signing by electronic means are reflected in the history of a Bankruptcy Rule  
352 provision that was published for comment and then withdrawn. Many filings include things that are  
353 signed by someone other than the filer. Common civil practice examples include affidavits or  
354 declarations supporting and opposing summary-judgment motions, and discovery materials. Means  
355 for verifying electronic signatures are advancing rapidly, but have not reached a point of common  
356 acceptance and practice that would support attempted rules on the issue. It was agreed that the rule  
357 text should adhere to the approach that describes only filing by e-means, and then states that the act  
358 of filing constitutes the filer's signature. But it also was agreed that it would be better to delete the  
359 next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

360 Another issue was presented by the bracketed final paragraph in the Committee Note that  
361 raised the question whether anything should be said about verification. Present Rule 5(d)(3)  
362 recognizes local rules that allow a rule to be verified by electronic means. The proposed amendment  
363 omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for  
364 verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to  
365 perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit  
366 to support a temporary restraining order. Verification or an affidavit may be required in receivership  
367 proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although  
368 these add up to a fair number of rules by count, they touch only a small part of the docket. It was  
369 concluded that it would be better to omit this paragraph from the recommendation to publish.

370 RULE 5(b)(2)(E): E-SERVICE

371 Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in  
372 writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if  
373 authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all  
374 districts an attorney is required to become a registered user of the court's system, and access to the  
375 court's system is conditioned on consent to be served through the system. The proposed revision of  
376 Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that  
377 service may be made by electronic means. It further provides that a person may show good cause  
378 to be exempted from such service, and that exemptions may be provided by local rule.

379 This time it is preparation of the agenda materials for an Appellate Rules Committee meeting  
380 later this month that has raised complicating issues. The complications again involve pro se litigants.  
381 The concern is that many pro se litigants may not have routine, continuous access to means of

382 electronic communication, and in any event may not be adept in its use. This has not been a problem  
383 under the present rule, since it requires consent to e-service. A pro se party need not consent, and  
384 is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate  
385 substantial work in case-specific court orders or in amending local rules.

386 These questions were presented on the eve of this meeting. Drafting to accommodate them  
387 can be considered, but subject to further polishing. The draft presented for consideration responded  
388 by distinguishing registered users of the court's system from others. It continues to say simply that  
389 service may be made by electronic means on a person who is a registered user of the court's system.  
390 But it requires consent for others. The consent can provide ample protection by specifying the  
391 electronic address to use, and a form of transmission that can be used by the recipient. Consent also  
392 will be available for registered user of the court's system who find it convenient to serve some  
393 papers by means other than the court's system. For civil cases, discovery requests and responses are  
394 a common example. These papers are not to be filed with the court until they are used in the case  
395 or the court orders filing. It may prove desirable to serve them by electronic means outside the  
396 court's system. Here too, consent will afford important protections by specifying the address to be  
397 used and the form of communication.

398 A judge observed that he encounters many pro se litigants who exchange with attorneys by  
399 e-mail.

400 Another judge noted that bankruptcy practice is moving to bar pro se filing, but to recognize  
401 consent to service by e-mail. "This saves costs."

402 It was noted that the CM/ECF system allows service without filing. One court, as an  
403 example, requires a court order after a litigant moves for permission. It would be good to have a rule  
404 that allows consent to serve this function without need for a court order.

405 A separate question was whether written consent should be required, as in the present rule.  
406 Why not allow consent in an e-communication? One way written consent can be accomplished  
407 would be to add consent to the check list of provisions on the pro se appearance form. Another judge  
408 suggested that it would be prudent to get written consent, but the rule should not specify it.

409 If the rule is framed to require consent for service outside the court's system, it was agreed  
410 that there is no need to carry forward from the agenda draft the exceptions that allow a person to be  
411 exempted for good cause or by local rule.

412 Further discussion reiterated the point that the revised draft distinguishes service through the  
413 court system on registered users, which would not require consent, from service by other electronic  
414 means, which would require consent. This is an advance over the original suggestion, which focused  
415 on service through the court's system. The Committee Note can address consent among the parties,  
416 refer to a check-the-box pro se appearance form, the availability of direct e-mail service with  
417 consenting parties, and the need for court permission for consent by a person who is not a registered  
418 user to receive service through the court system.

419 The Committee agreed to go forward with a recommendation to publish a version of Rule  
420 5(b)(2)(E) that distinguishes between service on registered users through the court's system and  
421 service by other e-means with consent. Precise rule language and corresponding changes in the  
422 Committee Note will be settled, if possible in ways that achieve uniformity with other advisory  
423 committees.



424 (An observer raised a particular question outside the agenda materials. She has twice  
425 encountered difficulties with e-filing in this circumstance: A discovery subpoena is served on a  
426 nonparty outside the district where the action is pending. A motion to compel compliance becomes  
427 necessary in the district where the discovery will be taken. There is no current docket in the district  
428 for enforcement. Two courts have refused to allow her to use electronic means to open a  
429 miscellaneous docket item. They insisted on a personal appearance. This is an unnecessary  
430 inconvenience. There is a patchwork of rules around the country.

431 (This problem may not be a subject for rulemaking. Certainly it is not fit for rulemaking on  
432 the spur of the moment. But the problem may be helped by proposed Rule 5(d)(3), which will allow  
433 e-filing unless a local rule requires paper filing. It might be possible to add a comment on this  
434 problem to the Committee Note for Rule 5(d)(3). That possibility was taken under advisement.)

435 NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

436 The agenda materials include an amendment of Rule 5(d)(1) that would provide that a notice  
437 of electronic filing constitutes a certificate of service on any party served through the court's  
438 transmission facilities. The draft includes in brackets a provision that would add a statement similar  
439 to Rule 5(b)(2)(E): the notice of electronic filing does not constitute a certificate of service if the  
440 serving party learns that the filing did not reach the party to be served.

441 Allowing a notice of electronic filing to constitute a certificate of service on any party served  
442 through the court's transmission facilities may not seem to do much. A party accustomed to serving  
443 through the court's system includes in the filing a certificate that says the paper was served through  
444 the court's system. Eliminating those lines is a small gain. But the amendment also protects those  
445 who do not think to add those lines, and also avoids the instinctive reaction of cautious filers that  
446 prompts filing a separate certificate just to be sure. The amended rule text was approved as a  
447 recommendation to publish.

448 Brief discussion concluded that the bracketed material addressing failed delivery is not  
449 necessary. As drafted, it is limited to service through the court's facilities. Ordinarily the court  
450 system will flag a failed transmission. It may be that a party will learn that a successful transmission  
451 somehow did not come to the recipient's attention, but that situation seems too rare to require rule  
452 text. That will be deleted from the recommendation to publish.

453 Judge Harris, after these questions were discussed in the Bankruptcy Rules Committee,  
454 suggested that it would be useful to expand the rule by adding a statement of what should be  
455 included in a certificate of service when service is not made through the court's electronic facilities.  
456 The added language would address the elements that should be included in a certificate: the date and  
457 manner of service; the names of the persons served; and the address used for whatever form of  
458 service was made. The advantage of adding this language to the several sets of rules that address  
459 certificates of service would be to establish a uniform certificate for all federal courts. Uniformity  
460 is desirable in itself, and uniformity would protect against the need to consult local rules, or the ECF  
461 manual, for each district. Certificates now may vary. It may be as bland as "I served by mail," or "I  
462 served by mail on this date, to this address," and so on. The proposed language is taken from  
463 Appellate Rule 25(d)(1)(B) for a proof of service. The language works there, and would work  
464 elsewhere.

465 This proposal was countered: the courts and parties seem to be doing well without help from  
466 a detailed rule prescription. And service by these other means is likely to decline continually as  
467 electronic service takes over and provides a notice of electronic filing. Another member added that

468 he routinely includes all of this information in the certificate of service. It was further noted that the  
469 Civil Rules did not provide for certificates of service until 1991. The present provision was added  
470 then to supersede a variety of local rules. The Committee then considered a provision that would  
471 prescribe the contents of the certificate, but feared that in some situations the party making service  
472 would not be able to provide all of the information that might be included.

473 Brief further discussion showed that no Committee member favored adding a provision that  
474 would define the contents of a certificate of service by means other than the court's transmission  
475 facilities.

476 A style question was left for resolution by the Style Consultant. Rule 5(d)(1) now concludes  
477 with a sentence introduced by "But." A paper that is required to be served must be filed. "But"  
478 disclosure and discovery materials must not be filed except in defined circumstances. The question  
479 is whether "but" remains appropriate after lengthening the first sentence.

480 RULE 68

481 Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule  
482 68 was the subject of two published amendment proposals in 1983 and 1984. The project was  
483 abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early  
484 in the 1990s and again the project was abandoned. Multiple problems surround the rule, including  
485 the basic question whether it is wise to maintain any rule that augments natural pressures to settle.  
486 But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public  
487 suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to  
488 the rule by adding more severe consequences for failing to win a judgment better than a rejected  
489 offer. The Committee decided in October that the most fruitful line of attack will be to explore  
490 practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan  
491 Rose undertook preliminary research that produced a chart of state rules, comparing their features  
492 to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the  
493 Administrative Office could make time to explore these materials, and perhaps to look for state-court  
494 decisions. There have been too many competing demands on his time, however, and little progress  
495 has been made. This work will be pursued, aiming at a report to the meeting next November.

496 DISCOVERY: "REQUESTER PAYS"

497 Judge Grimm opened the subject of requester-pay discovery rules by noting that these  
498 questions were opened at the fall meeting in 2013 in response to suggestions that "requester-" or  
499 "loser-pays" rules be adopted to shift the costs of responding to discovery requests in cases where  
500 the burdens of responding to discovery are disproportionate among the parties or otherwise unfair.  
501 The focus of these suggestions ordinarily is Rule 34 document production. The background is the  
502 shared assumption, not articulated in any rule but recognized in the 1978 Oppenheimer opinion in  
503 the Supreme Court, that ordinarily the responding party bears the burdens and costs of responding.  
504 The Court noted then, and it is also widely understood, that a court order can shift the costs, in whole  
505 or in part, to the requesting party.

506 The Rule 26(c) proposal now pending in the Supreme Court as part of the Duke Rules  
507 Package expressly confirms the common understanding that a protective order can allocate the  
508 expenses of discovery among the parties.

509 The House of Representatives has held hearings to examine the possibilities of requester-pay  
510 practices. Patent law reform bills recently introduced in Congress contain such provisions.

511 Subcommittee work on these issues was sidetracked for a year while the Subcommittee  
512 concentrated on the Rule 37(e) provisions addressing loss of electronically stored information that  
513 now are pending before the Supreme Court. The work is resuming now.

514 Passionate views are held on all sides of requester pays. Much of the discussion focuses on  
515 asymmetric discovery cases in which one party has little discoverable information and is able to  
516 impose heavy burdens in discovering vast deposits of information held by an adversary. The  
517 explosion of discoverable matter embodied in electronically stored information adds to the passion.  
518 And it is often suggested that a data-poor party may deliberately engage in massive discovery for  
519 tactical reasons.

520 The other side of the debate is framed as an issue of access to justice. Often a data-poor party  
521 is poor in other resources as well, and cannot afford to pay the expenses of sorting through  
522 information held by a data-rich party. This viewpoint was expressed in public comments on many  
523 of the discovery rules provisions in the Duke Rules Package, and particularly in the comments on  
524 proposed Rule 26(c).

525 A 2014 publication of the Institute for the Advancement of the American Legal System  
526 provides information about these issues. A recent law review article catalogues the current rules that  
527 allow shifting litigation costs — most of them discovery rules — and explores many of the  
528 surrounding issues, including possible due process implications. The closed-case study done by the  
529 Federal Judicial Center in conjunction with the Duke Conference shows that most cases do not  
530 generate significant discovery burdens. But it also shows that there are outliers that involve serious  
531 burdens and present serious issues for possible reform. It remains a challenge to determine whether  
532 these problems are unique to identifiable types of cases. One particular opportunity will be to  
533 explore the experience of "patent courts." Other subject-matter areas may be identifiable. Or other  
534 characteristics of litigation may be associated with disproportionate discovery, whether or not it is  
535 possible to address them in any particular way by court rules.

536 One line of inquiry will be to attempt to find out through the Federal Judicial Center what  
537 kinds of cases are now associated with motions to order a requester to bear the costs of discovery.

538 Emery Lee reported that it is difficult to sort the cases out of general docket entries. He  
539 began an inquiry by key-citing the headnotes in the Zubulake opinions, which are prominent in  
540 addressing cost-shifting in discovery of ESI. They have not been much cited. Looking at the cases  
541 he found through Pacer, he developed search terms. Then he undertook a docket search in four  
542 districts that have high volumes of cases — S.D.N.Y., N.D.Ill, N.D.Cal., and S.D.Tex. A "fuzzy  
543 search" turned up nothing useful. There were, to be sure, "lots of hits" in the Northern District of  
544 Illinois because the e-pilot there requires the parties to discuss cost bearing. And a lot of the hits  
545 involved the costs of depositions, not documents. There were not many hits for document discovery.

546 Judge Grimm asked what further research might be done: law review articles? State  
547 experience? Case law? A survey or other empirical inquiry? The quest would be to refine our  
548 understanding of how often burdensome costs are encountered.

549 Judge Grimm further noted that England has cost shifting, but it also has broad bilateral  
550 initial disclosures.

551 The Subcommittee hopes to narrow what needs be considered. What guidance can be  
552 provided?

553 Judge Campbell reminded the Committee that the Committee Note to Rule 26(c) in the  
554 pending package of Duke Rules amendments was revised after publication to provide reassurance  
555 that it is not intended to become a general requester-pays rule. Many comments on the published  
556 proposal expressed fears on this score

557 A judge urged that it is not wise "to write rules for exceptional-exceptional cases. There is  
558 a cost of litigation. Part of that is the cost of discovery." It is really depositions that drive the cost  
559 of discovery in most cases. And the requesting party pays for most of the costs of a deposition.  
560 Document production does not drive discovery costs in most cases. There are not many cases where  
561 the plaintiff does not have to bear some discovery costs, especially depositions. The rules already  
562 limit the numbers of interrogatories and depositions, and proposals to tighten these limits were  
563 rejected for good reasons after publication of the Duke Rules Package. And "counsel has to invest  
564 time in depositions." It is better not to attempt to write rules for the massive document discovery  
565 cases that do come up.

566 Another judge asked what is the scope of the problem? We need to know that before making  
567 a rule. Whose problem needs to be fixed? Why do we think we should redistribute the costs of  
568 discovery?

569 Judge Grimm responded that the Subcommittee shares these concerns. "We can understand  
570 there are problem cases without knowing what to do about them. The source of the problems  
571 remains to be determined."

572 A member asked what protections there are for discovery from third parties who do not have  
573 a stake in the game? Rule 45(d)(1) directs that a party or attorney responsible for issuing and serving  
574 a subpoena take reasonable steps to avoid imposing undue burden or expense on a person subject  
575 to the subpoena. Rule 45(d)(2) further provides that a person directed to produce documents or  
576 tangible things may serve objections. An objection suspends the obligation to comply, which revives  
577 only when ordered by the court, and the order "must protect a person who is neither a party nor a  
578 party's officer from significant expense resulting from compliance." Perhaps that is protection  
579 enough.

580 One possible approach was suggested — to sample a pool of district judges to ask whether  
581 they have problems with excessive discovery that should be addressed by explicit requester-pays  
582 rules provisions. Much civil litigation now occurs in MDL proceedings; perhaps we could look  
583 there.

584 A different suggestion was that "this looks like a solution in search of a problem. The  
585 requester-pays proposals have the air of a strategic effort to deter access to justice in certain types  
586 of cases. District judges will have a much better sense of it — whether there are patterns of abuse  
587 that can be dealt with by rule, rather than case management. I litigate cases with massive discovery,  
588 but the pressures are to be reasonable because it's 2-way, and I have to search through what I get."  
589 Perhaps there are problems in asymmetric cases. "But the very fact that the Committee is struggling  
590 to figure out whether there is a problem suggests we pause" before plunging in.

591 Another member said that the mega cases tend to be MDL proceedings. The purpose of MDL  
592 is to centralize discovery, to avoid constant duplication. The management orders are for production  
593 that occurs once, and for one deposition per witness. MDL proceedings are likely to save costs,  
594 reaping the efficiency advantages of economies of scale. MDL judges seek to tailor cost sharing in  
595 ways that make sense.

596 Another lawyer member noted the many protective provisions built into the rules. Rule  
597 45(c)(2)(B) expressly protects nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not  
598 reasonably accessible, and contemplates requester-pays solutions. Rule 26(b)(2)(C)(iii) directs the  
599 court to limit discovery on a cost-benefit analysis. Rule 26(c) is used now to invoke requester-pays  
600 protections. Rule 26(g) requires counsel to avoid unduly burdensome discovery requests. The Duke  
601 Rules package pending before the Supreme Court is designed to invigorate these principles. If the  
602 Court and Congress allow the proposed rules to take effect, we will need to find out whether they  
603 have the intended effect. Among them is the explicit recognition in Rule 26(c) of protective orders  
604 for cost-sharing. Together, these rules provide many opportunities to control unreasonable  
605 discovery.

606 Continuing, this member noted that something like 300,000 cases are filed in federal courts  
607 every year. Perhaps 15,000 to 30,000 of them will involve document-heavy discovery. The FJC  
608 closed-case study shows that most cases have little discovery. We need to find out whether there are  
609 types of cases that generate problems. But even that inquiry might be deferred for a while to see how  
610 the proposed amended rules will work. "I do not know that it's a big problem now in most cases."  
611 Problems are most likely to arise when discovery pairs a data-poor party against a data-rich party.  
612 Perhaps we should defer acting on requester-pays rules for a while.

613 It was noted that the Department of Justice has a lot of experience with discovery, both  
614 asking and responding. Further inquiry probably is warranted. The Department can undertake further  
615 internal inquiries.

616 A judge said that there are not many reported cases invoking Rule 45(c)(2). That may  
617 suggest there is little need for new rules to protect nonparties. More generally, the rules we have  
618 now seem adequate to address any problems. "The need may be to use them, not to add new rules."

619 A lawyer echoed these views, observing that a great deal of work went into shaping the Duke  
620 Rules package with the goal of advancing proportionality in discovery. We should wait to see what  
621 effect the new rules have if they are allowed to become effective.

622 Another judge suggested that study of initial disclosure may be a good place to start. It may  
623 be helpful to return to the original rule, requiring disclosure of what is relevant to the case as a  
624 whole, not merely "your case." The present limited disclosure rule seems to fit awkwardly with our  
625 focus on cooperation and proportionality. Initial disclosure rules, indeed, will be discussed later in  
626 this meeting as a possible subject for a pilot project.

627 Discussion of initial disclosure continued. The original idea was to get the core information  
628 on the table at the outset. That proved too ambitious at the time — local rule opt-outs were provided  
629 to meet resistance, and many districts opted out in part or entirely. National uniformity was attained  
630 only by narrowing disclosure to "your case." The employment protocols now adopted by 50 judges  
631 may show that broad initial disclosure can work. So it was suggested that we could look to state  
632 practices. The Institute for the Advancement of the American Legal System has generated reports.  
633 Broad initial disclosure remains a controversial idea: "You can be right, but too soon."

634 The final observation was that the Committee undertook to study requester-pays rules in  
635 response to a letter from members of Congress.

636 *Appellate-Civil Rules Subcommittee*

637 A joint subcommittee has been reconstituted to explore issues that overlap the Appellate

638 Rules and Civil Rules. Judge Matheson chairs the Subcommittee. Virginia Seitz is the other Civil  
639 Rules member. Appellate Rules Committee members are Judge Fay, Douglas Letter, and Kevin  
640 Newsom.

641 The Subcommittee is exploring two sets of issues that first arose in the Appellate Rules  
642 Committee. As often happens, if it seems wise to act on these issues, the most likely means will be  
643 revisions of Civil Rules. That is why a joint Subcommittee is useful. The issues involve  
644 "manufactured finality" and post-judgment stays of execution under Civil Rule 62.

645 MANUFACTURED FINALITY

646 Judge Matheson introduced the manufactured finality issues. "This is not a new topic." An  
647 earlier subcommittee failed to reach a consensus. "Nor is consensus likely now." The Subcommittee  
648 seeks direction from the Appellate and Civil Rules Committees.

649 "Manufactured finality" refers to a wide variety of strategies that may be followed in an  
650 attempt to appeal an interlocutory order that does not fit any of the well-established provisions for  
651 appeal. Rule 54(b) partial finality is, for any of many possible reasons, not available. Other  
652 elaborations of the final-judgment rule, most obviously collateral-order doctrine, also fail. Avowedly  
653 interlocutory appeals under § 1292 are not available. The theoretical possibility of review by  
654 extraordinary writ remains extraordinary.

655 Many examples of orders that prompt a wish to appeal could be offered. A simple example  
656 is dismissal of one claim while others remain, and a refusal to enter a Rule 54(b) judgment. Or  
657 important theories or evidence to support a single claim are rejected, leaving only weak grounds for  
658 proceeding further.

659 If the would-be plaintiff manages to arrange dismissal of all remaining claims among all  
660 remaining parties with prejudice, courts recognize finality. Finality is generally denied, however,  
661 if the dismissal is without prejudice. And an intermediate category of "conditional prejudice" has  
662 caused a split among the circuits. This tactic is to dismiss with prejudice all that remains open in the  
663 case after a critical interlocutory order, but on terms that allow revival of what has been dismissed  
664 if the court of appeals reverses the order that prompted the appeal. Most circuits reject this tactic,  
665 but the Second Circuit accepts it, and the Federal Circuit has entertained such appeals. There is a  
666 further nuance in cases that conclude a dismissal nominally without prejudice is de facto with  
667 prejudice because some other factor will bar initiation of new litigation — a limitations bar is the  
668 most common example.

669 The Subcommittee has narrowed its discussion to four options: (1) Do nothing. The courts  
670 would be left free to do whatever they have been doing. (2) Adopt a simple rule stating what is  
671 generally recognized anyway — a dismissal with prejudice achieves finality. Although this is  
672 generally recognized, an explicit rule would provide a convenient source of guidance for  
673 practitioners who are not familiar with the wrinkles of appeal jurisdiction and reassurance for those  
674 who are. But the rule might offer occasion for arguments about implied consequences for dismissals  
675 without prejudice, particularly the "de facto prejudice" and "conditional prejudice" situations. (3)  
676 Adopt a clear rule saying that only a dismissal with prejudice establishes finality. Still, that might  
677 not be as clear as it seems. Only elaborate rule text could definitively defeat arguments for de facto  
678 prejudice or conditional prejudice. Committee Note statements might lend further weight. Assuming  
679 a clear rule could be drafted to close all doors, it would remain to decide whether that is desirable.  
680 (4) A rule could directly address conditional prejudice, whether to allow it or reject it.

681 Rules sketches illustrating the three alternatives for rules approaches are included in the  
682 agenda materials. The Subcommittee deliberated its way to the same pattern as the earlier  
683 subcommittee. It has not been possible to reach consensus. On the conditional prejudice question,  
684 the circuit judges on the Subcommittee would not propose a rule that would manufacture finality in  
685 this way. The lawyers seemed to like the idea, and there are indications that district judges also like  
686 the idea.

687 This introduction was followed by reflections on the general setting. The final-judgment rule  
688 rests on a compromise between competing values. The paradigm final judgment leaves nothing more  
689 to be done by the district court, apart from execution if there is a judgment awarding relief. Insisting  
690 on finality is a central element in allocating authority between trial courts and appellate courts. It  
691 also conduces to efficiency, both in the trial court and in the appellate court. Many issues that seem  
692 to loom large as a case progresses will be mooted by the time the case ends in the district court. Free  
693 interlocutory appeal from many orders would delay district-court proceedings and, upon affirmance,  
694 produce no offsetting benefit. Periodic interruptions by appeals could wreak havoc with effective  
695 case management.

696 The values of complete finality are offset by the risk that all trial-court proceedings after a  
697 critical and wrong ruling will be wasted. Some interlocutory orders, moreover, have real-world  
698 consequences or exert pressures on the parties that, if the order is wrong, are distorting pressures.  
699 These concerns underlie not only the provision for partial final judgments in Rule 54(b) but a  
700 number of elaborations of the final-judgment concept. The best known elaboration is found in  
701 collateral-order doctrine, an interpretation of the "final decision" language in § 1291 that allows  
702 appeals from orders that do not resemble a traditional final judgment. Other provisions are found  
703 in avowedly interlocutory-appeal provisions, most obviously in § 1292 and Rule 23(f) for orders  
704 granting or refusing class certification. Extraordinary writ review also provides review in compelling  
705 circumstances.

706 The recent process of elaborating § 1291 seems, on balance, to show continuing pressure  
707 from the Supreme Court to restrain the inventiveness shown by the courts of appeals. The courts of  
708 appeals embark on lines of decision that expand appeal opportunities, confident in their abilities to  
709 achieve a good balance among the competing forces that shape appeal jurisdiction on terms that at  
710 times seem to approach case-specific rules of jurisdiction. The Supreme Court believes that it is  
711 better to resist these temptations. The clearest illustrations are provided by the line of cases that have  
712 restricted collateral-order appeals by insisting that collateral-order appeal is proper only when all  
713 cases in a "category" of cases are appealable. Otherwise, no case in a particular "category" will  
714 support appeal.

715 These are the pressures that have shaped approaches to manufactured finality. A bewildering  
716 variety of circumstances have been addressed in the cases without generating clear patterns. The  
717 concept of "de facto prejudice" is an example. The seemingly clear example of dismissal nominally  
718 without prejudice in circumstances that would defeat a new action by a statute of limitations is clear  
719 only if the limitations outcome is clear. But the limitations question may depend on fact  
720 determinations, and even choice of law, that cannot easily be made in deciding on appeal  
721 jurisdiction. Another example is found in cases that have accepted jurisdiction when a dismissal is  
722 without prejudice to bringing a new action in a state court — often with very good reason if the  
723 critical ruling by the federal court is affirmed on appeal — but the dismissal is on terms that bar  
724 filing a new action in federal court. And a particularly clear example is provided by a case in which  
725 the University of Alabama filed an action, only to have the state Attorney General appear and  
726 dismiss the action without prejudice. The University was allowed to appeal to challenge the  
727 Attorney General's authority to assume control if the action.

728 The Rules Committees have clear authority under § 2072(c) to adopt rules that "define when  
729 a ruling of a district court is final for the purposes of appeal under section 1291." But regulating  
730 appeal jurisdiction is an important undertaking. There is great value in having clear rules. Attorneys  
731 who are not thoroughly familiar with appeal practice may devote countless hours to attempts to  
732 determine whether and when an appeal can be taken, and may reach wrong conclusions. Even  
733 attorneys who are familiar with these rules may seek reassurance by costly reexamination. And  
734 misguided attempts to appeal can disrupt district-court proceedings while imposing unnecessary  
735 work on the court of appeals.

736 Clear rules, however, may not always be the best approach. Clarity can sacrifice important  
737 nuances. The pattern of common-law elaborations of a simply worded appeal statute shows an  
738 astonishing array of subtle distinctions that may provide important protections by appeal.

739 The choice to proceed to recommend a clear rule, any clear rule, is beset by these competing  
740 forces.

741 Discussion began by recognizing that these are hard choices. Courts of appeals often believe  
742 strongly in the opportunity to shape appeal jurisdiction to achieve an optimal concept of finality.  
743 How would they react, for example, to a recommendation that adopts finality by dismissal with  
744 conditional prejudice?

745 A related suggestion was that it may be better to leave these issues to resolution by the  
746 Supreme Court in the ordinary course of reviewing individual cases. Circuit splits can be identified  
747 on some easily defined issues, such as conditional prejudice.

748 It was further suggested that the Committee does not believe that it must always act to  
749 resolve identifiable circuit splits. The conditional prejudice issue, for example, "is of first importance  
750 to appellate judges." The Subcommittee, as the earlier subcommittee, has shown the difficulty of the  
751 question through its divided deliberations. Do we need to act to establish clarity for lawyers?

752 These questions are not for the Civil Rules Committee alone. The Appellate Rules  
753 Committee shares responsibility for determining what is best. So far it has happened that actual rules  
754 provisions tend to wind up in the Civil Rules, in part because many appeal-affecting provisions  
755 remained in the Civil rules when the Appellate Rules were separated out from their original home  
756 in the Civil Rules. But it is possible to imagine that new rules could be located in the Appellate  
757 Rules, or even in a new and independent Federal Rules of Appeal Jurisdiction.

758 Further discussion suggested that everyone agrees that a dismissal with prejudice is final. It  
759 may be useful to say that in a rule. The Committee Note can say that the rule text does not address  
760 the question whether "conditional prejudice" qualifies as "with prejudice." It may be worth doing.

761 A response asked what is the value of a rule that states an obvious proposition widely  
762 accepted? The reply was that people who are not familiar with appellate practice may benefit.

763 Judge Sutton noted that these questions first came up in 2005. "My first reaction was that this  
764 is a manufactured problem." The circuit split on conditional prejudice may be worth addressing, but  
765 either answer could prove difficult to advance through the full Enabling Act process. And any more  
766 general rule would incur the risk of negative implications. The time has come to fish or cut bait.

767 Judge Matheson observed that it would be useful to have the sense of the Committee to  
768 report to the Appellate Rules Committee when it meets in two weeks.



769 The first question put to the Committee was whether the best choice would be to do nothing.  
770 Thirteen members voted in favor of doing nothing. One vote was that it would be better to do  
771 something.

772 STAYS OF EXECUTION: RULE 62

773 Judge Matheson began by observing that the questions posed by Rule 62 and stays of  
774 execution arose in part in the Appellate Rules Committee. They have not been as much explored by  
775 the Subcommittee as the manufactured-finality issues. The focus has been on execution of money  
776 judgments, not judgments for specific relief. The provisions for injunctions, receiverships, or  
777 directing an accounting may be relocated, but have not been considered for revision.

778 Rule 62(a) provides an automatic stay. Until the Time Computation Project the automatic  
779 stay provision dovetailed neatly with the Rule 62(b) provision for a court-ordered stay pending  
780 disposition of post-judgment motions under Rules 50, 52, 59, and 60. The automatic stay lasted for  
781 10 days, and the time to make the Rule 50, 52, and 59 motions was 10 days. The Time Computation  
782 Project, however, set the automatic stay at 14 days, but extended to 28 days the time to move under  
783 Rules 50, 52, and 59. A district judge asked the Committee what to do during this apparent "gap."  
784 The Committee concluded at the time that the court has inherent authority to stay its own judgment  
785 after expiration of the automatic stay and before a post-judgment motion is made. The question of  
786 amending Rule 62 was deferred to determine whether actual difficulties arise in practice.

787 A separate concern arose in the Appellate Rules Committee. Members of that committee  
788 have found it useful to arrange a single bond that covers the full period between expiration of the  
789 automatic stay and final disposition on appeal. That bond encompasses the supersedeas bond taken  
790 to secure an stay pending appeal, and is already in place when an appeal is filed.

791 The Subcommittee has begun work focusing on Rule 62(a), (b), and (d). Other parts of Rule  
792 62 have yet to be addressed. A detailed memorandum by Professor Struve, Reporter for the  
793 Appellate Rules Committee, addresses other issues that remain for possible consideration.

794 The Subcommittee brings a sketch of possible revisions to the Committee for reactions. The  
795 first question is whether in its present form Rule 62 causes uncertainties or problems.

796 The second of two sketches in the agenda book became the subject of discussion. This sketch  
797 rearranges subdivisions (a), (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution on a  
798 judgment to pay money, and proceedings to enforce it." It carries forward an automatic stay,  
799 extending the period to 30 days. But it also recognizes that the court can order a stay at any time  
800 after judgment is entered, setting appropriate terms for the amount and form of security or denying  
801 any security. The court also can dissolve the automatic stay and deny any further stay, subject to a  
802 question whether to allow the court to dissolve a stay obtained by posting a supersedeas bond. An  
803 order denying or dissolving a stay may be conditioned on posting security to protect against the  
804 consequences of execution. The order may designate the duration of a stay, running as late as  
805 issuance of the mandate on appeal. That period could extend through disposition of a petition for  
806 certiorari.

807 The question whether a supersedeas bond should establish a right to stay execution pending  
808 appeal remains open for further consideration. Consideration of the amount also remains open —  
809 if a stay is to be a matter of right, the rule might set the amount of the bond at 125% of the amount  
810 of a money judgment.

811 The purpose of this sketch is to emphasize the primary authority of the district court to deny  
812 a stay, to grant a stay, and to set appropriate terms for security on granting or denying a stay. It also  
813 recognizes authority to modify or terminate a stay once granted. Appellate Rule 8 reflects the  
814 primacy of the district court. Explicit recognition of matters that should lie within the district court's  
815 inherent power to regulate execution before and during an appeal may prove useful.

816 Discussion began with a judge's suggestion that he had not seen any problems with Rule 62.  
817 The question whether any other judge on the Committee had encountered problems with Rule 62  
818 was answered by silence.

819 The next question was whether the lack of apparent problems reflects the practice to work  
820 out these questions among the parties. A lawyer member responded that "you wind up stipulating  
821 to a stay through the decision on appeal." Another lawyer member observed, however, that "there  
822 may be power struggles."

823 It was noted that the "gap" between expiration of the automatic stay and the time to make  
824 post-judgment motions seems worrisome, but perhaps there are no great practical problems.

825 Another member said that the "more efficient" draft presented for discussion is simple, and  
826 collects things in a pattern that makes sense. Most cases are resolved without trial. Even recognizing  
827 summary judgments for plaintiffs, problems of execution may not arise often. This "little rewrite"  
828 seems useful. A judge repeated the thought — this version "makes for a cleaner rule."

829 Judge Matheson concluded by noting that the Subcommittee is "still in a discussion phase."  
830 Knowing that Committee members have not encountered problems with Rule 62 "makes a point. But  
831 we can address the 'gap,' and perhaps work toward a better rule."

832 *Rule 23 Subcommittee*

833 Judge Dow began the report of the Rule 23 Subcommittee by pointing to the list of events  
834 on page 243 of the agenda materials. The Subcommittee has attended or will attend many of these  
835 events; some Subcommittee members will attend others that not all members are able to attend. The  
836 events for this year will culminate in a miniconference to be held at the Dallas airport on September  
837 11. The miniconference will be asked to discuss drafts that develop further the approaches reflected  
838 in the preliminary sketches included in the agenda materials. The most recent of these events was  
839 a roundtable discussion of settlement class actions at George Washington University Law School.  
840 It brought together a terrific group of practitioners, judges, and academics. It was very helpful.

841 Suggestions also are arriving from outside sources and are being posted on the  
842 Administrative Office web site. The suggestions include many matters the Subcommittee has not  
843 had on its agenda. It is important to have the Committee's guidance on just how many new topics  
844 might be added to the Rule 23 agenda. The Subcommittee's sense has been that there is no need for  
845 a fundamental rewrite of Rule 23. But some of the submissions suggest pretty aggressive  
846 reformulations of Rule 23(a) and (b) that seem to start over from scratch. These suggestions have  
847 overtones of a need to strengthen the perspective that class actions should be advanced as a means  
848 of increasing private enforcement of public policy values.

849 A Subcommittee member noted that several professors propose deletion of Rule 23(a)(1),  
850 (2), and (3). Adequacy of representation would remain from the present rule. And they would add  
851 a new paragraph looking to whether a class action is the best way to resolve the case as compared

852 to other realistic alternatives. The question for the Committee is whether we should spend time on  
853 such fundamental issues.

854 A first reaction was that no compelling justifications have been offered for these suggestions.  
855 It was noted that in deciding to take up Rule 23, the Committee did not have a sense that a broad  
856 rewrite is needed, but instead focused on specific issues. "The burden of proof for going further has  
857 not been carried."

858 The next question was whether new issues should be added to the seven issues listed in the  
859 Subcommittee Report that will be brought on for discussion today.

860 Multidistrict proceedings were identified as a topic related to Rule 23. There was a  
861 presentation on MDL proceedings to the Judicial Conference in March. MDL proceedings overlap  
862 with Rule 23. It will be important to pay attention to developments in MDL practice. And it was  
863 noted that discussion at the George Washington Roundtable included the thought that some of the  
864 current Rule 23 sketches reflect approaches that could reduce the pressures that mass torts exert on  
865 MDL practice. Further development of settlement-class practice might move cases into Rule 23,  
866 with the benefits of judicial review and approval of settlements, and away from widespread private  
867 settlements of aggregated cases free from any judicial review or supervision. One way of viewing  
868 these possibilities is the idea of a "quasi class action" — a sensible system for certifying settlement  
869 classes could be helpful. So a big concern is how to settle mass-tort cases after Amchem.

870 Another suggestion was that the "biggest topic not on our list" is the concept of  
871 "ascertainability" that has recently emerged from Third Circuit decisions.

872 Settlement class certification: Discussion turned to the question whether there should be an explicit  
873 rule provision for certifying settlement classes. One question will be whether the rule should  
874 prescribe the information provided to the court on a motion to certify and for preliminary "approval."  
875 Should the concept be not preliminary "approval," but instead preliminary "review"? The review  
876 could focus on whether the proposed settlement is sufficiently cogent to justify certification and  
877 notice to the class. What information does the judge need for taking these steps? Something like  
878 what Rule 16 says should be given to the judge? An explicit rule provision could guide the parties  
879 in what they present, as well as help the judge in evaluating the proposal. There was a lot of interest  
880 in this at the George Washington Roundtable.

881 Further discussion noted that Rule 23(e) does not say anything about the procedure for  
882 determining whether to certify a settlement class in light of a proposed settlement. At best there is  
883 an oblique implication in the Rule 23(e)(1) provision for directing notice in a reasonable manner to  
884 all class members who would be bound by the proposal.

885 A judge observed that once the parties agree on a settlement and take it to the judge, the  
886 judge's reaction is likely to be that it is good to settle the action. The result may be that notice is sent  
887 to the class without a sufficiently detailed appraisal of the settlement terms. Problems may appear  
888 as class members respond to the notice, but the process generates a momentum that may lead to final  
889 approval of an undeserving settlement. Another judge observed that there are great variations in  
890 practice. Some judges scrutinize proposed settlements carefully. Some do not. It would be helpful  
891 to have criteria in the rule.

892 A choice was offered. The rule could call for a detailed "front load" of information to be  
893 considered before sending out notice to the class. Or instead it could follow the ALI Aggregate  
894 Litigation Project, characterizing the pre-notice review as review, not "approval." Discussion at the

895 George Washington Roundtable "was almost all for front-loading."

896 A judge said that most of the time in a "big value case" the lawyers know they should front-  
897 load the information. "But when the parties are not so sophisticated, the late information that  
898 emerges after notice to the class may lead me to blow up the settlement." And if the settlement is  
899 rejected after the first notice, a second round of notice is expensive and can "eat up most of the case  
900 value."

901 Another judge observed that "it gets dicey when some defendants settle and others do not."  
902 What seems fairly straightforward at the time of the early settlement may later turn out to be more  
903 complicated.

904 A lawyer thought that front-loading sounds like it makes sense. But the agenda materials do  
905 not include rule language for this. What factors should be addressed by the parties and considered  
906 by the court? It was suggested that the factors are likely to be much the same as the factors a court  
907 considers in determining whether to give final approval. One perspective is similar to the predictions  
908 made when considering a preliminary injunction: a "likelihood of approval" test at the first stage.

909 Another judge said that the Third Circuit "is pretty clear on what I should consider. Lawyers  
910 who practice class actions understand the factors." But there are many class actions — for example  
911 under the Fair Credit Reporting Act — brought by lawyers who do not understand class-action  
912 practice. Those lawyers will not be helped by a new rule. There is no problem calling for a more  
913 detailed rule. A different judge agreed that the problem lies with the less experienced lawyers.

914 Yet another judge expressed surprise at this discussion. "We go through pretty much the  
915 same information as needed for final approval of a settlement." It may help to say that in generic  
916 terms in rule text, but it is less clear whether detailed standards should be stated in the rule.

917 And another judge said "I do less work on the front end than at the back end. But the factors  
918 are the same."

919 The final comment was that drafting a rule provision will require careful balancing. There  
920 are impulses to make the criteria for final approval simpler and clearer, as will be discussed. But  
921 there also are impulses to demand more information up front.

922 It was agreed that the Subcommittee agenda would be expanded to include a focus on the  
923 procedure for determining whether to approve notice to the class of a settlement, looking toward  
924 final certification and approval.

925 Rule 23(f) Appeal of Settlement Class Certification: The question whether a Rule 23(f) appeal can  
926 be taken from preliminary approval of a settlement class has come to prominence with the Third  
927 Circuit decision in the NFL case. Given the language of Rule 23(f) as it stands, the answer seems  
928 to turn on whether preliminary approval of a settlement and sending out notice to the class involves  
929 "certification" of the settlement class. The deeper question is whether it is desirable to allow appeal  
930 at that point, remembering that appeal is by permission and that it might be hoped that a court of  
931 appeals will quickly deny permission to appeal when there are not compelling reasons to risk  
932 derailing the settlement by the delays of appeal.

933 The question of appeal at the preliminary review and notice stage is not academic. High  
934 profile cases are likely to draw the attention of potential objectors well before the preliminary  
935 review. They may view the opportunity to seek permission to appeal at this stage as a powerful

936 opportunity to exert leverage.

937 The Third Circuit ruled that Rule 23(f) does not apply at this stage. But other courts of  
938 appeals have simply denied leave to appeal without saying whether Rule 23(f) would authorize an  
939 appeal if it seemed desirable. This issue will arise again. The Third Circuit reasoned that the record  
940 at this early stage will not be sufficient to support informed review. But if the rules are amended to  
941 require the parties to present sufficient information for a full-scale evaluation of the proposed  
942 settlement at the preliminary review stage, that problem may be reduced.

943 A judge observed that Rule 23(f) hangs on the seismic effect of certification or a refusal to  
944 certify. Certification of a settlement class is very important. It is rare to go to trial. Certification even  
945 for trial tends to end the case by settlement. So what, then, of certification for settlement? Will an  
946 opportunity to appeal enable objectors to derail settlements? Given the agreement of class and the  
947 opposing parties to settle, a court of appeals will be reluctant to grant permission to appeal.

948 Uncertainty was expressed whether the possibility of a § 1292(b) appeal with permission of  
949 the trial court as well as the court of appeals may provide a sufficient safety valve.

950 An observer stated that "the notice process is what brings out objectors." If Rule 23(f) appeal  
951 is available on preliminary review, the way may be opened for a second Rule 23(f) appeal after  
952 notice has gone out.

953 It was agreed that seriatim Rule 23(f) appeals would be undesirable.

954 The discussion concluded with some sense that the Third Circuit approach seems sensible.  
955 Whether Rule 23(f) should be revised to entrench this approach may depend on the text of any rule  
956 that formalizes the process of certifying a settlement class. If the rule calls for certification only after  
957 preliminary review, notice, review of any objections, and final approval of the settlement, then there  
958 will be no room to argue that the preliminary review grants certification, nor, for that matter, that  
959 refusal to send out notice after a preliminary review denies certification.

960 A final Rule 23(f) question was noted later in the meeting. The Department of Justice  
961 continues to experience difficulties with the requirement that the petition for permission to appeal  
962 be filed with the circuit clerk within 14 days after the order is entered. It will explore this question  
963 further and present the issue in greater detail in time for the fall meeting.

964 With this, discussion turned to the seven topics listed in the agenda materials.

965 Criteria for Settlement Approval: Rule 23(e) was revised in the last round of amendments to adopt  
966 the "fair, reasonable, and adequate" phrase that had developed in the case law to express the multiple  
967 factors articulated in somewhat different terms by the several circuits. At first a long list of factors  
968 was included in draft rule text. The factors were then demoted to a draft Committee Note that is set  
969 out in the agenda materials. Eventually the list of factors was abandoned for fear it would become a  
970 "check list" that would promote routinized presentations on each factor, no matter how clearly  
971 irrelevant to a particular case, and divert attention from serious exploration of the factors that in fact  
972 are important in a particular case.

973 The question now is whether the rule text should elaborate, at least to some extent, on the  
974 bland "fair, reasonable, and adequate" phrase. The ALI Aggregate Litigation Project criticized the  
975 "grab bag" of factors to be found in the decisions, but provided a model of a more focused set of  
976 criteria requiring four findings, looking to adequate representation; evaluation of the costs, risks,

977 probability of success, and delays of trial and appeal; equitable treatment of class members relative  
978 to each other; and arm's-length negotiation without collusion. These factors are stated in the agenda  
979 sketch as a new Rule 23(e)(2)(A), supplemented by a new (B) allowing a court to consider any other  
980 pertinent factor and to refuse approval on the basis of any such other factor. The goal is to focus  
981 attention on the matters that are useful. A related goal is to direct attention away from factors that  
982 have been articulated in some opinions but that do not seem useful. The common example of factors  
983 that need not be considered is the opinion of counsel who shaped the proposed settlement that the  
984 settlement is a good one.

985 One reaction to this approach may be "I want my Circuit factors." Another might be that the  
986 draft Committee Note touches on too many factors. And of course yet another reaction might be that  
987 these are not the right factors.

988 A participant recalled a remark by Judge Posner during the George Washington Roundtable  
989 discussion: "why three words? 'Reasonable' says it all" — the appropriate amendment would be to  
990 strike "fair" and adequate" from the present rule text. The response was that these three words had  
991 become widely used in the cases when Rule 23(e) was amended. They were designed to capture  
992 ongoing practice. There is little need to delete them simply to save two words in the body of all the  
993 rules.

994 The agenda materials include a spreadsheet comparing the lists of approval factors that have  
995 been articulated in each Circuit. It was asked whether each of these factors is addressed in the draft  
996 Committee Note. Not all are. Greater detail could be added to the Note. Some factors are addressed  
997 negatively in the note, such as support of the settlement by those who negotiated it. The formulation  
998 in rule text was built on the foundation provided by the ALI. The question is how far the Committee  
999 Note should go in highlighting things that really matter.

1000 A judge observed that the sketch of rule text required the court to consider the four listed  
1001 elements, but the text then went on to allow the court to reject a settlement by considering other  
1002 matters even though the settlement had been found fair, reasonable, and adequate. Would it not be  
1003 better to frame it to make it clear that these other factors bear on the determination whether the  
1004 settlement is fair, reasonable, and adequate? What factors might those be?

1005 A response was that this sketch of a Rule 23(e)(2)(B) is a catch-all for case- or settlement-  
1006 specific factors. Such factors may be important. It might be used to invoke the old factors lists, but  
1007 it seems more important to capture unique circumstances.

1008 Subparagraph (B) also generated this question: Is this structure designed so that passing  
1009 inspection under the required elements of subparagraph (A) creates a presumption of fairness that  
1010 shifts the burden from the proponents of the settlement to the opponents? The immediate response  
1011 was that this question requires further thought, but that often it is not useful to think of sequential  
1012 steps of procedure as creating a "presumption" that invokes shifting burdens.

1013 A different approach asked what is gained by this middle ground that avoids any but a broad  
1014 list of considerations without providing a detailed list of factors? So long as these open-ended  
1015 considerations remain, they can be used to carry forward all of the factors that have been identified  
1016 in any circuit. All of those factors were used to elaborate the capacious "fair, reasonable, and  
1017 adequate" formula, and they still will be.

1018 A response was that various circuits list 10, or 12, or 15 factors. Some are more important  
1019 than others. "Distillation could help." But the reply was that "then we should make clear that these

1020 are the only factors."

1021 The next step was agreement that if a proposal to amend Rule 23(e) emerges from this work,  
1022 it should be sent out for comment without the "any other matter pertinent" provision sketched in  
1023 subparagraph (B).

1024 Turning back to subparagraph (A), it was noted that it will be difficult to implement criterion  
1025 (iv), looking to arm's-length negotiation without collusion. The lawyers will always say that they  
1026 negotiated at arm's length and did not collude. The response was that this element is one to be  
1027 shown by objectors. If they make the showing of "collusion" — an absence of arm's length  
1028 negotiation — the settlement must be disapproved. This was challenged by asking whether a court  
1029 should be required to disapprove a settlement that in fact is fair, reasonable, and adequate — perhaps  
1030 the best deal that can be made — simply for want of what seems an arm's-length negotiation?

1031 A broader perspective was brought to bear. Courts commonly recognize separate components  
1032 in evaluating a proposed settlement, one procedural and other substantive. There may be striking  
1033 examples that combine both components, as in one case where a settlement was quickly arranged  
1034 for the purpose of preempting a competing class action in a state court. It may be hoped that such  
1035 examples are rare.

1036 A twist was placed on the nature of "collusion." One dodge may be that parties who have  
1037 engaged in amicable negotiations take the deal to some form of ADR — often a retired judge — for  
1038 review and blessing. "If reputable counsel are involved, it's different from a rushed settlement by  
1039 an inexperienced lawyer."

1040 Item (iv), then, might be dropped. But the focus on procedural fairness and adequacy may  
1041 be important. It may be useful to highlight it in rule text.

1042 Discussion of these issues concluded with a reminder that the federal law of attorney conduct  
1043 is growing. Collusion is prohibited by state rules of attorney conduct. These rules are adopted into  
1044 the local rules of federal courts. Item (iv) will become "another rule governing attorney conduct."

1045 Settlement Class Certification: A settlement-class rule was published for comment as a new  
1046 subdivision (b)(4) at virtually the same time as the Amchem decision in the Supreme Court. The  
1047 Committee suspended consideration to allow time to evaluate the aftermath of the Amchem decision.  
1048 The idea of reopening the question is that certification to settle is different from certification to try  
1049 the case. The ALI Aggregate Litigation Project is something like this. Most participants in the  
1050 George Washington Roundtable discussion were of similar views.

1051 One common thread that distinguishes proposals to certify a settlement class from trial  
1052 classes is to downplay the role of "predominance" in a (b)(3) class.

1053 Two alternative sketches are presented in the agenda materials. The first expressly invokes  
1054 Rule 23(a), and includes an optional provision invoking subdivision (b)(3). Certification focuses on  
1055 the superiority of the proposed settlement and on finding that the settlement should be approved  
1056 under Rule 23(e). The second includes a possible invocation of Rule 23(b)(3), but focuses on  
1057 reducing the Rule 23(a) elements by looking to whether the class is "sufficiently numerous to  
1058 warrant classwide treatment," and the sufficiency of the class definition to determine who is in the  
1059 class.

1060 Is either alternative a useful addition to Rule 23?

1061 A judge offered no answers, but only questions. "It is a big step to downplay predominance."  
1062 At some point a settlement class judgment where common issues do not predominate might violate  
1063 Article III or due process. "Huge numbers of cases will be moved from (b)(3) to (b)(4)."

1064 The first response was that many predominance issues are obviated by settlement. The  
1065 common illustration is choice of law. By adopting common terms, the settlement avoids the  
1066 difficulties that arise when litigation would require applying different bodies of law, emphasizing  
1067 different elements, to different groups within the class. But the reply was that the sketch does not  
1068 refer to predominance for settlement.

1069 The next observation was that "manageability" appears in the text of Rule 23(b)(3) now, and  
1070 at the time of Amchem, but the Court ruled in Amchem that manageability concerns can be obviated  
1071 by the terms of settlement. Commonality, on the other hand, provides protection to class members,  
1072 even if its significance is reduced by the terms of settlement.

1073 That observation led to the question whether, if Rule 23(a) continues to be invoked for  
1074 settlement classes, the result will be to place greater weight on typicality. The first response was that  
1075 "typicality is easy." But what of common causation issues, and defenses against individual  
1076 claimants, that are not common? The only response was that if class treatment is not recognized,  
1077 cases will settle by other aggregated means that provide no judicial review or control.

1078 Cy pres: The agenda materials include a sketch that would add an extensive set of provisions for  
1079 evaluating cy pres distributions to Rule 23(e)(1). The sketch is based on the ALI Aggregate  
1080 Litigation Project, § 3.07. The value of addressing these issues in rule text turns in part on the fact  
1081 that cy pres distributions seem to be rather common, and in part on the hesitations expressed by  
1082 Chief Justice Roberts in addressing a denial of certiorari in a cy pres settlement case. Nothing in the  
1083 federal rules addresses cy pres issues now. Some state provisions do — California, for example, has  
1084 a cy pres statute.

1085 The sketch narrowly limits cy pres recoveries. The first direction is to distribute settlement  
1086 proceeds to class members when they can be identified and individual distributions are sufficiently  
1087 large to be economically viable. The next step, if funds remain after distributions to individual class  
1088 members, is to make a further distribution to the members that have participated in the first  
1089 distribution unless the amounts are too small to be economically viable or other specific reasons  
1090 make further individual distributions impossible or unfair. Finally, a cy pres approach may be  
1091 employed for remaining funds if the recipient has interests that reasonably approximate the interests  
1092 of class members, or, if that is not possible, to another recipient if that would serve the public  
1093 interest. This cy pres provision includes a bracketed presumption that individual distributions are  
1094 not viable for sums less than \$100, but recent advice suggests that in fact claims administrators may  
1095 be able to provide efficient distributions of considerably smaller sums.

1096 The opening lines of the sketch include, in brackets, a provision that touches a sensitive  
1097 question. These words allow approval of a proposal that includes a cy pres remedy "if authorized  
1098 by law." There is virtually no enacted authority for cy pres remedies in federal law. The laws of a  
1099 few states to address the question. It may be possible to speak to the sources of authority in the  
1100 general law of remedies. But the question remains: courts are approving cy pres distributions now.  
1101 If the practice is legitimate, there should be authority to regulate it by court rule. If it is not  
1102 legitimate, it would be unwise to attempt to legitimate it by court rule.

1103 The value of cy pres distributions depends in large measure on how effective the claims  
1104 process is in reducing the amounts left after individual claims are paid. Courts are picking up the



1105 ALI principle. It seems worthwhile to confirm it in Rule 23.

1106 The first question was whether the rule should require the settlement agreement to address  
1107 these issues. That would help to reduce the Article III concerns. This observation was developed  
1108 further. Suppose the agreement does not address disposition of unclaimed funds. What then? Must  
1109 there be a second (and expensive) notice to the class of any later proposal to dispose of them? The  
1110 sketch Committee Note emphasizes that cy pres distribution is a matter of party agreement, not court  
1111 action.

1112 It was observed that even though a cy pre distribution is agreed to by the parties, it becomes  
1113 part of the court's judgment. It can be appealed. And there is a particular problem if cy pres  
1114 distribution is the only remedy. Suppose, for example, a defendant's wrong causes a ten-cent injury  
1115 to each of a million people. Individual distributions do not seem sensible. But finding an alternative  
1116 use for the \$100,000 of "damages" seems to be creating a new remedy not recognized by the  
1117 underlying substantive law of right and remedy.

1118 Another judge noted that "courts have been doing this, but it's a matter of follow-the-leader."  
1119 There is not a lot of endorsement for the practice, particularly at the circuit level. Cy pres theory has  
1120 its origins in trust law. Settlement class judgments ordinarily are not designed to enforce a failed  
1121 trust. "What is the most thoughtful judicial discussion" that explains the justification for these  
1122 practices?

1123 The response was that cy pres recoveries have been discussed in a number of California state  
1124 cases. California recognizes "fluid recovery," as illustrated by the famous case of an order reducing  
1125 cab fares in Los Angeles — there was likely to be a substantial overlap between the future cab users  
1126 who benefit from the period of reduced fares and the past cab users who paid the unlawful high  
1127 fares, but the overlap was not complete. The Eighth Circuit has provided a useful review this year.  
1128 And cy pres distribution can be made only when the court has found the settlement to be fair,  
1129 reasonable, and adequate. That determination itself requires an effort to compensate class members  
1130 — by direct distribution if possible, but if that is not possible in some other way.

1131 A judge noted a recent case in his court involving a defendant who sent out 100,000,000  
1132 spam fax messages. The records showed the number of faxes, but then the records were spoliated.  
1133 There was no record of where the faxes had gone. The liability insurer agreed to settle for \$300 for  
1134 each of the class representatives. But what could be done with the remaining liability, which — with  
1135 statutory damages — was for a staggering sum? Seven states in addition to California provide for  
1136 distributing a portion of a cy pres recovery to Legal Services. That still leaves the need to dispose  
1137 of the rest. Addressing these questions in rule text must rest on the premise that such distributions  
1138 are proper.

1139 It was agreed that these questions are serious. The ALI pursued them to cut back on cy pres  
1140 distributions, to make it difficult to bypass class members. Perhaps a rule should say that it is unfair  
1141 to have all the settlement funds distributed to recipients other than class members.

1142 Discussion concluded on two notes: these questions cannot be resolved in a single afternoon.  
1143 And although it would be possible to adopt a rule that forbids cy pres distributions, that probably  
1144 is not a good idea.

1145 Objectors: Objectors play a role that is recognized by Rule 23 and that is an important strand in  
1146 reconciling class-action practice with the dictates of due process. Well-framed objections can be  
1147 very valuable to the judge. At the same time, it is widely believed that there are "bad objectors" who

1148 seek only strategic personal gain, not enhancement of values for the class. On this view, some  
1149 objectors may seek to exploit their ability to delay a payout to the class in order to extract tribute  
1150 from class counsel that may be to the detriment of class interests. Rule 23(e)(5) was added to reflect  
1151 the concern with improperly motivated objections by requiring court approval for withdrawal of an  
1152 objection. This provision appears to have been "somewhat successful."

1153 The Appellate Rules Committee is studying proposals to regulate withdrawal of objections  
1154 on appeal. The Rule 23 Subcommittee is cooperating in this work.

1155 Alternative sketches are presented at page 273 in the agenda materials. In somewhat different  
1156 formulations, each requires the parties to file a statement identifying any agreement made in  
1157 connection with withdrawal of an objection. An alternative approach is illustrated by sketches at  
1158 pages 274-275 of the agenda materials. The first simply incorporates a reminder of Rule 11 in rule  
1159 23(e)(5). The second creates an independent authority to impose sanctions on finding that an  
1160 objection is insubstantial or not reasonably advanced for the purpose of rejecting or improving the  
1161 settlement.

1162 No rule can define who is a "good" or a "bad" objector. The idea of these sketches is to alert  
1163 and arm judges to do something about bad objectors when they can be identified.

1164 Another possibility that has been considered is to exact a "bond" from an objector who  
1165 appeals. The more expansive versions of the bond would seek to cover not simply the costs of appeal  
1166 — which may be considerable — but also "delay costs" reflecting the harm resulting from delay in  
1167 implementing the settlement when the appeal fails.

1168 A "good" objector who participated in the George Washington Roundtable commented  
1169 extensively on the obstacles that already confront objectors.

1170 The first comment was that sanctions on counsel "are more and more regulation of attorney  
1171 conduct."

1172 And the first question from an observer was whether discovery is appropriate to support  
1173 objections. The response was that it is not likely that a rule would be written to provide automatic  
1174 access to discovery. There is a nexus to opt-out rights. At most such issues might be described in  
1175 a Committee Note, recognizing that at times discovery may be valuable.

1176 The next question was whether courts now have authority under Rule 11 and 28 U.S.C. §  
1177 1927 to impose sanctions on frivolous objections or objections that multiply the proceedings  
1178 unreasonably and vexatiously. The response was that the second alternative, on page 275, seems to  
1179 cut free from these sources of authority, creating an independent authority for sanctions. But it  
1180 remains reasonable to ask whether independent authority really is needed. One departure from Rule  
1181 11, for example, is that Rule 11 creates a safe harbor to withdraw an offending filing as a matter of  
1182 right; the Rule 23 sketch does not include this.

1183 Rule 68 Offers: The sketches in the agenda materials, beginning at page 277, provide alternative  
1184 approaches to a common problem. Defendants resisting class certification often attempt to moot the  
1185 representative plaintiff by offering complete individual relief. Often the offers are made under Rule  
1186 68. Although acceptance of a Rule 68 offer leads to entry of a judgment, it is difficult to find any  
1187 principled reason to suppose that a Rule 68 offer has greater potential to moot an individual claim  
1188 than any other offer, particularly one that may culminate in entry of a judgment. Courts have reacted  
1189 to this ploy in different ways. The Supreme Court has held that a Rule 68 offer of complete relief

1190 to the individual plaintiff in an opt-in action under the Fair Labor Standards Act moots the action.  
1191 The opinion, however, simply assumed without deciding that the offer had in fact mooted the  
1192 representative plaintiff's claim, and further noted that an opt-in FLSA action is different from a Rule  
1193 23 class action. Beyond that, courts seem to be increasingly reluctant to allow a defendant to "pick  
1194 off" any representative plaintiff that appears, and thus forever stymie class certification. Some of the  
1195 strategies are convoluted. In the Seventh Circuit, for example, a class plaintiff is forced to file a  
1196 motion for class certification on filing the complaint because only a motion for certification defeats  
1197 mooting the case by an offer of complete individual relief. But it also is recognized that an attempt  
1198 to rule on certification at the very beginning of the action would be foolish, so the plaintiff also  
1199 requests, and the courts understand, that consideration of the certification motion be deferred while  
1200 the case is developed. This convoluted practice has not commended itself to judges outside the  
1201 Seventh Circuit.

1202 The first sketch attacks the question head-on. It provides that a tender of relief to a class  
1203 representative can terminate the action only if the court has denied certification and the court finds  
1204 that the tender affords complete individual relief. It further provides that a dismissal does not defeat  
1205 the class representative's standing to appeal the order denying certification.

1206 The second sketch simply adopts a provision that was included in Rule 68 amendments  
1207 published for comment in 1983 and again in 1984. This provision would direct that Rule 68 does  
1208 not apply to actions under Rules 23, 23.1, and 23.2. It did not survive withdrawal of the entire set  
1209 of Rule 68 proposals.

1210 The third sketch begins by reviving a one-time practice that was at first embraced and then  
1211 abandoned in the 2003 amendments. This practice required court approval to dismiss an action  
1212 brought as a class action even before class certification. The parties must identify any agreement  
1213 made in connection with the proposed dismissal. The sketch also provides that after a denial of  
1214 certification, the plaintiff may settle an individual claim without prejudice to seeking appellate  
1215 review of the denial of certification.

1216 The first question was whether these proposals reflect needs that arise from limits on the  
1217 ability to substitute representatives when one is mooted. The first response was that it is always safer  
1218 to begin with multiple representatives. But it was suggested that the problem might be addressed by  
1219 a rule permitting addition of new representatives. That approach is often taken when an initial  
1220 representative plaintiff is found inadequate.

1221 The next observation was that substituting representatives may not solve the problem. The  
1222 defendant need only repeat the offer to each successive plaintiff. The approach taken in the first  
1223 sketch is elegant.

1224 Another member observed that courts allow substitution of representatives at the inadequacy  
1225 stage of the certification decision. But substitution may require formal intervention. That is too late  
1226 to solve the mootness problem. These issues are worth considering.

1227 The last observation was that the Seventh Circuit work-around seems to be effective. "It's  
1228 not that big a deal." But the first and second sketches are simple.

1229 Issues Classes: The relationship of Rule 23(c)(4) issues classes to the predominance requirement in  
1230 Rule 23(b)(3) has been a longstanding source of disagreement. One view is that an issue class can  
1231 be certified only if common issues predominate in the claims considered as a whole. The other view  
1232 is that predominance is required only as to the issues certified for class treatment. There are some

1233 signs that the courts may be converging on the view that predominance is required only as to the  
1234 issues.

1235 The first sketch in the agenda materials, page 281, simply adds a few words to Rule 23(b)(3):  
1236 the court must find that "questions of law or fact common to the class predominate over any  
1237 questions affecting only individual class members, subject to Rule 23(c)(4), and \* \* \*." The "subject  
1238 to Rule 23(c)(4)" phrase may seem somewhat opaque, but the meaning could be elaborated in the  
1239 Committee Note.

1240 The second sketch, at page 282, would amend Rule 23(f) to allow a petition to appeal from  
1241 an order deciding an issue certified for class treatment. The rule might depart from the general  
1242 approach of Rule 23(f), which requires permission only from the court of appeals, by adding a  
1243 requirement that the district court certify that there is no just reason for delay. This added  
1244 requirement, modeled on Rule 54(b), might be useful to avoid intrusion on further management of  
1245 the case. An opportunity for immediate appeal could be helpful before addressing other matters that  
1246 remain to be resolved.

1247 A judge asked the first question. "Every case I have seen excludes issues of damages. Does  
1248 this mean that every class is a (c)(4) issues class that does not need to satisfy the predominance  
1249 requirement"? That question led to a further question: What is an issue class? An action clearly is  
1250 an issue class if the court certifies a single issue to be resolved on a class basis, and intends not to  
1251 address any question of individual relief for any class member. The action, for example, could be  
1252 limited to determining whether an identified product is defective, and perhaps also whether the  
1253 defect can be a general cause of one or more types of injury. That determination would become the  
1254 basis for issue preclusion in individual actions if defect, and — if included — general causation  
1255 were found. Issues of specific causation, comparative responsibility, and individual injury and  
1256 damages would be left for determination in other actions, often before other courts. But is it an  
1257 "issue" class if the court intends to administer individual remedies to some or many or all members  
1258 of the class? We have not thought of an action as an issue class if the court sets the questions of  
1259 defect and general causation for initial determination, but contemplates creation of a structure for  
1260 processing individual claims by class members if liability is found as a general matter.

1261 This plaintive question prompted a response that predominance still is required for an issue  
1262 class. This view was repeated. Discussion concluded at that point.

1263 Notice: The first question of class-action notice is illustrated by a sketch at page 285 of the agenda  
1264 materials. Whether or not it was wise to read Rule 23(c) to require individualized notice by postal  
1265 mail in 1974 whenever possible, that view does not look as convincing today. Reality has  
1266 outstripped the Postal Service. The sketch would add a few words to Rule 23(c)(2)(B), directing  
1267 individual notice "by electronic or other means to all members who can be identified through  
1268 reasonable effort." The Committee Note could say that means other than first class mail may suffice.

1269 This proposal was accepted as an easy thing to do.

1270 The Committee did not discuss a question opened in the agenda materials, but not yet much  
1271 explored by the Subcommittee. It may be time to reopen the question of notice in Rule 23(b)(1) and  
1272 (2) classes, even though the concern to enable opt-out decisions is not present. It is not clear whether  
1273 the Subcommittee will recommend that this question be taken up.

1274 *Pilot Projects*

1275 Judge Campbell opened the discussion of pilot projects by describing the active panel  
1276 presentation and responses at the January meeting of the Standing Committee. Panel members  
1277 explored three possible subjects for pilot projects: enhanced initial disclosures, simplified tracks for  
1278 some cases, and accelerated ("Rocket") dockets.

1279 The Standing Committee would like to encourage this Committee to frame and encourage  
1280 pilot projects. It likely will be useful to appoint a subcommittee to study possible projects, looking  
1281 to what has been done in state courts and federal courts, and to recommend possible subjects.

1282 One potential issue must be confronted. Implementation of a pilot project through a local  
1283 district court rule must come to terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a),  
1284 which direct that local rules must be consistent with the national Enabling Act rules. The agenda  
1285 materials include the history of a tentative proposal twenty years ago to amend Rule 83 to authorize  
1286 local rules inconsistent with the national rules, subject to approval by the Judicial Conference and  
1287 a 5-year time limit. The proposal was abandoned without publication, in part for uncertainty about  
1288 the fit with § 2071(a).

1289 The Rule 83 question will depend in part on the approach taken to determine consistency,  
1290 or inconsistency, with the national rules. The current employment protocols employed by 50 district  
1291 judges are a good illustration. They direct early disclosure of much information that ordinarily has  
1292 been sought through discovery. But they seem to be consistent with the discovery regime established  
1293 in Rule 26, recognizing the broad discretion courts have to guide discovery.

1294 Initial Disclosures: Part of the Rule 26(a)(1) history was discussed earlier in this meeting. The rule  
1295 adopted in 1993 directed disclosure of witnesses with knowledge, and documents, relevant to  
1296 disputed matters alleged with particularity in the pleadings. It included a provision allowing districts  
1297 to opt out by local rule; this provision was included under pressure from opponents who disliked the  
1298 proposal. The rule was revised in 2000 as part of the effort to eliminate the opt-out provision of the  
1299 1993 rule, limiting disclosure to witnesses and documents the disclosing party may use. Arizona  
1300 Rule 26.1 requires much broader disclosure even than the 1993 version of Rule 26(a)(1). It is clearly  
1301 intended to require disclosure of unfavorable information as well as favorable information. The  
1302 proposal for adoption was greeted by protests that such disclosures are inconsistent with the  
1303 adversary system. The Arizona court nonetheless persisted in adoption. This broad disclosure is  
1304 coupled with restrictions on post-disclosure discovery. Permission is required, for example, to  
1305 depose nonparty witnesses. Arizona lawyers were surveyed to gather reactions to this rule in 2008  
1306 and 2009. In the 2008 survey, 70% of the lawyers with experience in both state and federal courts  
1307 preferred to litigate in state court. (Nationally, only 43% of lawyers with experience in both state  
1308 and federal courts prefer their state courts.) The results in the 2009 survey were similar. More than  
1309 70% of the lawyers who responded said that initial disclosures help to narrow the issues more  
1310 quickly. The Arizona experience could be considered in determining whether to launch a pilot  
1311 project in the federal courts.

1312 An observer from Arizona said that debate about the initial disclosure rule declines year-by-  
1313 year. "It does require more work up front, but it is, on average, faster and cheaper. Unless a client  
1314 wants it slow and expensive, we often recommend state court." An action can get to trial in state  
1315 court in 12, or 16, months. Two years is the maximum. It takes longer in federal court. He further  
1316 observed that Arizona should be considered as a district to be included in a federal pilot project  
1317 because the bar, and much of the bench, understand broad initial disclosures.

1318 The next comment observed that a really viable study should include districts where broad  
1319 initial disclosure "is a complete shock to the system." There may be a problem with a project that

1320 exacts disclosures inconsistent with the limited requirements of Rule 26(a)(1). But it is refreshing  
1321 to consider a dramatic departure, as compared to the usually incremental changes made in the federal  
1322 rules. This comment also observed that even in districts that adhered to the 1993 national rule,  
1323 lawyers often agreed among themselves to opt out.

1324 A member asked whether comparative data on case loads were included in the study of  
1325 Arizona experience. The answer was that they were not in the study. But Maricopa County has 120  
1326 judges. Their dockets show case loads per judge as heavy as the loads in federal court.

1327 A judge observed that a mandatory initial disclosure regime that includes all relevant  
1328 information would be an integral part of ensuring proportional discovery. The idea is to identify  
1329 what it is most important to get first. A pilot project would generate this information as a guide to  
1330 judicial management. The judge could ask: "What more do you need"? This process could be  
1331 integrated with the Rule 26(f) plan. This is an extraordinarily promising prospect. There will be  
1332 enormous pushback. Justice Scalia, in 1993, wondered about the consistency of initial disclosure  
1333 with an adversary system. But the success in Arizona provides a good response.

1334 Accelerated Dockets: This topic was introduced with a suggestion that the speedy disposition rates  
1335 recently achieved in the Western District of Wisconsin appear to be fading. The Southern District  
1336 of Florida has achieved quick disposition times for some case. "Costs are proportional to time."  
1337 Setting a short time for discovery reflects what is generally needed. State-court models exist. The  
1338 "patent courts" are experimenting with interesting possibilities. The Federal Judicial Center will  
1339 report this fall on experience with the employment protocols.

1340 These and other practices may help determine whether a pilot project on simplified  
1341 procedures could be launched. Federal-court tracking systems could be studied at the beginning.  
1342 State court practices can be consulted.

1343 A member provided details on the array of cases filed in federal court. The four most  
1344 common categories include prisoner actions, tort claims, civil rights actions (labor claims can be  
1345 added to this category), and contract actions. Smaller numbers are found for social security cases,  
1346 consumer credit cases, and intellectual property cases. Some case types lend themselves to early  
1347 resolution. Early case evaluation works if information is shared. Early mediation also works,  
1348 although the type of case affects how early it can be used.

1349 One thing that would help would be to have an e-discovery neutral available on the court's  
1350 staff to help parties work through the difficulties. Many parties do not know what they're doing with  
1351 e-discovery. This member has worked as an e-discovery master. "Weekly phone calls can save the  
1352 parties a lot of money." One ploy that works is to begin with a presumption that the parties will share  
1353 the master's costs equally, unless the master recommends that one party should bear a larger share.  
1354 That provision, and the fact that they're being watched, dramatically reduces costs and delay. And  
1355 e-discovery mediation can help.

1356 It also helps when the parties understand the case well enough for early mediation.

1357 And experience as an arbitrator, where discovery is limited to what the arbitrator directs,  
1358 shows that it is possible to control costs in a fair process.

1359 Another suggestion was that a statute allows summary jury trial. If the parties agree, it can  
1360 be a real help. The trial can be advisory. It may be limited, for example to 3 hours per party.  
1361 Summaries of testimony, or live witnesses, may be used. Charts may be used. "Juries love it." After

1362 the jury decides, lawyers can ask the jury why they did what they did. This practice can be a big help  
1363 in conjunction with a settlement conference.

1364 Another suggestion was that it would help to devise rules to dispose of cases that require the  
1365 court to review a "record." Social Security cases, IDEA cases, and ERISA fiduciary cases are  
1366 examples.

1367 Another judge noted that the Northern District of Ohio has a differentiated case management  
1368 plan. The categories of cases include standard, expedited, complex, mass tort, and administrative.  
1369 There are ADR options, and summary jury trial. It would be good to study this program to see how  
1370 it works out over time.

1371 Discussion concluded with the observation that if done well, study of these many alternatives  
1372 could lead to useful pilot projects.

1373 Judge Sutton concluded the discussion of pilot projects by noting that the Standing  
1374 Committee is grateful for all the work done on the Duke Rules package and on Rule 37(e). He  
1375 further noted that Rule 26(a)(1) failed in its initial 1993 form because it was a great change from  
1376 established habits. It may be worthwhile to restore it, or something much like it, as a pilot project  
1377 in 10 or 15 districts to see how it might be made to work now.

1378 Judge Sutton concluded the meeting by noting that Judge Campbell's term as Committee  
1379 Chair will conclude on September 30. Judge Campbell will attend the November meeting, and the  
1380 Standing Committee meeting in January, for proper recognition of his many contributions to the  
1381 Rules Committees. "Surely 100% of Arizona lawyers would prefer David Campbell to anyone else."  
1382 His stewardship of the Committee has been characterized by steadiness, even-handedness, patience,  
and insight. And he is always cheerful. "Thank you."

Respectfully submitted,

Edward H. Cooper  
Reporter

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# 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

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CHAIR  
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CIVIL RULES

REENA RAGGI  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

MEMORANDUM

**DATE:** May 4, 2015

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

**FROM:** Judge Steven M. Colloton, Chair  
Advisory Committee on Appellate Rules

**RE:** Report of Advisory Committee on Appellate Rules

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**I. Introduction**

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval. Part III covers other matters.

The Committee has scheduled its next meeting for October 29 and 30, 2015, in Chicago, Illinois.

More information about the Committee's activities can be found in the Committee's study agenda and in the Reporter's forthcoming draft of the minutes of the April meeting.

## **II. Action Items—for Final Approval**

The Committee seeks final approval of six sets of proposed amendments.

### **A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7**

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments 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. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

## **1. Text of proposed amendments and Committee Note**

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

## **2. Changes made after publication and comment**

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.<sup>1</sup> Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

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<sup>1</sup> Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense (“Today ... I am depositing”) rather than the past tense (“I deposited ...”), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution’s mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules’ reference to a court’s ability to “exercise[] its discretion to permit the later filing” of the declaration (the style suggestion was to say simply “permit[]”). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did not adopt suggestions that the Rules should authorize courts to excuse an inmate’s failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules’ reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

#### **B. Tolling motions: Rule 4(a)(4)**

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4) if a court has mistakenly ordered an “extension” of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called “tolling motions” filed in the district court that have the effect of extending the appeal deadline, but “§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear.” 16A Wright et al., Federal



Practice & Procedure § 3950.4. At the time of enactment, “caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal.” *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that “[i]f a party timely files in the district 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.” A number of circuits have ruled that the Civil Rules’ deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly “extends” the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a “timely” one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g., Blue v. Int’l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of “timely” in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not “timely” under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court’s decision in *Bowles*, which held that the Court has “no authority to create equitable exceptions to jurisdictional requirements.” 551 U.S. at 214.

### **1. Text of proposed amendment and Committee Note**

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

### **2. Changes made after publication and comment**

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has

power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator’s objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule “is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party’s consent or failure to object; or (iii) the court’s disposition of the motion.” Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a “trap.”

**C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6**

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32’s word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party’s principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document’s length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court’s ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

\* \* \*

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee’s clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32’s word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document’s length. The published proposals would add a new Rule 32(f) setting forth such a list.

### **1. Text of proposed amendment and Committee Note**

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

## **2. Changes made after publication and comment**

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether

the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history, briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, “thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer.” Judge Easterbrook reported that “[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief.”

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit “approximate[s] the current 50-page limit.” After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit “reduces the length below the traditional 50 page limit.” The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 “about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief,” and that 14,000 words “is closer to the length of a professionally printed brief.” But the minutes of the Advisory Committee reflect that “[i]n order to avoid reopening the controversy” over the length of briefs, “several members spoke in favor of retaining the 14,000 word limit,” and “[a] majority favored staying with 14,000.” When the chair of the Advisory Committee presented the proposal to the Standing Committee, “[h]e pointed out that a 50-page brief would include about 14,000 words.” When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee’s report said that the rule “establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages).”

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General “agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit,” but noted that “in some cases parties will justifiably need to file longer briefs.”

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief’s due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at [Regulations.gov](http://Regulations.gov).

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee’s conclusion in 1997 that “computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief.”

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief

length and reversal. But correlation does not show causation, and the authors caution that it would be “absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal.”

In collecting more recent data, the Committee’s clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend Rule 32(e) to highlight a circuit court’s ability to increase any or all of the Appellate Rules’ length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)’s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

#### **D. Amicus filings in connection with rehearing: Rule 29**

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

##### **1. Text of proposed amendment and Committee Note**

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

##### **2. Changes made after publication and comment**

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus



filings in connection with the merits briefing of an appeal are limited to half the length of “a party’s principal brief.”

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party’s petition, and the required contents of the amicus’s brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party’s petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus’s identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party’s petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal’s deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party’s petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies

resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

#### **E. Amending the “three-day rule”: Rule 26(c)**

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the “three-day rule” in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

#### **1. Text of proposed amendment and Committee Note**

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

## 2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the

time available to respond. Extensions of time may be warranted to prevent prejudice.” The Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document “is submitted with a motion for leave to file or is not accepted for filing.” Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the “de facto” deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee’s work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

#### **F. Updating a cross-reference in Rule 26(a)(4)(C)**

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)’s reference to “filing by mail under Rule 13(b)” should have been updated to refer to “filing by mail under Rule 13(a)(2).”

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

### III. Information Items

The Committee continues work on two matters that may result in proposed amendments for consideration at the January 2016 meeting of the Standing Committee. One involves Rule 41, concerning issuance of the mandate; the other relates to Rule 25, which governs electronic filing and service and proof of electronic service. The Committee is also working on a project concerning appellate disclosure statements and Rule 26.1, and is coordinating with the Civil Rules Committee on a project about appeal bonds and Civil Rule 62. Also on the study agenda are a question concerning amicus filings by consent of the parties and a proposal to amend the Appellate Rules to address appeals by class action objectors.

The Committee is considering amendments to Rule 41 that would address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

#### **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

\* \* \*

(b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

\* \* \*

(d) STAYING THE MANDATE.

\* \* \*

(2) *Pending Petition for Certiorari.*

\* \* \*

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the filing of a Supreme Court order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to “extend the time” for issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to “extend the time” for issuing its mandate by mere inaction, or whether an order is required. As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion. This past spring, Judge Richard C. Tallman wrote to the Committee to propose that Rule 41 be amended to “permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances.”

At its fall 2015 meeting, the Committee will consider proposed amendments to Rule 41 that would (1) restore the requirement that stays of the mandate require an order; (2) make clear that stays of the mandate (other than pending a petition for certiorari) require extraordinary circumstances; and (3) streamline the rule by eliminating Rule 41(d)(1).

At the fall meeting, the Committee will give further consideration to amendments to Appellate Rule 25 to address electronic filing and service and proof of electronic service. Like the proposals currently under development by the Civil and Bankruptcy Rules Committees, the Appellate Rule 25 proposal would presumptively require electronic filing (subject to exceptions for good cause and by local rule) and would presumptively authorize electronic service through the court’s transmission facilities (subject, again, to exceptions for good cause and by local rule). Pro se litigants would be treated differently, however, in order to take account of concerns about electronic filing and service by and on unrepresented parties (including inmates). The amendments would also provide that the notice of electronic filing generated by CM/ECF constitutes proof of service on any litigant served electronically through the court’s transmission facilities.

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures. The Committee is evaluating whether such disclosures elicit information that may affect a judge’s analysis of his or her recusal obligations and, if so, whether the disclosures should be required by national rule. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee will keep other Advisory Committees apprised of work in this area.

During the past several years, the Civil and Appellate Rules Committees and their joint subcommittee have discussed the possibility of adopting a rule amendment to address the practice of “manufactured finality.” A principal topic of discussion has been the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about whether one technique—described as “conditional dismissals with prejudice”—suffices to achieve finality. The Civil Rules Committee, however, has opted to take no action on this matter. Recognizing that any rule amendment addressing the conflict in authority likely should be placed in the Civil Rules rather than the Appellate Rules, the Appellate Rules Committee acceded to the Civil Rules Committee’s proposal to take no action. The reporters will monitor the caselaw in this area and alert the committees of significant developments.

The Civil-Appellate Subcommittee also has discussed the treatment of appeal bonds in Civil Rule 62. An Appellate Rules Committee member has suggested that it would be useful to clarify a number of aspects of practice under that rule. The subcommittee has begun drafting a possible rule amendment, focusing particularly on current Rules 62(a), (b), and (d). Although discussion in the Civil Rules Committee suggested that members of that Committee do not see problems with the current rule, attorney members of the Appellate Rules Committee have noted that problems with the rule are likely to be felt most keenly by appellate lawyers.

Other topics on the Committee’s agenda may receive attention in the next year. One item concerns a proposal that Appellate Rule 42 be amended to bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. The Appellate Rules Committee is hopeful that the work of the Civil Rules Committee’s Rule 23 Subcommittee will assist with deliberations in this area. Another item concerns amicus filings during initial consideration of a case on the merits. Current Rule 29(a) provides that the United States or a State may file without consent of the parties or leave of court. It then states: “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.” Some circuits have local provisions that prevent the filing of amicus briefs that would cause a recusal. The Committee will consider whether a revision to the Rule 29(a) provision on party consent would be desirable.

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# TAB 4B

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE\***

1 **Rule 4. Appeal as of Right—When Taken**

2 \* \* \* \* \*

3 **(c) Appeal by an Inmate Confined in an Institution.**

4 (1) If an institution has a system designed for legal  
5 mail, an inmate confined there must use that  
6 system to receive the benefit of this Rule 4(c)(1).

7 If an inmate ~~confined in an institution~~ files a  
8 notice of appeal in either a civil or a criminal  
9 case, the notice is timely if it is deposited in the  
10 institution's internal mail system on or before the  
11 last day for filing. ~~If an institution has a system~~  
12 ~~designed for legal mail, the inmate must use that~~  
13 ~~system to receive the benefit of this rule. Timely~~  
14 ~~filing may be shown by a declaration in~~

---

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

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15 ~~compliance with 28 U.S.C. § 1746 or by a~~  
16 ~~notarized statement, either of which must set~~  
17 ~~forth the date of deposit and state that first class~~  
18 ~~postage has been prepaid. and:~~

19 (A) it is accompanied by:

20 (i) a declaration in compliance with 28  
21 U.S.C. § 1746—or a notarized  
22 statement—setting out the date of  
23 deposit and stating that first-class  
24 postage is being prepaid; or

25 (ii) evidence (such as a postmark or date  
26 stamp) showing that the notice was so  
27 deposited and that postage was  
28 prepaid; or

29 (B) the court of appeals exercises its discretion  
30 to permit the later filing of a declaration or

31 notarized statement that satisfies

32 Rule 4(c)(1)(A)(i).

33 \* \* \* \* \*

### Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule 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. New Form 7 in the Appendix of Forms 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 court of appeals 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 inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

### **Changes Made After Publication and Comment**

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates’ legal mail but do not log the date of deposit of inmates’ non-legal mail. The Committee’s subsequent inquiries revealed that a number of other States similarly record the date of inmates’ legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 \* \* \* \* \*

4 **(2) Filing: 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  
9 receive the benefit of this Rule 25(a)(2)(C).

10 A paper 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  
13 before the last day for filing. ~~—If an~~  
14 ~~institution has a system designed for legal~~  
15 ~~mail, the inmate must use that system to~~  
16 ~~receive the benefit of this rule. Timely~~

17 ~~filing may be shown by a declaration in~~  
18 ~~compliance with 28 U.S.C. § 1746 or by a~~  
19 ~~notarized statement, either of which must~~  
20 ~~set forth the date of deposit and state that~~  
21 ~~first class postage has been prepaid. and:~~

22 (i) it is accompanied by:

23 • a declaration in compliance with  
24 28 U.S.C. § 1746—or a notarized  
25 statement—setting out the date of  
26 deposit and stating that first-class  
27 postage is being prepaid; or

28 • evidence (such as a postmark or  
29 date stamp) showing that the  
30 paper was so deposited and that  
31 postage was prepaid; or

32 (ii) the court of appeals exercises its  
33 discretion to permit the later filing of a  
34 declaration or notarized statement that  
35 satisfies Rule 25(a)(2)(C)(i).

36 \* \* \* \* \*

**Committee Note**

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper 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. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other

evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals 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 inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

### **Changes Made After Publication and Comment**

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates’ legal mail but do not log the date of deposit of inmates’ non-legal mail. The Committee’s subsequent inquiries revealed that a number of other States similarly record the date of inmates’ legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to

proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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1 **Form 1. Notice of Appeal to a Court of Appeals From**  
2 **a Judgment or Order of a District Court**

3 United States District Court for the \_\_\_\_\_  
4 District of \_\_\_\_\_  
5 File Number \_\_\_\_\_  
6

A.B., Plaintiff

v.

Notice of Appeal

C.D., Defendant

7 Notice is hereby given that \_\_\_(here name all  
8 parties taking the appeal)\_\_, (plaintiffs) (defendants) in the  
9 above named case,\* hereby appeal to the United States  
10 Court of Appeals for the \_\_\_\_\_ Circuit (from the final  
11 judgment) (from an order (describing it)) entered in this  
12 action on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_.

13 (s) \_\_\_\_\_  
14 Attorney for \_\_\_\_\_  
15 Address: \_\_\_\_\_

16 **[Note to inmate filers: If you are an inmate confined in an**  
17 **institution and you seek the timing benefit of Fed. R. App.**  
18 **P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing)**  
19 **and file that declaration along with the Notice of Appeal.]**

\_\_\_\_\_  
\* See Rule 3(c) for permissible ways of identifying appellants.

### **Changes Made After Publication and Comment**

The Committee added the word “timing” to the “Note to inmate filers” in order to clarify the reference to Rule 4(c)(1).

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).



1 **Form 5. Notice of Appeal to a Court of Appeals from a**  
2 **Judgment or Order of a District Court or a**  
3 **Bankruptcy Appellate Panel**

4 United States District Court for the \_\_\_\_\_  
5 District of \_\_\_\_\_  
6

In re _____, Debtor  _____, Plaintiff v.  _____, Defendant	File No. _____
---	----------------

7 Notice of Appeal to United States Court of Appeals for the  
8 \_\_\_\_\_ Circuit

9 \_\_\_\_\_, the plaintiff [or defendant or  
10 other party] appeals to the United States Court of Appeals  
11 for the \_\_\_\_\_ Circuit from the final judgment [or order  
12 or decree] of the district court for the district of  
13 \_\_\_\_\_ [or bankruptcy appellate panel of the  
14 \_\_\_\_\_ circuit], entered in this case on \_\_\_\_\_, 20\_\_  
15 [here describe the judgment, order, or decree]  
16 \_\_\_\_\_

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17 The parties to the judgment [or order or decree]  
18 appealed from and the names and addresses of their  
19 respective attorneys are as follows:

20 Dated \_\_\_\_\_  
21 Signed \_\_\_\_\_  
22 *Attorney for Appellant*  
23 Address: \_\_\_\_\_  
24 \_\_\_\_\_

25 *[Note to inmate filers: If you are an inmate confined in an*  
26 *institution and you seek the timing benefit of Fed. R. App.*  
27 *P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing)*  
28 *and file that declaration along with the Notice of Appeal.]*

### **Changes Made After Publication and Comment**

The Committee added the word “timing” to the “Note to inmate filers” in order to clarify the reference to Rule 4(c)(1).

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

1 **Form 7. Declaration of Inmate Filing**

2 \_\_\_\_\_  
3 *[insert name of court; for example,*  
4 *United States District Court for the District of Minnesota]*

5

<u>A.B., Plaintiff</u>	
<u>v.</u>	<u>Case No. _____</u>
<u>C.D., Defendant</u>	

6 I am an inmate confined in an institution. Today,  
7 \_\_\_\_\_ [insert date], I am depositing the  
8 \_\_\_\_\_ [insert title of document; for example,  
9 “notice of appeal”] in this case in the institution’s internal  
10 mail system. First-class postage is being prepaid either by  
11 me or by the institution on my behalf.

12 I declare under penalty of perjury that the foregoing is  
13 true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

14 Sign your name here \_\_\_\_\_

15 Signed on \_\_\_\_\_ [insert date]

16  
17  
18 [Note to inmate filers: If your institution has a system  
19 designed for legal mail, you must use that system in order

20 *to receive the timing benefit of Fed. R. App. P. 4(c)(1) or*  
21 *Fed. R. App. P. 25(a)(2)(C).*  
22

### **Changes Made After Publication and Comment**

The Committee revised Form 7 to use the present tense (“Today ... I am depositing”) rather than the past tense (“I deposited ...”), to reflect the fact that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution’s mail system. The Committee added a “Note to inmate filers” pointing out the legal-mail-system requirement in Rules 4(c)(1) and 25(a)(2)(C). The Committee also made style changes.

### **Summary of Public Comments**

**AP-2014-0002-0007: Edward Baskauskas.** Objects to “the implicit assumption that a signed declaration can prove the occurrence of an event happening after signing (such as the mailing of the declaration and accompanying document). How can a document deposited in the mail be accompanied by a declaration that says I deposited [the document] . . . in the institutions internal mail system (the language of proposed new Form 7), when no one can truthfully make or sign such a statement until after the document has actually been deposited in the mail and is beyond the signers control?”

Suggests “changing the language of proposed new Form 7 to read I am today depositing instead of I deposited. ... Changing to the present tense would be consistent with the Forms later statement that postage is being affixed .... Alternatively, if the past-tense deposited language is retained in proposed new Form 7, the amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) might be modified to specify that a paper to be filed by an inmate may be accompanied by an unsigned copy of the declaration or statement, and that the signed original of the declaration or notarized statement must be filed separately within a reasonable time.” In addition, “the amendments should explicitly permit separate filing of the declaration or notarized statement as a matter of course, rather than leaving the matter to judicial discretion or interpretation.”

**AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers.** Supports the proposals.

**AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice.** In an article appended to her comment, supports this proposal as “clarifying and helpful.”

**AP-2014-0002-0030: Joshua R. Heller.** Opposes the proposed amendments. By “eliminat[ing] the requirement that an inmate use an institution’s legal mail system that establishes the date of filing when one is available,” the proposed amendments will “significantly harm[] the inmate filing systems that many states, including

Florida, have created to establish the date documents are provided to prison officials in federal cases.” Inmates have a motive to lie about the filing date.

The State of Florida’s procedures for inmate legal mail “permit[] — without the enormous expense of establishing outgoing mail logs for every prisoner in the custody of the State of Florida’s Department of Corrections – a date certain that a document is placed by an inmate into the hands of a corrections official for mailing.”

The proposed amendments would only affect appellate filings. “Neither inmates nor those who litigate against them benefit from having two sets of inmate-filing rules: one for trial court filings and one for appeals.”

**AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association.** “The Committee endorses the amendments (1) to include a sample declaration of timely filing (Form 7); and (2) to eliminate the distinction between an institution’s legal mail system and its general mail system. The Committee does not endorse the proposed amendments to the extent they require inmates to include an affidavit or declaration of timely mailing at the time of mailing itself.” Such a requirement “could cause unwitting defaults by pro se prisoner litigants.”

Also, in Form 7, “[a]n inmate should not be required to declare that she ‘deposited’ materials (past tense) as part of a declaration that she is supposed to include in the same envelope as the very materials being deposited.” Use of the

past tense “may cause further confusion for pro se inmates as to whether the declaration needs to be included in the same mailing as the document being filed.”

**AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers.** Supports the proposal. “In new paragraphs 4(c)(1)(B) and 25(a)(2)(C)(ii), the Court of Appeals should have discretion not only to accept separate and subsequent proof of timely mailing ... but also to excuse ‘for good cause’ any failure by the inmate to ‘prepay’ the postage”; it is hard to take account of variations in institutions’ policies for providing postage to inmates. “In the Note proposed to be added to Form 1 (as well as to Form 5), we would add, after the reference to Rule 4(c)(1), a brief explanatory parenthetical, such as ‘(allowing timely filing by mail).’ In Form 7, we would change ‘Insert name of court’ to say ‘Insert name of trial-level court.’”

**AP-2014-0002-0058: John Derrick on behalf of the State Bar of California’s Committee on Appellate Courts.** Supports the proposal, but expresses concern about “potential problems that might arise with inadequate postage, where an inmate relied upon an institution for advising on the proper postage or some other issue arose that prevented the inmate from including proper postage.” Proposes the following revision to proposed Rule 4(c)(1)(B) (along with a corresponding revision to proposed Rule 25(a)(2)(C)(ii)): “(B) the court of appeals exercises its discretion to excuse a failure to prepay postage

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or to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).”



1 **Rule 4. Appeal as of Right—When Taken**

2 **(a) Appeal in a Civil Case.**

3 \* \* \* \* \*

4 **(4) Effect of a Motion on a Notice of Appeal.**

5 (A) If a party ~~timely~~ files in the district court  
6 any of the following motions under the  
7 Federal Rules of Civil Procedure, ~~and~~  
8 does so within the time allowed by those  
9 rules—the time to file an appeal runs for all  
10 parties from the entry of the order disposing  
11 of the last such remaining motion:

12 \* \* \* \* \*

**Committee Note**

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that “[i]f a party timely files in the district 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 this provision, 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 Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), 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 Civil 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.

### **Changes Made After Publication and Comment**

The Committee made no changes after publication and comment.

### **Summary of Public Comments**

**AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers.** Supports the proposal.

**AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice.** In an article appended to her comment, supports this proposal as “clarifying and helpful.”

**AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C.** “CCL does not oppose the proposed amendment ....”

**AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association.** Supports the proposal, “which will create uniformity and clarity (and ... will not change the practice in the Second Circuit).”

**AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee.** “The PBA opposes the proposed amendments to Rule 4(a)(4), governing the timeliness of a notice of appeal when a post-judgment motion is filed, because, without providing greater clarification, it simply substitutes a new trap for the unwary in place of the current trap for the unwary.” Encloses a memo regarding the “Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules.” The memo notes the desirability of clarifying Rule 4(a)(4) “in light of the consequences of filing a late appeal” but expresses doubt that the proposed language is clear enough. The memo also states it is “anomalous that while a post-judgment motion tolls the time for an appeal and a district court has discretion to extend the time for filing a post-judgment motion, such an implicit extension of time does not toll the time for appeal, notwithstanding the district court’s power to enlarge the time for appeal for cause under Rule 4(a).”

**AP-2014-0002-0058: John Derrick on behalf of the State Bar of California’s Committee on Appellate**

**Courts.** Supports the proposal. “Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority” with respect to the circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 can count as “timely” under Rule 4(a)(4).

1 **Rule 5. Appeal by Permission**

2 \* \* \* \* \*

3 (c) **Form of Papers; Number of Copies; Length**

4 **Limits.** All papers must conform to Rule 32(c)(2).

5 ~~Except by the court's permission, a paper must not~~

6 ~~exceed 20 pages, exclusive of the disclosure~~

7 ~~statement, the proof of service, and the accompanying~~

8 ~~documents required by Rule 5(b)(1)(E). An original~~

9 and 3 copies must be filed unless the court requires a

10 different number by local rule or by order in a

11 particular case. Except by the court's permission, and

12 excluding the accompanying documents required by

13 Rule 5(b)(1)(E):

14 (1) a paper produced using a computer must include

15 a certificate under Rule 32(g) and not exceed

16 5,200 words; and

17 (2) a handwritten or typewritten paper must not

18 exceed 20 pages.

19 \* \* \* \* \*

### **Committee Note**

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 5(b)(1)(E) and any items listed in Rule 32(f).

### **Changes Made After Publication and Comment**

The Committee deleted the proposed line limit and revised the proposed word limit from 5,000 words to 5,200 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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1 **Rule 21. Writs of Mandamus and Prohibition, and**  
2 **Other Extraordinary Writs**

3 \* \* \* \* \*

4 **(d) Form of Papers; Number of Copies; Length**

5 **Limits.** All papers must conform to Rule 32(c)(2).

6 ~~Except by the court's permission, a paper must not~~

7 ~~exceed 30 pages, exclusive of the disclosure~~

8 ~~statement, the proof of service, and the accompanying~~

9 ~~documents required by Rule 21(a)(2)(C). An original~~

10 and 3 copies must be filed unless the court requires

11 the filing of a different number by local rule or by

12 order in a particular case. Except by the court's

13 permission, and excluding the accompanying

14 documents required by Rule 21(a)(2)(C):

15 (1) a paper produced using a computer must include

16 a certificate under Rule 32(g) and not exceed

17 7,800 words; and

- 18           (2) a handwritten or typewritten paper must not  
19           exceed 30 pages.

### **Committee Note**

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 21(a)(2)(C) and any items listed in Rule 32(f).

### **Changes Made After Publication and Comment**

The Committee deleted the proposed line limit and revised the proposed word limit from 7,500 words to 7,800 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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1 **Rule 27. Motions**

2 \* \* \* \* \*

3 (d) **Form of Papers; Length Limits; ~~Page Limits~~; and**  
4 **Number of Copies.**

5 \* \* \* \* \*

6 (2) **Page Length Limits.** ~~A motion or a response to~~  
7 ~~a motion must not exceed 20 pages, exclusive of~~  
8 ~~the corporate disclosure statement and~~  
9 ~~accompanying documents authorized by~~  
10 ~~Rule 27(a)(2)(B), unless the court permits or~~  
11 ~~directs otherwise. A reply to a response must not~~  
12 ~~exceed 10 pages.~~ Except by the court's  
13 permission, and excluding the accompanying  
14 documents authorized by Rule 27(a)(2)(B):  
15 (A) a motion or response to a motion produced  
16 using a computer must include a certificate

17 under Rule 32(g) and not exceed 5,200

18 words;

19 (B) a handwritten or typewritten motion or

20 response to a motion must not exceed 20

21 pages;

22 (C) a reply produced using a computer must

23 include a certificate under Rule 32(g) and

24 not exceed 2,600 words; and

25 (D) a handwritten or typewritten reply to a

26 response must not exceed 10 pages.

27 \* \* \* \* \*

### **Committee Note**

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 27(a)(2)(B) and any items listed in Rule 32(f).

### **Changes Made After Publication and Comment**

The Committee deleted the proposed line limits. The Committee revised the proposed word limit for motions and responses from 5,000 words to 5,200 words, and revised the proposed word limit for replies from 2,500 words to 2,600 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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1 **Rule 28.1. Cross-Appeals**

2 \* \* \* \* \*

3 **(e) Length.**

4 (1) **Page Limitation.** Unless it complies with  
5 Rule 28.1(e)(2)~~and (3)~~, the appellant's principal  
6 brief must not exceed 30 pages; the appellee's  
7 principal and response brief, 35 pages; the  
8 appellant's response and reply brief, 30 pages;  
9 and the appellee's reply brief, 15 pages.

10 (2) **Type-Volume Limitation.**

11 (A) The appellant's principal brief or the  
12 appellant's response and reply brief is  
13 acceptable if it includes a certificate under  
14 Rule 32(g) and:

15 (i) ~~it contains no more than 14,000~~ 13,000  
16 words; or

17 (ii) ~~it~~—uses a monospaced face and  
18 contains no more than 1,300 lines of  
19 text.

20 (B) The appellee’s principal and response brief  
21 is acceptable if it includes a certificate  
22 under Rule 32(g) and:

23 (i) ~~it~~—contains no more than ~~16,500~~15,300  
24 words; or

25 (ii) ~~it~~—uses a monospaced face and  
26 contains no more than 1,500 lines of  
27 text.

28 (C) The appellee’s reply brief is acceptable if it  
29 includes a certificate under Rule 32(g) and  
30 contains no more than half of the type  
31 volume specified in Rule 28.1(e)(2)(A).

32 ~~(3) **Certificate of Compliance.** A brief submitted~~  
33 ~~under Rule 28.1(e)(2) must comply with~~  
34 ~~Rule 32(a)(7)(C).~~  
35 \* \* \* \* \*

#### Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 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.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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.

Rule 28.1(e) is amended to refer to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

### **Changes Made After Publication and Comment**

The Committee revised the proposed word limit for the appellant's principal brief and the appellant's response and reply brief from 12,500 words to 13,000 words, and revised the proposed word limit for the appellee's principal and response brief from 14,700 words to 15,300 words. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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

2 **(a) Form of a Brief.**

3 \* \* \* \* \*

4 **(7) Length.**

5 **(A) Page Limitation.** A principal brief may  
6 not exceed 30 pages, or a reply brief 15  
7 pages, unless it complies with  
8 Rule 32(a)(7)(B)~~and (C)~~.

9 **(B) Type-Volume Limitation.**

10 (i) A principal brief is acceptable if it  
11 includes a certificate under Rule 32(g)  
12 and:

- 13 • ~~it~~—contains no more than  
14 ~~14,000~~13,000 words; or

- 15                   • ~~it~~ uses a monospaced face and  
16                   contains no more than 1,300 lines  
17                   of text.
- 18           (ii) A reply brief is acceptable if it  
19               includes a certificate under Rule 32(g)  
20               and contains no more than half of the  
21               type volume specified in Rule  
22               32(a)(7)(B)(i).
- 23           ~~(iii) Headings, footnotes, and quotations~~  
24               ~~count toward the word and line~~  
25               ~~limitations. The corporate disclosure~~  
26               ~~statement, table of contents, table of~~  
27               ~~citations, statement with respect to~~  
28               ~~oral argument, any addendum~~  
29               ~~containing statutes, rules or~~  
30               ~~regulations, and any certificates of~~

31 ~~counsel do not count toward the~~  
32 ~~limitation.~~

33 ~~(C) Certificate of compliance.~~

34 ~~(i) A brief submitted under~~  
35 ~~Rules 28.1(e)(2) or 32(a)(7)(B) must~~  
36 ~~include a certificate by the attorney, or~~  
37 ~~an unrepresented party, that the brief~~  
38 ~~complies with the type-volume~~  
39 ~~limitation. The person preparing the~~  
40 ~~certificate may rely on the word or~~  
41 ~~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 brief;~~

45 ~~or~~

46                                   • the number of lines of  
47                                   monospaced type in the brief.

48                   (ii) Form 6 in the Appendix of Forms is a  
49                   suggested form of a certificate of  
50                   compliance. Use of Form 6 must be  
51                   regarded as sufficient to meet the  
52                   requirements of Rules 28.1(e)(3) and  
53                   32(a)(7)(C)(i).

54                                   \* \* \* \* \*

55   **(e) Local Variation.** Every court of appeals must accept  
56                   documents that comply with the form requirements of  
57                   this rule and the length limits set by these rules. By  
58                   local rule or order in a particular case, a court of  
59                   appeals may accept documents that do not meet all of  
60                   the form requirements of this rule or the length limits  
61                   set by these rules.



- 62 **(f) Items Excluded from Length.** In computing any  
63 length limit, headings, footnotes, and quotations count  
64 toward the limit but the following items do not:
- 65 ● the cover page;
  - 66 ● a corporate disclosure statement;
  - 67 ● a table of contents;
  - 68 ● a table of citations;
  - 69 ● a statement regarding oral argument;
  - 70 ● an addendum containing statutes, rules, or  
71 regulations;
  - 72 ● certificates of counsel;
  - 73 ● the signature block;
  - 74 ● the proof of service; and
  - 75 ● any item specifically excluded by these rules or  
76 by local rule.
- 77 **(g) Certificate of Compliance.**

78 **(1) Briefs and Papers That Require a Certificate.**

79 A brief submitted under Rules 28.1(e)(2),  
80 29(b)(4), or 32(a)(7)(B)—and a paper submitted  
81 under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A),  
82 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must  
83 include a certificate by the attorney, or an  
84 unrepresented party, that the document complies  
85 with the type-volume limitation. The person  
86 preparing the certificate may rely on the word or  
87 line count of the word-processing system used to  
88 prepare the document. The certificate must state  
89 the number of words—or the number of lines of  
90 monospaced type—in the document.

91 **(2) Acceptable Form.** Form 6 in the Appendix of  
92 Forms meets the requirements for a certificate of  
93 compliance.

### Committee Note

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. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has re-evaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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 (e) 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 (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) 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 Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit) – including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

### **Changes Made After Publication and Comment**

The Committee revised the proposed word limit for principal briefs from 12,500 words to 13,000 words. The Committee added an amendment to Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. A cross-reference in Rule 32(a)(7)(A) was updated. A reference to Rule 29(b)(4) was added to Rule 32(g)(1), to reflect the Committee's approval of a proposed amendment to Rule 29. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

1 **Rule 35. En Banc Determination**

2 \* \* \* \* \*

3 **(b) Petition for Hearing or Rehearing En Banc.** A  
4 party may petition for a hearing or rehearing en banc.

5 \* \* \* \* \*

6 (2) Except by the court's permission, ~~a petition for~~  
7 ~~an en banc hearing or rehearing must not exceed~~  
8 ~~15 pages, excluding material not counted under~~  
9 ~~Rule 32.:~~

10 (A) a petition for an en banc hearing or  
11 rehearing produced using a computer must  
12 include a certificate under Rule 32(g) and  
13 not exceed 3,900 words; and

14 (B) a handwritten or typewritten petition for an  
15 en banc hearing or rehearing must not  
16 exceed 15 pages.

17 (3) For purposes of the ~~page-limits~~s in Rule 35(b)(2),  
18 if a party files both a petition for panel rehearing  
19 and a petition for rehearing en banc, they are  
20 considered a single document even if they are  
21 filed separately, unless separate filing is required  
22 by local rule.

23 \* \* \* \* \*

**Committee Note**

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 32(f).

### **Changes Made After Publication and Comment**

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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1 **Rule 40. Petition for Panel Rehearing**

2 \* \* \* \* \*

3 (b) **Form of Petition; Length.** The petition must comply  
4 in form with Rule 32. Copies must be served and  
5 filed as Rule 31 prescribes. ~~Unless the court permits~~  
6 ~~or a local rule provides otherwise, a petition for panel~~  
7 ~~rehearing must not exceed 15 pages.~~Except by the

8 court's permission:

- 9 (1) a petition for panel rehearing produced using a  
10 computer must include a certificate under Rule  
11 32(g) and not exceed 3,900 words; and  
12 (2) a handwritten or typewritten petition for panel  
13 rehearing must not exceed 15 pages.

**Committee Note**

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those

page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 32(f).

### **Changes Made After Publication and Comment**

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

1 **Form 6. Certificate of Compliance with ~~Rule 32(a)~~**  
 2 **Type-Volume Limit**

3 Certificate of Compliance With Type-Volume Limitation,  
 4 Typeface Requirements, and Type-Style Requirements

5 1. This ~~brief~~document complies with [the type-  
 6 volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~[insert  
 7 Rule citation; e.g., 32(a)(7)(B)] [the word limit of Fed. R.  
 8 App. P. [insert Rule citation; e.g., 5(c)(2)]] because,  
 9 excluding the parts of the document exempted by Fed. R.  
 10 App. P. 32(f) [and [insert applicable Rule citation, if any]]:

11  this ~~brief~~document contains [*state the number of*]  
 12 words, ~~excluding the parts of the brief exempted~~  
 13 ~~by Fed. R. App. P. 32(a)(7)(B)(iii), or~~

14  this brief uses a monospaced typeface and  
 15 contains [*state the number of*] lines of text;  
 16 ~~excluding the parts of the brief exempted by Fed.~~  
 17 ~~R. App. P. 32(a)(7)(B)(iii).~~

18 2. This ~~brief~~document complies with the typeface  
 19 requirements of Fed. R. App. P. 32(a)(5) and the type-style  
 20 requirements of Fed. R. App. P. 32(a)(6) because:

21  this ~~brief~~document has been prepared in a  
 22 proportionally spaced typeface using [*state name*  
 23 *and version of word-processing program*] in  
 24 [*state font size and name of type style*], **or**

25            this brief has been prepared in a monospaced  
26                            typeface using [*state name and version of word-*  
27                            *processing program*] with [*state number of*  
28                            *characters per inch and name of type style*].

29           (s) \_\_\_\_\_

30           Attorney for \_\_\_\_\_

31           Dated: \_\_\_\_\_

### **Changes Made After Publication and Comment**

The Committee revised the proposed amendments to Form 6 to reflect the deletion of the proposed line limits for documents other than briefs. The Committee also made style changes to the Form.

### **Summary of Public Comments**

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

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

This chart shows the length limits stated in the Federal Rules of Appellate Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you are using a word limit or a line limit (other than the word limit in Rule 28(j)), you must include the certificate required by Rule 32(g).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 5, 21, 27, 35, and 40:
  - 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.

	<b>Rule</b>	<b>Document type</b>	<b>Word limit</b>	<b>Page limit</b>	<b>Line limit</b>
<b>Permission to appeal</b>	5(c)	<ul style="list-style-type: none"> <li>· Petition for permission to appeal</li> <li>· Answer in opposition</li> <li>· Cross-petition</li> </ul>	5,200	20	Not applicable
<b>Extraordinary writs</b>	21(d)	<ul style="list-style-type: none"> <li>· Petition for writ of mandamus or prohibition or other extraordinary writ</li> <li>· Answer</li> </ul>	7,800	30	Not applicable

	<b>Rule</b>	<b>Document type</b>	<b>Word limit</b>	<b>Page limit</b>	<b>Line limit</b>
<b>Motions</b>	27(d)(2)	· Motion · Response to a motion	5,200	20	Not applicable
	27(d)(2)	· Reply to a response to a motion	2,600	10	Not applicable
<b>Parties' briefs (where no cross-appeal)</b>	32(a)(7)	· Principal brief	13,000	30	1,300
	32(a)(7)	· Reply brief	6,500	15	650
<b>Parties' briefs (where cross-appeal)</b>	28.1(e)	· Appellant's principal brief · Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	· Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	· Appellee's reply brief	6,500	15	650
	28(j)	· Letter citing supplemental authorities	350	Not applicable	Not applicable
<b>Party's supplemental letter</b>					

	<b>Rule</b>	<b>Document type</b>	<b>Word limit</b>	<b>Page limit</b>	<b>Line limit</b>
<b>Amicus briefs</b>	29(a)(5)	· Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	· Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
<b>Rehearing and en banc filings</b>	35(b)(2) & 40(b)	· Petition for hearing en banc · Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

### **Changes Made After Publication and Comment**

The Committee added the Appendix after the public comment period, as an aid to understanding the various length limits that will now be stated in the Appellate Rules.

### **Summary of Public Comments and Hearing Testimony**

**AP-2014-0002-0003: Judge Jon O. Newman.** Suggests “that ‘monospaced face’ be defined in Rule 1(b). The definition might be “‘Monospaced face’ means that the combined width of every letter or other character and the space immediately to the right of the letter or character is the same for all letters and other characters.’ ... I realize that the term is now in the current FRAP 32(a)(7)(B)(i), which I had not previously realized, but now that it will be used in several places, it should be defined.”

**AP-2014-0002-0004: Richard A. Ferraro.** Notes that the word “brief” would be changed to “document” (in Form 6), and asks whether this should be a global change throughout the Appellate Rules.

**AP-2014-0002-0005: Robert Markle.** “I support the Committee’s proposed revision to Rule 32(a)(7)(B) reducing the word limit for principal briefs. In the typical case, nothing justifies even approaching, much less reaching or exceeding, 14,000 words. Indeed, I would



support reducing the limit to 10,000 words, but 12,500 is a good start.”

**AP-2014-0002-0006: Judge Frank H. Easterbrook.** Supports “[t]he replacement of page limits with word limits in all Rules of Appellate Procedure.”

Discusses the origin of the current type-volume limits for briefs. “When the 14,000 word limit was being devised, I was a member of the Standing Committee and the liaison to the Appellate Rules Committee. I drafted Rule 32, which was based on a rule that the Seventh Circuit had issued a few years earlier. The 14,000 word limit came from Seventh Circuit Local Rule 32, not from any new calculation and Seventh Circuit Rule 32 came from a detailed count of words in briefs filed in the Supreme Court, not from a word-count or line-count of briefs filed in the court of appeals.”

Opposes shortening the length limits for briefs. “[T]he Supreme Court ... chose 15,000 as the replacement for 50 pages. Many cases in courts of appeals are every bit as complex as those in the Supreme Court. Issues may be simpler on average, but cases have more issues on average, and lawyers often must devote substantial space to discussing evidence, which is not so important after a grant of certiorari. Changing to a system in which the old 50-page-printed-brief rule converts to 15,000 words in the Supreme Court, and 12,500 words in the court of appeals, would create an unjustified difference.”

**AP-2014-0002-0008: Louis R. Koerner Jr.** Opposes shortening briefing length limits because the length is necessary in complex, important cases. “I would keep the limits at 14,000 and 7,000 words and use those limitations as formulaic for other word limitations. I think, however, that the rule should stress that briefs do not have to come close to the word limitations and that briefs that are short and to the point and free from unnecessary repetition are gratefully received.”

**AP-2014-0002-0009: Hirbod Rashidi.** “I would go a step further. In oral argument typically when the appellant wants to have time to rebut, he/she will have to save some of the time for rebuttal. Why not adopt the same rule for briefing? The total limit for briefing, 12.5K or 14K words, should be the total (I think 12.5k in overwhelming cases is plenty).”

**AP-2014-0002-0010: Joshua Lee.** “I do capital habeas litigation, and such cases are often very legally complex and come with records tens of thousands of pages long. I find that the existing volume limits frequently prevent me from adequately briefing a capital habeas appeal, and reduction of the existing limits would only aggravate the problem, putting the court in a situation when it must either repeatedly adjudicate overlength motions or else have a case that is not adequately briefed.”

**AP-2014-0002-0011: John J. White, Jr.** Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

Shorter limits will force lawyers to abandon (or to brief inadequately and thus waive) arguments that might have merit. And the time it will take lawyers to pare down their prose will be costly to clients.

**AP-2014-0002-0012: Andrew Kennedy.** Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

**AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers.** Opposes the proposal to shorten brief length limits and the proposal to use a 250-word-per-page conversion rate for the new type/volume limits in Rules 5, 21, 27, 35, and 40.

Asserts that, to the extent that the history of the 1998 amendments is discernible, it supports the view that a 280-word-per-page conversion ratio was employed in 1998 “because it appeared wise and reasonable.” Suggests that Committee members who voted in 2014 to reduce the length limit for briefs were acting on the basis of “individual preferences, perhaps supported by unreported anecdotal information.”

As a policy matter, argues that shortening the length limits would limit the ability to brief complex issues adequately (and to fulfil counsel’s responsibility in criminal cases) and would generate motions for leave to file longer briefs. Suggests that appeals nowadays tend to be more complex than appeals were in 1998. Argues that better

training for advocates is a preferable way to address verbose briefs.

Opposes the use of the 250-words-per-page conversion ratio for type/volume limits in Rules 5, 21, 27, 35, and 40, based on anecdotal reports that the current page limits permit longer documents than the type/volume limits would. Argues that the downside of shortening the already-short limits for these documents “would likely be even more pronounced.” Argues that a 280-word-per-page conversion ratio, rounded up, should be used.

**April 2015 testimony, Charles A. Bird, American Academy of Appellate Lawyers.** Mr. Bird submitted both written and oral testimony.

Written testimony: The target for improvement “should be bad briefs, not all briefs in the range of 12,500 to 14,000 words.” Means of improvement could include a certification for appellate specialists (and perhaps “competency standards for admission to circuit-level practice”), and better education of advocates through circuit bar associations, more oral arguments, and more informative rulings. The Committee could develop a form for pro se briefs, modeled on the Ninth Circuit’s informal brief form. The Committee could consider “allowing circuits that actively manage appeals to shorten the 14,000 word limit based on the length of the record and the complexity of the case,” with the shortening to be done “by a motions attorney when the briefing schedule is set.”

Oral testimony: The American Academy of Appellate Lawyers' view that complex cases require 14,000 words has been "confirmed in part" by the Sisk & Heise study and "anecdotally validated" by the comments of experienced practitioners. Solicitor General Verrilli's proposal – for rule text and/or a Committee Note stating that more length should be granted when appropriate – would not solve the problem that a 12,500-word limit would create for private practitioners; judges will be more willing to grant extra length to the U.S. Government than to private parties. Currently, the circuits vary widely in their willingness to grant requests for extra length. The D.C. Circuit's rule, like the Fifth Circuit's rule, disfavors requests for extra length. Problems might also arise because, in adjudicating a motion for extra length, a court might pre-judge the issues involved in the appeal.

The American Academy of Appellate Lawyers would be glad to assist in efforts to improve appellate briefs. Courts of appeals could post, on their court websites, short videos outlining how to write a decent brief. Circuit bar associations (in the circuits where they exist) could develop programs that would certify lawyers as competent in federal appellate practice. The courts of appeals could experiment with active case management.

It would be possible to change the structure of appellate briefs in ways that make them shorter. For example, the brief could commence with a short agenda-setting introduction, rather than starting with the basis for jurisdiction. The 2013 amendment, which deleted from

Rule 28(a) the requirement of separate statements of the case and of the facts, was a useful one.

The American Academy of Appellate Lawyers did not attempt to perform its own study of the history of the 1998 amendments. Most of its members were doing appellate work under the pre-1998 rules. The adoption in 1998 of the 14,000-word limit was a great relief because the prior 50-page limit was subject to a lot of manipulation (for example, through use of single-spaced text). There is reason not to trust any statistical information concerning briefs filed during the bad old days of length-limits manipulation. The pre-1998 50-page limit “was an issue in complex cases more so than 14,000 words.” Lawyers tended to deal with that issue by using self-help (i.e., manipulating technicalities in order to fit within the page limit) rather than by making motions for extra length.

It is a good idea to change the remaining page limits to word limits. However, a conversion ratio of 250 words per page is too restrictive. Also, Mr. Bird endorses Mr. Samp’s view that the proposed length limit for amicus briefs in support of a petition for rehearing is too short.

Responding to a question about a recent article by Carl S. Kaplan in the *Journal of Appellate Practice and Process*, Mr. Bird stated that, as a former journalist, he has a great appreciation for good editing. Experienced lawyers try to budget their time and to combat the disincentives to “writing short.” However, after the recent recession, clients are much less willing to pay for time spent editing a brief. Also, lawyers might sometimes face unexpectedly

quick deadlines in instances when the record is filed earlier than expected. Clients can be very directive about what should go in the brief; clients and trial counsel tend to suggest additions, not deletions.

**AP-2014-0002-0014: Mark Langer on behalf of the U.S. Court of Appeals for the D.C. Circuit.** “The Judges of the U.S. Court of Appeals for the D.C. Circuit support the proposal to amend FRAP 32 to reduce the length limitations for briefs.”

**AP-2014-0002-0016: Molly Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice).** Opposes the imposition of type/volume limits for petitions for permission to appeal, motions, and petitions for writs of mandamus/prohibition. By referring to the proposal’s “more exacting limits” and by asserting a lack of “evidence that lengthy petitions for permission to appeal have presented a problem for the Court,” suggests that the type/volume limits would shorten the existing length limits for these documents. And suggests that checking for compliance with type/volume limits would be burdensome.

**AP-2014-0002-0017: Judge Laurence H. Silberman.** Supports the proposal to shorten the length limits. Under the 14,000 word limit, briefs are “too long to be persuasive.” Lawyers include unnecessary fact discussions and brief “marginal issues” (problems which are less likely to afflict briefs filed in the Supreme Court).

**AP-2014-0002-0018: Lisa Perrochet, Chair, Rules and Law Subcommittee, Appellate Courts Section, Los Angeles County Bar Association.** Supports the use of word limits, but opposes the reduction from 14,000 to 12,500 words. Argues that there is insufficient evidence that the benefits of lowering the word limit outweigh the costs. Motions to file oversized briefs in complex cases require lawyer and court time, and judges may not be well positioned to evaluate such motions before they are familiar with the appeal. Suggests that judges overestimate the benefits of shorter briefs because they are “more pleasant to read.” Advocates further research to investigate, for instance, the following questions:

“[I]s there a disparity now among circuits as to the number of motions filed seeking oversized brief limits and as to the rate at which such motions are granted? If so, would any undue disparity be exacerbated by a lower word limit? What is the briefing practice in jurisdictions where certain types of filings are subject to no limits at all? Is the quality of advocacy materially worse? And do state courts in jurisdictions with lower word counts see demonstrably higher quality briefs, overall? Are judges better able to perform their functions in those states?”

**AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York.** Opposes the reduction in length limits for parties’ briefs. In complex cases, the shorter limit would often cause either



inadequate briefing or a request to exceed the length limit. There is no evidence of problems with the current length limits.

The 1993 D.C. Circuit Advisory Committee study is not a good basis for selecting a conversion ratio of 250 words per page. The study used a small and non-random sample of briefs and excluded those which the study's authors deemed to contain an excessive amount of footnotes and block quotes.

Committee members' survey of some recently filed briefs indicates that the word count per page can vary and that papers compliant with the pre-1998 font size and margin guidelines "can significantly exceed 280 words per page."

Supports the introduction of type-volume limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be based on a conversion ratio of 280 words per page. Current practice features the use of proportional type, and a type-volume limit using a 250-word-per-page conversion ratio would effectively cut the permitted length. Issues addressed in these papers can be important and complex, necessitating the additional length.

**AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice.** Notes "that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived." Argues that if a court decides to address an issue that is insufficiently briefed due to length limits, that will increase

the court's workload. "Reductions in word count could also trigger more collateral motions and attacks on judgments in the criminal context because of claimed ineffectiveness in appellate counsel."

Reports that the courts of appeals disfavor motions to file over-length briefs. Cites a January 2012 standing order by the Third Circuit which stated "that ... motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent." Argues that the prevalence of such motions under the existing rules shows that a further reduction in limits would be undesirable.

**AP-2014-0002-0021: Chief Judge Mary Beck Briscoe.** "All of the active judges of our court (except for one who abstains) support the proposed amendment to Fed. R. App. P. 32 to reduce the word limit for briefs. The vast majority of our senior judges have responded and also support this amendment."

Many briefs "are needlessly lengthy." "By excising tangential facts, secondary or tertiary arguments, or issues on which a party is unlikely to prevail, attorneys do both the court and their clients a service by focusing the court's attention on the core facts and dispositive legal issues." When necessary, counsel may seek leave to file an over-length brief.

**AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission.** Opposes reducing the length limits for parties' briefs and amicus briefs. The appeals in which the EEOC files briefs are often legally and factually complex. A lower length limit would result in motions to file over-length briefs and/or in inadequate briefing.

Supports adopting word limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be set using a conversion ratio of 280 words per page.

Argues that the 250-words-per-page conversion ratio "is too low and appears to be premised on a mistaken assumption that briefs filed under the old 50-page limit for briefs averaged 250 words per page. On reviewing a number of its briefs filed under the old page limit, the EEOC learned that while some briefs are shorter, several contain more than 14,000 words."

**AP-2014-0002-0023: Matthew Stiegler, thirdcircuitblog.com.** Opposes the reduction in brief length limits. "Brevity is a reflection of good advocacy, not its cause. Under the current limit, the courts are burdened with too many aimless, bloated 14,000-word briefs. Under the proposed limit, they will get aimless, bloated 12,500-word briefs instead. The problem is real, but the solution proposed will miss the mark."

**AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center.** Agrees that most briefs should be less than 12,500 words. A study

of “approximately two dozen NIJC briefs filed in recent years” showed that “all or nearly all were less than 12,500 words in length.” But “some appeals have involved such a plethora of complex issues that we have approached the current word limit.” And such appeals might be decided on the basis of an issue that there was barely space to brief.

“Court of Appeals cases have not had issues narrowed through the certiorari process, and cases may present numerous complex or novel issues; and a court may not be equipped in advance of full briefing and oral argument to perceive all of those issues, much less to choose among the issues which it should address.” On balance, “the likely time-savings from a reduction in brief size in some small number of cases would likely be outweighed by the costs of adjudicating those additional motions for leave to file over-length briefs.” Moreover, a court might deny a request for extra length, only to find that the resulting brief inadequately covers the issues – which then might lead to supplemental briefing.

Proposes an alternative to shortening the length limit: “a rule which would discourage the filing of briefs exceeding 12,500 words, but do so not by changing the word count limitation, but by requiring an additional attestation by counsel filing briefs between 12,500 and 14,000 words. The attestation could require counsel to attest that the length of the brief is required by the legal or factual complexity of the issues in the case, and that after exercising reasonable diligence, the brief could not be made to fit within 12,500 words.”

**AP-2014-0002-0025: Steven L. Mayer, California Academy of Appellate Lawyers.** Brief length limits should not be shortened, “and word-count limits for documents that do not now have them should be set based on the same conversion ratio of 280 words per page.”

Adopts by reference “section D of the comments by the American Academy of Appellate Lawyers.”

The rationale for the proposals is “unpersuasive.” Statutes and doctrines are more complex than they were in 1998. In a complex case it does not aid the court to truncate the brief. And shortening the limits will burden the courts with requests for extra length.

**AP-2014-0002-0026: The Appellate Practice Group of Reed Smith LLP.** Supports the use of word limits, but opposes the reduction in brief length limits and the use of the 250-words-per-page conversion ratio for other documents’ length limits. The current rule “has worked well for 17 years” and the proposed changes “would have numerous negative consequences.”

Notes that other commenters have questioned the premise “that use of the 250 word conversion ratio is necessary to correct a historical error.” Asserts a lack of evidence that unnecessarily long briefs are burdening the courts in ways that cannot be addressed by other means. Poorly written briefs will remain so whatever their length, and this problem is best addressed through education of the bar.

Meanwhile, skilled lawyers may need the current length. Law, facts, cases, and appeals have become more complex. Cutting the length limits will cause more requests to file over-length briefs and can deprive the courts of information they need to decide a case. As oral arguments become ever rarer, briefs become even more important.

**AP-2014-0002-0027: Cynthia K. Timms on behalf of the Appellate Section, State Bar of Texas.** Opposes reducing the word limits for briefs. Word limits for documents other than briefs should be set using a conversion ratio of “at least 280 words per page.”

The Appellate Section’s members located 15 briefs filed in federal courts of appeals under the pre-1998 Appellate Rules; these briefs averaged 294 words per page. “[T]he fewest number of words per page was 263. The maximum number of words per page was 336.” The members originally sought “to gather briefs that were 50 pages in length (or more) because it was thought those briefs would probably reflect the attorneys’ attempt to put as many words on the page as possible.” Of the 15 briefs that were located, “around 60% of the briefs were nearly 50 pages or longer.”

Also recounts a “study in 2012, when the Texas Rules of Appellate Procedure were being amended to convert page limits to word limits.” This study focused on “shorter briefs filed with the Texas Supreme Court.” The study “included 63 briefs and showed the average words per page was 291” (or 293 if outliers at both ends of the spectrum

were excluded). “Twenty-eight of the 63 briefs had 300 words or more per page, while only 4 of the 63 briefs had 250 words or fewer per page.” Ultimately, “the Texas Supreme Court adopted a conversion ratio of 300 words per page.”

The two studies described by Ms. Timms’ would “support ... conversion ratios between 290 and 300 words per page.”

Cases are complex and can involve huge sums of money. Local circuit practices make it difficult to file over-length briefs.

**April 2015 testimony, Cynthia K. Timms, Chair, State Bar of Texas Appellate Section.** Ms. Timms submitted both written and oral testimony. Her written testimony reiterated the points made in Comment AP-2014-0002-0027.

Oral testimony: Ms. Timms understands the Committee’s proposal to stem from the Committee’s perception of a flaw in the conversion rate employed when the 14,000-word limit was adopted in 1998. That rationale was articulated in the published materials. If the current proposal stemmed instead from some other impetus, then the Committee should re-think the entire proposal. A properly working process will create buy-in.

It was difficult to find briefs to include in Ms. Timms’ study of briefs filed in federal courts of appeals under the pre-1998 Appellate Rules, because lawyers had not saved

all of their briefs from that time. The briefs included in the study were those that people hung onto; Ms. Timms' surmise is that these briefs were filed in complicated, "upper-end" cases. The Texas Supreme Court study looked at documents that were subject to short page limits. The need to fit within the applicable limit may have led lawyers to use techniques such as reducing font size, using shorter words, and/or trimming paragraphs that ended with only one or a few words in their last line. This year, Ms. Timms has filed only one brief that pushed the relevant length limit; so the studies may reflect a sampling difference.

Ms. Timms has always found a way to comply with the length limit – both the pre-1998 50-page limit and the post-1998 14,000-word limit – and she has never requested extra length. (She did, though, recall one instance in which her brief "in its initial form was rejected by the Fifth Circuit." Her client in that instance was "someone who could not drop arguments, ... and loved footnotes." The court "was very nice at working with us to get us to be able to file a[n] acceptable brief, but it was a challenge.") Ms. Timms does not think that she could have lived with a 40-page limit. The nice thing about the 14,000-word limit is that it has cut back dramatically on the number of motions for permission to file an overlength brief. (Ms. Timms made this observation in response to a question about whether, prior to 1998, there were concerns about a 50-page limit being insufficient.)

The 2013 amendment that deleted Appellate Rule 28(a)'s requirement of separate statements of the case and



of the facts has not substantially decreased the length of briefs. “The only savings is the extra heading.”

**AP-2014-0002-0028: Steven M. Klepper.** Opposes reducing the length limits for briefs. Harmless error analysis “requires the error to be viewed in the context of the entirety of the evidence,” which may be copious after a lengthy trial. Warns that shortening the length of briefs might increase the number of instances when arguments are raised for the first time in reply briefs.

**AP-2014-0002-0032: Michael Skotnicki.** Opposes the change in length limits. “I teach persuasive writing techniques as a continuing education instructor and blog about the process of writing appellate briefs.... While appellate judges may dislike long, poorly written briefs, they'll also dislike shorter, poorly written briefs. Meanwhile, the appellate advocate will undoubtedly be hamstrung in making his or her client's case on appeal when the facts, claims, or both, are complex. The correct focus should be on preparing law students to be better writers and for the Courts to emphasize writing quality.”

**AP-2014-0002-0033: Stanley Neustadter.** States that “a dismaying proportion of briefs fail to prune the secondary and marginal issues; fail to crystallize and sharply define the issues chosen; have a fuzzy grasp of the limits of appellate review; and manage to display a gift for compressing the largest number of often bombastic words into the tiniest and least relevant thoughts, repetitiously to boot. Massive, undisciplined briefs divert judicial time from the skilled and focused briefs, those that actually meet

the needs of the bench [and therefore perforce of the client] rather than the ego of the brief writer.”

“Not only do I favor the reduced word limit, I wouldn’t stop there. I would couple the new word limit with a special rule to govern motions to file oversize briefs, a rule that makes it emphatically clear that such motions are looked upon with great disfavor, a rule that explicitly eliminates as a ground counsel’s bald assertion that the record is lengthy and complex. It is one of counsel’s key functions to reduce and simplify lengthy and complex lower court proceedings, not to replicate those costly features on appeal.”

**AP-2014-0002-0034: Jason C. Rylander, Senior Attorney, Defenders of Wildlife.** Opposes shortening the length limits for briefs. “Environmental law ... is an increasingly complex field. Such cases often depend on evaluation of voluminous administrative records. They may involve numerous claims, intervenors, and amici curiae. By statute, some actions even originate in the Courts of Appeals, so there may be no prior opportunity for resolution of factual disputes.” The defense side in an environmental case may have an aggregate briefing length much longer than that allocated to the plaintiffs (given that the defense side may include “a state agency intervenor and multiple interest group intervenors”).

**AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C.** “CCL supports the conversion from page limits to type-volume limits for briefs and other documents.

However, CCL opposes the recommendation that those limits be reduced below current practice.” Shortening the length limit will not improve the quality of briefs. Cases that result in appeals tend to be complex, and there is reason to think that the law is becoming more complex. “Supreme Court opinions ... have become substantially longer,” and there is “no reason to believe federal appellate opinions have not followed suit.” Briefing is all the more important in light of the fact that there may be no opportunity for oral argument.

Shorter length limits may create inefficiency in amicus practice. “Whereas now it is common for several amici to sign on to one amicus brief, a reduced word limit for amicus briefs would invite amici in complex cases to seek out other amici to make the arguments that won’t fit within the new word limits ....” The length reduction “will affect amicus briefs disproportionately,” given that the statement of the amicus’s interest and the authorship-and-funding disclosure count toward the length limit.

**AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association.** “The Committee endorses these proposed amendments.” The proposed word limits “better achieve the intended result of maintaining the length limits in place in 1998.” And a circuit would be free to adopt a local rule permitting longer briefs.

The “proposed amendments relating to papers other than briefs on the merits ... provide greater uniformity in

length limits across different types of appellate papers, and greater clarity in calculating a paper's length."

"[T]hese amendments should be adopted or implemented in a manner that applies the changes in length limits only to appeals filed after the Effective Date, because without that specification there will be appeals in which the Appellee's principal brief is subject to the shortened word count even though the Appellant's principal brief was not."

**AP-2014-0002-0037: Richard L. Stanley.** Voices "strong opposition" to the proposed reduction in length limits in Appellate Rules 28.1 and 32(a)(7). Also argues that the proposed new word limits in other Rules "should be based on a conversion ratio of at least 280 words per page, and preferably ... 300 words per page."

Based on his experience litigating patent cases in the Federal Circuit (as well as other types of cases in the federal appellate courts), reports that "the latter stages of the appellate brief writing process under the current rules is already unduly focused on the labor-intensive, delicate, and often painful task of reducing each brief to the required word count in a manner that does not unduly sacrifice its meaning, clarity, or possible success." Shortening the limit "to 12,500 words will not turn 'bad' brief writers into good ones [but] may turn some 'good' briefs into 'not so good' ones." Briefs in complex cases start out longer than the length limit and are edited down until they are just under the length limit. "[J]ust as it is doubtful that any attorney whose initial draft of a brief contains less than the required word count will add text merely for purposes of increasing

its length, it is also doubtful that most attorneys whose briefs satisfy the word count will engage in extensive further editing merely to achieve a shorter brief.” Gives a sampling of “word processing techniques and word counting tricks” (such as over-use of abbreviations) and predicts that they will proliferate if length limits are shortened. Attorneys will “excise important procedural details [and] incorporate factual background and even substantive material from citation to the record,” and tracking down that referenced information will be more burdensome for judges than reading a longer brief.

Asserts “that the courts of appeal will soon realize a need to adopt a formal rule like that in Supreme Court Rule 37.6 to prohibit counsel for parties from authoring any part of a supporting amicus brief and to prohibit both counsel and parties from making any monetary contributions to such amicus briefs.” Also predicts “that the courts of appeal will also realize a need to adopt a formal rule to govern and restrict when multiple or related parties on the same side of an appeal can file separate briefs which address different issues while adopting the positions set forth in the parallel brief(s)... Until then, while the briefs may be shorter, it is quite possible that there will be more of them.” And predicts an increase in requests for permission to file overlength briefs and requests “for judicial notice.”

**AP-2014-0002-0038: Walter K. Pyle.** The law has become more complex since 1998 – as illustrated by “Supreme Court caselaw interpreting the Antiterrorism and Effective Death Penalty Act.” “Judge Easterbrook, who

should know, says 14,000 [words] was chosen because it was thought to be a good number. It is.” Shorter limits will not improve brief quality and will penalize litigants in complex cases. The proposal fails to account for variations in case type and complexity. “In California the word limit for a brief in a civil case is 14,000, and in a criminal appeal it is 25,500. Criminal cases and complex civil cases normally require more words.”

**AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers.** “NACDL opposes the proposed reduction of type-volume limits and page[] lengths throughout the appellate rules.” A conversion ratio of 280 words per page should be used in setting new type-volume limits. The complexity of federal criminal cases has increased, due to the substantive law, the inclusion of multiple counts, and the increasing intricacy of sentencing and habeas issues. Explaining why error was not harmless requires thorough discussion of the record. “[T]he number of precedential opinions required by rules of professional responsibility to be cited is ever-growing.” The proposed limits would impair the constitutional effectiveness of NACDL’s members (when representing clients) and the efficacy of NACDL’s own amicus filings.

“To the listing of excluded portions under Rule 32(f), the Committee should add any required statement of related cases in a brief. For similar reasons, the required statement justifying en banc review under Rule 35(b) should be excluded from the word-count in a rehearing petition.”

**AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee.** “The PBA supports proposed amendments to Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, and Rule 40, governing page and word limits for filings, and Form 6.” Encloses a memo regarding the “Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules.”

The memo states that “[t]he Committee ... felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement.” At the Committee’s suggestion, the Committee Chair solicited the views of the judges of the U.S. Court of Appeals for the Third Circuit. “Judge Michael Chagares ... indicated his strong support for the changes. Comments were received from almost half of the court and two judges expressed strong concern in shortening briefs as less words may ultimately reduce the quality of the product. The Chair of the FPC is also a member of the Third Circuit standing panel to review requests for excess pagination. In 2013-2014 motions were received on 65 cases and relief was denied on 13 cases. This is a relatively small percentage of the court caseload and experienced counsel have learned that excess pagination requests are disfavored. The consensus of the court was that the proposed changes will not impact the frequency of requests. The FPC chair believes the Committee should support the proposed amendments based on the assurance of Judge Chagares that the recommendation was made only after all the issues

were carefully and fully considered by the Advisory Committee on Appellate Rules.”

**AP-2014-0002-0041: The Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference.** The Council opposes reducing the length limits for briefs. “[T]he 14,000 word count limit was accurately derived from word-processed and professionally printed documents that carry 280 (or more) words per page—in contrast to monospaced, typewritten briefs that carry 250 words per page. Moreover, any proposed changes to Rule 32 should be based on current considerations rather than on some concept of a historical ‘correction.’ No such present need has been demonstrated.” Shorter limits will not improve the quality of poor briefs, but such limits will require good lawyers to expend effort moving for permission (which may not be granted) to file a longer brief and will burden those whose cases are complex, have extensive records, or feature multiple parties. Adequate briefing is all the more important in light of the curtailment of oral argument. “The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count.” (The Council appended members’ comments – 15 opposing a reduction in the length limit and two supporting such a reduction.) Briefing could be improved through educating lawyers and by altering font, line spacing, and margins. “The Advisory Committee might also consider eliminating the requirement of a summary of argument or otherwise altering the structure of briefs to try to improve their quality and lessen the occurrence of repetition.”



**April 2015 testimony, David H. Tennant, Co-chair, Appellate Rules Committee, Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference.** Mr. Tennant submitted both written and oral testimony. His written testimony reiterated the points made in Comment AP-2014-0002-0041.

Oral testimony: In one of Mr. Tennant's areas of expertise – federal Indian law – the issues are complex and courts tend to be willing to allow parties extra brief length when needed. By contrast, Mr. Tennant recently represented a defendant-appellee in a discrimination case; the appellant submitted an under-sized brief with seven incompletely-articulated grounds for reversal. In such instances the appellee's brief needs space to address the defects and fill the gaps in the appellant's brief. Lawyers need the current 14,000 words in order to assist the court when an opponent's unskilled lawyer writes a deficient brief.

Length is a very crude measure of brief quality. But the Sisk & Heise study suggests a strong positive correlation between the length of the appellant's opening brief and success on appeal.

The Committee should conduct further study of the courts' actual practices. How do courts treat motions for permission to file over-length briefs? In the set of unduly-long briefs, can patterns be discerned? Do such briefs tend to arise in particular subject areas? Areas where the law is

settled? Multi-party cases? Appeals in which a litigant raises too many issues?

When Mr. Tennant was a law clerk, what bothered him were the briefs that omitted citations to the record and to pertinent legal authorities. He therefore prefers to err on the side of completeness. Also, lawyers must contend with “clients who make all kinds of real world demands.”

At least one circuit has a local rule that requires motions for extra length to be made two weeks before the brief’s due date. It can be very challenging to comply with such a timeline.

The 14,000-word limit has worked well since 1998 and should not be changed. The question on which the Committee should focus is what makes sense today, not a technical question concerning the basis for the change in 1998. It is key for litigants to feel that they have had their day in court, and with oral arguments increasingly rare, adequate space for briefing is essential.

**AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission.** Opposes the proposed “word limits for appellate briefs in Proposed Rules 28.1, 29 and 32.” Those limits “could negatively affect our ability to convey important information in SEC briefs. Many SEC appeals arise from lengthy and complex district court or administrative proceedings that have voluminous records. In such matters, the SEC often must dedicate a significant number of words to the statement of the facts ....” Many such appeals

“involve specialized securities law issues relating to complex regulations, financial instruments, transactions, markets, and frauds. Such matters may be unexplored by the other parties in the case, particularly in some of the pro se cases, and reducing the word count could force the SEC to truncate its discussions of these complex matters, increasing the burden on the court ....”

**AP-2014-0002-0043: Jonathan Block.** “The proposed change to the rules ... governing the length of briefs should either be rejected or modified to maintain the current word limit, but allow a greater number of words where there are complex factual, legal and technical issues presented.” For many cases involving nuclear, energy, or environmental regulation, legal and technical complexity requires briefs longer than the rules currently permit. Shortening the length limits will deprive the courts of needed information and increase the risk of judicial error.

**AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP.** Opposes the proposal to reduce Rule 32's length limits for briefs. The current limits “strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions.... [A] reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits.” Many appeals are complex due to, e.g., “intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law.” Shorter limits “would impose particular harm on parties on the same side of a

consolidated or joint appeal who, under the local rules of several circuits, must submit a joint brief.” Shorter length limits would burden the courts with more frequent motions to file overlength briefs, and issues of waiver (due to inadequate briefing) would arise more often. “[A]ppeals court filings have decreased by fifteen percent over the past ten years.... Consequently, the courts are less burdened, in terms of the total amount of briefing they must review, than they were when the current word limits were adopted.”

**AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice (“DOJ”).** As to the proposal to change page limits to word limits in Rules 5, 21, 27, 35, and 40, DOJ “defers to the views of the FRAP Committee concerning the need for such a change and whether it is more likely to reduce or exacerbate the burden on clerks’ offices ....” However, the proposed word limits may be too short for some substantive motions (such as a motion for summary disposition), for petitions for a writ of mandamus, or for other filings. If those word limits are adopted, DOJ urges that the Committee Notes to Rules 5, 21, 27, 35, and 40 be amended to state in part: “Substantive filings may in some cases require additional words, and courts should apply the type-volume limits flexibly, granting leave where appropriate for a party to submit an over-length filing.”

As to the proposed change in the length limits for briefs, DOJ “supports the proposal to reduce the word limit to 12,500, but with an important caveat. The Department’s appellate litigators harbor a significant concern that the

proposed reduction could, in a small but important category of cases, compromise the Department's ability to discharge its duty to represent the interests of the United States, as well as its duty to serve as an officer of the court." Most briefs can be "substantially shorter than the current word limits." But in some cases (including "with some frequency" cases to which the United States is a party), longer briefs will be necessary. The Government may need to "respond in one consolidated brief to briefs filed by multiple criminal defendants"; may need to provide factual, procedural and legal context omitted from criminal defendants' briefs; or may need to respond to multiple amicus filings. DOJ urges that this type of need be addressed "either in the rule text or in the Committee Note."

Specifically, DOJ recommends that a new Rule 32(h) be added: "(h) A party may seek leave to file a brief that exceeds the type-volume limits imposed by these rules, and courts should grant leave when a party demonstrates that the type-volume limitation is insufficient in the specific circumstances of the case." DOJ also recommends the following addition to the Committee Notes to Rules 28.1, 29, and 32: "A party that must respond to multiple briefs by opposing parties or amici, or that must include additional information in its brief explaining relevant background or legal provisions governing a particular case, may need to file a brief that exceeds the type-volume limitations specified in these rules, and courts should accommodate those situations as they arise. Rule 32(h) recognizes that those circumstances might arise, and that courts should

accommodate them by granting leave to exceed the type-volume limitations.”

**AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation.** Addresses the proposal “that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words,” and observes that “an effect of the proposed change (per the operation of Rule 29(d)) would be to reduce the word limit on amicus briefs from 7,000 words to 6,250 words.” Opposes both these reductions.

Many briefs do not require 14,000 words, but in a complex case a limit tighter than 14,000 words will prevent attorneys “from fully developing important legal arguments” and/or will burden courts with more numerous requests to file overlength briefs. Nor will a tighter word limit improve the quality of briefs. The “principal cause” of the increase in brief length since 1998 is font size: “[T]he 1998 amendment to Rule 32 ... mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font.”

States that he is “unaware of any instance in which a federal appeals court granted” a request by an amicus to file an overlength brief. Asserts that “[b]efore 1998, the page limit on amicus briefs was 30 pages,” and based on that assertion, argues that “the Advisory Committee’s rationale for limiting a party’s brief – that a 12,500-word limit better approximates the pre-1998 50-page limit ... – is inapplicable to amicus briefs” and that “the Committee’s rationale would support a 7,500-word limit (250

words/page x 30 pages) for amicus briefs ....” The “most plausible argument” for tightening the length limit for parties’ briefs – that “overly long, unpersuasive briefs” waste judges’ time – does not apply to amicus briefs because judges do not “feel obliged to read all amicus briefs.” Drafters of amicus briefs thus have incentive to self-limit their length. If the length limits for parties’ briefs are tightened, Rule 29 should “be amended to state ... that amicus briefs in support of a party’s principal brief shall be no longer than 7,000 words.”

**AP-2014-0002-0047: Alan J. Pierce on behalf of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction.** “We have discussed and without dissent oppose the proposed word count reduction. We oppose it for the reasons set forth in the ABA Council of Appellate Lawyers' (CAL) comments, and further point out that in our bi-annual Second Circuit CLE in October 2014 the three (3) participating judges of that Court also expressed their view that there was no reason to reduce the word count of appellate briefs. If adopted, this change will likely result in unintended adverse consequences, including substantial motion practice seeking permission to file oversized briefs, and briefs full of unnecessary footnotes to meet the reduced page limit. No problem with the 14,000 word limit in place now has been documented.”

**AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis**

**LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP.** Opposes the reduction in length limits for briefs. Appeals often involve “multiple causes of action, complex statutory schemes, ever-growing bodies of precedent, disputes among lower courts, threshold questions of jurisdiction and standing, interactions between state and federal law, ... complicated technologies or business arrangements[,] ... statutes with complicated common-law backgrounds or legislative histories, ... cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand.” A tighter word limit could require a litigant to forgo an argument or brief it inadequately. Decreasing the length limit would burden judges with an increase in motions to file overlength briefs and with extra work to fill the gaps left by inadequate briefing. Where there are multiple litigants on the same side, shorter length limits may result in “an ineffective joint submission, or multiple briefs.” The U.S. Supreme Court gives litigants 15,000 words for opening merits briefs “addressing what is often a single question of law (and usually in a clean vehicle).” The 1993 study by the D.C. Circuit Advisory Committee on Procedures surveyed “only fifteen opening briefs and thirteen reply briefs,” and 11 of those briefs “would have exceeded the proposed new limits.” Also, “Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio.”

“If the Committee decides to reduce the word limits in Rule 32 notwithstanding these concerns, it should, at a



minimum, add a statement making clear that nothing in the rule prevents the courts of appeals from granting increased page limits, especially in cases where the parties agree that the case is a complex one and warrants more words.”

**AP-2014-0002-0049: Professor Gregory Sisk.**

Attaches a paper coauthored with Michael Heise: Gregory C. Sisk & Michael Heise, “Too Many Notes”? An Empirical Study of Advocacy in Federal Appeals, 12:3 *Journal of Empirical Legal Studies* (forthcoming 2015). “Studying civil appeals in the U.S. Court of Appeals for the Ninth Circuit, we found that, for appellants in civil appeals in which both sides were represented by counsel, briefs of greater length were strongly correlated with success on appeal. For the party challenging an adverse decision below, persuasive completeness may be more important than condensed succinctness. Rejecting as foolish the proposition that prolixity is a positive value in itself, we suggest that the underlying cause of both greater appellant success and accompanying longer briefs may lie in the typically complex nature of the reversible civil appeal. In light of our findings, reducing the limits on number of words in federal appellate briefs could cut more sharply against appellants.”

**AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP.**

Opposes reducing the length limits for briefs. “[T]he proposed limit of 12,500 words for principal briefs and the correspondingly reduced limits for cross-appeal and reply briefs are too low and would negatively affect the quality of briefing in complex cases involving multiple issues.”

Doubts that the 1998 amendment actually increased the permitted length of briefs: “although 14,000-word briefs prepared after the 1998 amendment typically exceed 50 pages because of the increase in the minimum font size to 14 points, many if not most 50-page briefs filed before the rule change were in 12-point type and contained more than 14,000 words.” It is already difficult in a complex case to address the facts, cite evidence and legal authority, and include required components of the brief. A shorter limit would mean fewer useful record citations and parentheticals; more artificial devices to cut length (such as use of acronyms); and choices between paring down all arguments or omitting certain issues entirely. The latter is risky: “Members of our practice have repeatedly prevailed on appeal based on arguments that they deemed to be the least likely to succeed and that they would have jettisoned had they been required to file a shorter brief.” Predictions are particularly difficult because in most circuits “the identity of panel members is unknown at the time of briefing ....” Challenges to a punitive damages award illustrate the broad range of issues on appeal, any one of which might prove decisive. The shorter limit would particularly disadvantage appellants (whose briefs have more required components). It would also lead to the omission “of important context[,]” leaving courts unaware of potential broader implications of a decision. The courts will likely remain unwilling to grant requests for extra length, and such requests will burden the courts and impose uncertainty, cost, and delay on litigants.

**AP-2014-0002-0051: Dershowitz, Eiger & Adelson, P.C.** Voices “deep concerns about the proposed reductions

in the word limitations.” Many of the firm’s cases “have involved multi-defendant trials with 10,000 pages of transcripts, hundreds of exhibits, multiple pre-trial motions and hearings, jury deliberations that last for days, and multi-day sentencing proceedings. Some indictments are ninety counts, with verdicts split irrationally on the counts of conviction. Sometimes argument by trial counsel over an evidentiary or expert issue will spread over many days of transcript, and frequently the district court will revisit an issue repeatedly during a trial. It is not uncommon for such large and complex cases to involve eight or ten meritorious issues on appeal.” “Very often we are required to dedicate several days to a substantial editing process in order to meet the current word limits. Of course, we must ... preserve issues or risk waiver ... [and] the government’s claims of waiver by appellants seem to have increased substantially.” And collateral review may be unavailable for issues “not adequately preserved on direct appeal.” Sometimes an appeal will be decided based on an issue that “counsel intended to address and dispose of” but did not, “due to space constraints.” And addressing whether an error was harmless “is difficult ... under severe word limitations.”

**AP-2014-0002-0052: Howard J. Bashman.**  
Opposes “the proposed word limit reduction amendment.”

“[T]he Advisory Committee’s explanation offered for the proposed word limit reduction appears to be erroneous,” because “the current 14,000–word limit was not adopted in error.” “The previous 50-page limit permitted the filing of professionally typeset printed briefs,

resembling the printed booklets that advocates in ‘paid’ cases are still required to file in the U.S. Supreme Court”; such a brief could “contain[] far more than what a 50–page brief prepared on 8 1/2 by 11 inch paper would have allowed.”

The proposed “11-percent across-the-board reduction in maximum brief size” is unjustified, will “[d]epriv[e] many litigants of the opportunity to say what needs to be said in their only appeal as of right,” and “will disproportionately impact in a negative way the quality of the appellate briefing in the most important and complex cases, cases that are ordinarily handled by the most talented appellate advocates.” “[E]ven the most highly regarded appellate advocates in particularly complex cases regularly find it necessary to file briefs that approach the current word limits.” The court of appeals can affirm on a ground not addressed by the trial court, and multiple appellees sometimes file separate briefs, with the result that the appellant’s reply brief may need to address a great many issues. Appeals often involve complex facts and/or law (such as foreign law) and a 14,000-word brief may be necessary to educate generalist judges.

Tightening the length limits will burden judges with the need to research issues that are briefed inadequately “(albeit not to the point of waiver)” and may increase the number of separate briefs filed per side when there are multiple parties per side on appeal. (Mr. Bashman also appears to suggest that tighter length limits might make appeals more difficult to decide because briefs that go on too long or “unnecessarily raise too many issues can make

a case easier to decide, by reducing the effectiveness of all the claims of error.”)

**AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California’s Committee on Federal Courts.** “[O]pposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40.”

Although “many appellate briefs are longer than they need to be,” complexity (such as that arising from “novel legal issues or divergent precedents, or ... a complex factual record”) may require longer briefs. In order properly to assist the court, a brief may need to include specific record citations, explanation of conflicting legal authorities, and/or correction of inaccuracies and omissions in an opponent’s brief. The tighter length limits would fail to address briefs that are unduly long but shorter than 12,500 words, and would “disproportionately affect cases that actually require long briefs.” The change would thus impair judicial decisionmaking “while doing little to lessen judges’ overall burden from overlong briefs.” The increase in motions for leave to file overlength briefs will burden courts and litigants, outweighing “any efficiency savings achieved by the word count reductions.” Such motions will occur at an early stage in the appeal, requiring the decisionmaker either to invest time in learning the relevant facts and law for purposes of deciding the motion or to “risk inappropriately refusing extensions.”

The word limits in Rules 5, 21, 35, and 40 should be derived using a conversion ratio of 280 words per page

rather than 250 – yielding limits of 5,600 words (Rule 5(c)); 8,400 words (Rule 21); and 4,200 words (Rules 35 and 40). For petitions for panel rehearing and/or rehearing en banc, the length is needed to explain why rehearing is appropriate – such as “when an opinion has created major conflicts with circuit precedent, or when circuit precedent needs reconsideration in light of intervening Supreme Court rulings or a trend in other circuits.” Also, proposed Rule 29(b)(4)’s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (not 2,000 words).

“We take no position on the other aspects of the proposed changes ... , including the proposed word count limits for motions under Rule 27, and the proposal to require word count limits instead of page limits in submissions prepared on computers. The Committee supports the proposed amendment to Rule 32(f) setting forth a uniform list of items that can be excluded when computing a document’s length.”

**AP-2014-0002-0054: James S. Azadian on behalf of the Appellate, Writs, and Constitutional Law Practice of Enterprise Counsel Group ALC.** Opposes “the proposal to reduce the maximum size for principal briefs.”

Such a change would increase court burdens and delay by spurring “the proliferation of principal briefs as well as motions to file oversized briefs.” Because a number of state appellate courts permit briefs to be 14,000 words or longer, lawyers who frequently practice in state court “are

likely to more frequently file oversized-briefing motions.” A 12,500-word brief typically does not suffice in “more complex or multiple-issue appeals presenting, for example, challenges to multiple trial court rulings or agency determinations.” Moving for permission to file an overlength brief is burdensome and the courts of appeal disfavor such motions (as evidenced by local rules from the Second and Ninth Circuits, a standing order from the Third Circuit, and a 2012 article by Third Circuit Chief Judge Theodore A. McKee reporting the results of an informal survey (of the Circuit Clerks) by the Third Circuit Clerk’s Office).

Michael Gans’s research “signals the proposed rule change may be ‘a solution in search of a problem’ because such a change is expected to affect the maximum size of briefs in only approximately ten percent of appeals.” The shorter length limit would prevent adequate briefing in complex cases and would not prevent unwarranted length in cases where the briefs should be shorter than 12,500 words. The solution for prolixity is better training (of inexperienced lawyers) by law schools, continuing legal education, and more experienced lawyers.

Other commenters have submitted “compelling evidence that the length of principal briefs was not mistakenly increased in 1998.” And even if the 1998 change was a mistake, “correction after approximately 17 years” would not be appropriate.

**AP-2014-0002-0055: Andrew G. McBride, Matthew J. Dowd, & Kevin P. Anderson.** “[S]trongly

urge” rejection of the proposed reduction in brief length limits (while acknowledging “valid reasons to use word limits instead of page limits for all submissions to the courts”).

Any benefit from the length-limit reduction “would be outweighed by the detriment to briefing in complex appeals, particularly in patent and telecommunications appeals.” Argue that Judge Easterbrook’s comment (AP-2014-0002-0006), “casts serious doubt on the correctness of the Advisory Committee’s conclusion” that the 1998 choice of a 14,000-word limit was the product of an error. In any event, the “key inquiry” is whether the current word limit works well, and it does. They always strive for conciseness in writing briefs, but length is necessary to address complex technologies in patent cases or “lengthy administrative hearings or rulemaking proceedings” in telecommunications cases. The availability of a motion to file an overlength brief “is not a sufficient safeguard”; such motions are often denied, and even if granted, require extra work for litigants and the court.

**AP-2014-0002-0056: Patrick Bryant.** “[O]ppose[s] the proposed word-limit reductions.” The proposed change will fail to improve brief quality. The burden of adjudicating more motions to file overlength briefs (and/or motions for extensions of time) will outweigh the burden of reading “the small number of briefs” that exceed 12,500 words under the current rules. Federal criminal cases are increasingly complex, and full briefing is all the more important because oral argument is so rare in the Fourth Circuit. “The proposed word-limit reduction might be



unobjectionable if it were accompanied by a liberalization of court rules concerning oversize briefs. However, in most courts such motions are disfavored.” The time for seeking extra length is especially tight in the Fourth Circuit, which requires such motions to be made “10 days in advance” and which sets “shortened deadlines for briefs in criminal cases.”

**AP-2014-0002-0057: Steven Finell.** “[J]oin[s] in the comments submitted by the American Bar Association Council of Appellate Lawyers concerning the proposal to reduce the maximum length of briefs and other papers.”

Points out that “[t]he proposed amendments would delete Rule 32(a)(7)(C), which requires a certificate of compliance, and move its content (with substantial amendments) to Rule 32(g). Therefore, if Rule 32(a)(7)(A) is retained, the reference to ‘(C)’ must be changed to ‘Rule 32(g).’”

Supports “the proposal to adopt type volume limits for all length limits” in the Appellate Rules, because “type volume limits are fair and avoid gamesmanship.” But “the structure of the proposed amendments is unnecessarily complex.” Instead, “each type of brief or other document should have a word limit if prepared on a computer, and a page limit only for persons who do not have reasonable access to a computer on which to prepare the document.” There is no need to give computer users the option of using a line limit. And giving computer users the option of a page limit for briefs invites the use of “hideously narrow,

hard-to-read, condensed serif fonts” and the reduction of “letter and word spacing.”

**AP-2014-0002-0058: John Derrick on behalf of the State Bar of California’s Committee on Appellate Courts.** “[O]pposes these proposed amendments to the extent they would reduce current word limitations or apply a conversion rate of 250 words per page to those rules that are currently based on a page limit, not a word limit.” But “supports the other proposed amendments to” Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6.

The California Court of Appeal sets a 14,000-word limit for principal merits briefs; “[i]n our experience, that word limit works best and should not be reduced.” The proposed shorter limits “will impair the ... sufficient development of the facts and issues in complex appeals.” The reduction “may also increase” the courts’ workload by generating more motions for extra length and/or “by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs.”

**AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Oppose the proposed reduction in brief length limits.** The “shortened word limits will likely present attorneys in complex cases with a dilemma: drop valid claims or raise them in such an abbreviated form as to risk losing the claim and making bad law.” The problem will be especially acute “in cases involving review of governmental agency actions, many of which are heard for

the first (and only) time in the federal courts of appeals,” and which can affect the public as well as the litigants.

Agency records “are often extensive, and parties may have valid legal objections to numerous different parts of the regulation, each of which needs to be explained separately.” Adequate briefing is particularly important both to avoid waiver and to overcome the applicable standard(s) for deference to agencies’ statutory interpretations and factual findings.

Agency review cases often involve multiple parties with “different (and often adverse) interests.” For example, “regulated entities [may] claim that a regulation is too stringent and ... environmental groups [may] claim it is insufficiently stringent.” The D.C. Circuit, in such cases, “typically receives two or more petitioner briefs,” but “usually reduces the number of words allowed in any individual brief substantially.” If the length reductions are adopted, “it is likely that courts will continue to shorten [the limits] further in multi-party cases.”

“Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing valid claims.” Not only would that harm public policy, but also it “would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions.”

Motions for extra length “are hardly ever granted” (as illustrated by the D.C. Circuit’s local rule), and even where they are granted, they are burdensome to litigants and the court. And “the current 14,000 word limit was established before the establishment of circuit rules that require parties’ briefs to include additional sections” – for example, D.C. Circuit Rule 28(a)(7)’s requirement concerning the basis for standing; “such additional sections ... can substantially reduce the number of words available for merits arguments.”

**April 2015 testimony, James S. Pew, Earthjustice.**

Mr. Pew’s written testimony reiterates the concerns stated in Comment AP-2014-0002-0059 and notes that judicial review of agency action frequently involves a lengthy record, intricate regulations, and “multiple claims involving complex technical issues.”

Oral testimony: Mr. Pew’s oral testimony reiterated concerns raised in his written submissions. Most of Mr. Pew’s practice involves proceedings in the D.C. Circuit seeking judicial review of federal agency action. These cases implicate the public interest, and judicial review provides the only check on federal agencies’ exercise of authority. Proceedings before the agency do not narrow the issues presented for judicial review. Rather, the petitioner may need to request that the court remand to the agency with directions to address multiple defects in the prior agency determination. A one-size-fits-all length limit does not make sense, because the need for length depends on the number of issues. An unduly short limit could force litigants to drop valid claims; and motions for extra length

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are not a good solution because courts are less likely to grant such motions when the motion is made by a private litigant than when the motion is made by the U.S. Government.

Adequate space is important in the reply brief as well as the opening brief; the respondent's brief may raise a new issue, such as standing, that the reply brief must address.

The D.C. Circuit already shortens briefing length limits on a regular basis, so the courts already have a process for addressing undue length without any change to the Appellate Rules. (In response to a question, Mr. Pew stated that he is unsure whether the D.C. Circuit shortens the length limits for briefs in cases that do not involve multiple parties on a side.) If the default length limits set by the Appellate Rules are decreased, the D.C. Circuit may continue its practice of shortening the default length limits in multi-party cases.

A system setting shorter default length limits and relying on motion practice to tailor those limits in cases that require greater length may actually end up consuming more judicial resources than the current system.

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1 **Rule 29. Brief of an Amicus Curiae**

2 (a) **During Initial Consideration of a Case on the**  
3 **Merits.**

4 **(1) Applicability.** This Rule 29(a) governs amicus  
5 **filings during a court's initial consideration of a**  
6 **case on the merits.**

7 **(2) When Permitted.** The United States or its  
8 officer or agency or a state may file an amicus-  
9 curiae brief without the consent of the parties or  
10 leave of court. Any other amicus curiae may file  
11 a brief only by leave of court or if the brief states  
12 that all parties have consented to its filing.

13 ~~(b)~~ **(3) Motion for Leave to File.** The motion must be  
14 accompanied by the proposed brief and state:

15 ~~(4)~~ **(A)** the movant's interest; and





32 with references to the pages of the brief  
33 where they are cited;

34 ~~(4)~~ (D) a concise statement of the identity of the  
35 amicus curiae, its interest in the case, and  
36 the source of its authority to file;

37 ~~(5)~~ (E) unless the amicus curiae is one listed in the  
38 first sentence of Rule 29(a)(2), a statement  
39 that indicates whether:

40 ~~(A)~~ (i) a party's counsel authored the brief in  
41 whole or in part;

42 ~~(B)~~ (ii) a party or a party's counsel  
43 contributed money that was intended  
44 to fund preparing or submitting the  
45 brief; and

46 ~~(C)~~ (iii) a person—other than the amicus  
47 curiae, its members, or its counsel—

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48 contributed money that was intended  
49 to fund preparing or submitting the  
50 brief and, if so, identifies each such  
51 person;

52 ~~(6)~~ (F) an argument, which may be preceded by a  
53 summary and which need not include a  
54 statement of the applicable standard of  
55 review; and

56 ~~(7)~~ (G) a certificate of compliance, if required by  
57 Rule 32(a)(7).

58 ~~(d)~~ (5) **Length.** Except by the court's permission, an  
59 amicus brief may be no more than one-half the  
60 maximum length authorized by these rules for a  
61 party's principal brief. If the court grants a party  
62 permission to file a longer brief, that extension  
63 does not affect the length of an amicus brief.

- 64 ~~(e)~~ **(6) Time for Filing.** An amicus curiae must file its  
65 brief, accompanied by a motion for filing when  
66 necessary, no later than 7 days after the principal  
67 brief of the party being supported is filed. An  
68 amicus curiae that does not support either party  
69 must file its brief no later than 7 days after the  
70 appellant's or petitioner's principal brief is filed.  
71 A court may grant leave for later filing,  
72 specifying the time within which an opposing  
73 party may answer.
- 74 ~~(f)~~ **(7) Reply Brief.** Except by the court's permission,  
75 an amicus curiae may not file a reply brief.
- 76 ~~(g)~~ **(8) Oral Argument.** An amicus curiae may  
77 participate in oral argument only with the court's  
78 permission.

79 **(b) During Consideration of Whether to Grant**

80 **Rehearing.**

81 **(1) Applicability.** This Rule 29(b) governs amicus  
82 filings during a court's consideration of whether  
83 to grant panel rehearing or rehearing en banc,  
84 unless a local rule or order in a case provides  
85 otherwise.

86 **(2) When Permitted.** The United States or its  
87 officer or agency or a state may file an amicus-  
88 curiae brief without the consent of the parties or  
89 leave of court. Any other amicus curiae may file  
90 a brief only by leave of court.

91 **(3) Motion for Leave to File.** Rule 29(a)(3) applies  
92 to a motion for leave.

93 **(4) Contents, Form, and Length.** Rule 29(a)(4)  
94 applies to the amicus brief. The brief must

95 include a certificate under Rule 32(g) and not  
96 exceed 2,600 words.

97 (5) **Time for Filing.** An amicus curiae supporting  
98 the petition for rehearing or supporting neither  
99 party must file its brief, accompanied by a  
100 motion for filing when necessary, no later than 7  
101 days after the petition is filed. An amicus curiae  
102 opposing the petition must file its brief,  
103 accompanied by a motion for filing when  
104 necessary, no later than the date set by the court  
105 for the response.

### **Committee Note**

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court 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 petitions for rehearing, and governing the procedures when such filings are permitted.

### **Changes Made After Publication and Comment**

The Committee changed the presumptive length limit under Rule 29(b)(4) from 2,000 words to 2,600 words and deleted the alternative line limit. The Committee changed Rule 29(b)(5)'s presumptive deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing.

### Summary of Public Comments

**AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers.** Supports the proposal, except that “2,000 words for a brief of an amicus curiae on rehearing is too short.” Such briefs “tend to be filed in ... difficult cases.” Amici should have the same limit as the party – which, according to the comment, should be at least 4,200 words. (The comment asserts that the 15-page limits in Rules 35 and 40 should be “converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.”)

**AP-2014-0002-0016: Molly C. Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice).** States that the time limits proposed for amicus filings in connection with rehearing petitions are too short. “[The] short turnaround time is likely to negatively impact the quality of the briefing and invite motions for extensions of time to file such briefs. Ninth Circuit Rule 29-2(e)(1) provides a 10-day period within which to file a brief to support or oppose a petition for rehearing.”

**AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York.** Argues that the deadline for amicus filings in support of or opposition to a petition for rehearing should be seven days after the filing by the party supported. Argues that the

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seven-day time lag is needed so the amicus can read the filing by the party that it supports and that such a deadline would not cause undue delay and could be shortened by order when necessary. Complains of the lack of an explanation for the shorter deadlines set by proposed Rule 29(b)(5).

As noted elsewhere in the agenda materials, the Committee on Federal Courts also appears to suggest that length limits for these amicus filings should be set using the 280-words-per-page conversion ratio.

**AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice.** In an article appended to her comment, supports this proposal as “clarifying and helpful.”

**AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission.** Supports the idea of specifying timing for amicus filings in connection with rehearing petitions, but disagrees with specifics of timing and length.

A deadline of “one week after the party’s rehearing petition” would be preferable. Three days is too short, especially “where the Office of General Counsel would have to obtain Commission approval before filing an amicus brief.”

“[T]he word limits for amicus briefs and party petitions should be the same. That is the rule in most



circuits now ....” Amici “must ... include a statement of interest” and they need space to develop their argument. Complains that the proposal does not explain the reasons for setting the limit at 2,000 words.

**AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center.** The NIJC “welcomes additional rulemaking to clarify the standards for amicus briefs filed at the rehearing stage, but submits that the word count limitations are likely so limited as to be unhelpful to courts of appeals.”

Supports “the proposed timing of amicus briefs.” There should be some time lag between the party’s due date and the amicus’s due date. It is not always appropriate for amici to coordinate with the party whose position they support.

However, the proposed length limit (2,000 words) is too short. The party’s briefing may be inadequate, leaving to the amicus the task of adequately explaining the need for rehearing. This is often true in immigration cases. “The proposed word limits might be sufficient for amicus efforts which focus on the importance of an issue for en banc review; but this is surely not the only (or even the princip[al]) benefit of amicus briefing at the rehearing stage.... One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision” (for example, a panel might narrow its reasoning and reserve some issues for future decision). “Adoption of the Tenth Circuit’s [3,000-]word limit would be more likely to permit helpful amicus filings at the rehearing stage ....”

**AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C.** “CCL favors the amendment of Rule 29 to set forth default rules regarding the filing of amicus briefs in connection with rehearing. However, CCL opposes the unrealistic limitations in proposed Rule 29(b) and questions limiting proposed Rule 29(a) to ‘the initial consideration of a case on the merits.’”

Amici should have more time and more space. The amicus’s deadline “should be extended from 3 days to one week after the party has filed the petition for rehearing.” 2,000 words is too short; “[r]ehearings are often sought by parties on the basis of facts that were not available to the initial panel or intervening developments in the law which would have altered the result.”

Proposes “that proposed Rule 29(a) either be changed to delete the words ‘initial’ from both the subheading and the text of Rule 29(a)(1), or that the Committee add a provision Rule 29(c) regarding amicus filings during the panel’s or en banc court’s subsequent consideration of the merits. The current rule does not limit when amicus briefs may be permitted ....” Amici may wish to brief the merits “after rehearing en banc has been granted or after a case has been remanded from the Supreme Court.”

**AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association.** “The Committee generally supports this clarification, particularly

in light of the room it leaves for courts to develop their own rules.” However, an amicus opposing rehearing should have a time lag of three days after the filing by the party opposing rehearing. An amicus will need “to point out how its own interests in the outcome differ from those of the parties and how its position is not otherwise adequately represented in the briefs that are already before the court” – a task that requires the amicus to review the party’s brief before finalizing its own.

**AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers.** “NACDL applauds the Committee for addressing this long-overlooked issue.” However, for amicus filings in connection with a petition for rehearing, the word limit should be 2,250 words rather than 2,000. Also, the proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short. “[A] five-day rule would allow the volunteer private counsel who typically author such documents a better chance to communicate with party counsel, obtain copies of needed record documents, and then fit this pro bono work into their schedules.”

**AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission.** Opposes the proposed “word limits for appellate briefs in Proposed Rules 28.1, 29 and 32.”

**AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation.** “[L]argely

support[s]” the proposal. “Nationwide uniformity” is important. Proposed Rule 29(b)(5)’s three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) gives the amicus time to read the petition without “unduly interfer[ing]” with the court’s process. But the length limit should be 2,500 words rather than 2,000 words; 2,500 words “better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages.”

**AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP.** Especially in connection with a request for rehearing en banc, amicus briefs can usefully provide expertise, illuminate a holding’s implications, and address points omitted by the parties. The proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short: “[A] potential amicus would have only 17 days after entry of judgment to evaluate the panel’s opinion, learn whether either party plans to seek rehearing, obtain the necessary internal and external approvals to submit an amicus brief, retain counsel, and prepare the brief.” Proposes “that the proposed rule be modified to require the amicus to file only a notice of intent to file a brief at the three-day deadline but permit an additional seven or ten days for the preparation and filing of the brief.” As a second-best alternative, proposes “that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed.”

**AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California’s Committee on Federal Courts.** Proposed Rule 29(b)(4)’s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (i.e.,  $(2,000 * 280) / 250$ ).

**AP-2014-0002-0058: John Derrick on behalf of the State Bar of California’s Committee on Appellate Courts.** “[S]upports clarifying the procedures for filing amicus curiae briefs at the petition for rehearing stage for those circuits that do not have existing local rules on the subject, but opposes the short word-length limits and due dates proposed. In the experience of our Committee members, the Ninth Circuit’s existing local rule, Rule 29-2, serves as a better model and has proven workable.” Notes that the proposed Rule 29(b) merely sets default rules and would leave the Ninth Circuit’s rule in place, but argues that Rule 29(b)’s default rules should track the Ninth Circuit’s rule because the latter “provides a well-tested and preferable model for other circuits.”

2,000 words “is insufficient for amici to explain both their interest in the subject matter of the case and their unique view of the issue(s) presented”; Ninth Circuit Rule 29-2 permits 4,200 words. The proposed due date (“within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support”) provides “insufficient [time] for amici to review the brief of the party being supported to avoid redundancy”; Ninth Circuit Rule 29-2 sets a due date of 10 days after the filing by the party supported.

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1 **Rule 26. Computing and Extending Time**

2 \* \* \* \* \*

3 (c) **Additional Time after Certain Kinds of Service.**

4 When a party may or must act within a specified time  
5 after ~~service~~being served, 3 days are added after the  
6 period would otherwise expire under Rule 26(a),  
7 unless the paper is delivered on the date of service  
8 stated in the proof of service. For purposes of this  
9 Rule 26(c), a paper that is served electronically is ~~not~~  
10 treated as delivered on the date of service stated in the  
11 proof of service.

**Committee Note**

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic

transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.



Rule 26(c) has also been amended to refer to instances when a party “may or must act . . . after being served” rather than to instances when a party “may or must act. . . after service.” If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)’s three added days are not accorded to the party who effected service.

### **Changes Made After Publication and Comment**

The Committee added language to the Committee Note to recognize the need for extensions of time in appropriate cases.

### **Summary of Public Comments**

**AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers.** Supports the proposal.

**AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York.** Supports the proposal.

**AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice.** In an article appended to her

comment, supports this proposal as “clarifying and helpful.”

**AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association.** A majority of the Committee’s members “generally endorses” the proposal (a minority dissents from this endorsement, fearing that the amendment “will lead to ‘gamesmanship’”). Observes that electronic service after business hours, particularly on a Friday night, can be unfair, especially where the papers are voluminous and will need to be printed. However, difficulties can be worked out by agreement or by seeking relief from the court.

Notes that “in the New York State court system, where electronic service is permitted it is considered equivalent to service by hand; that is, it does not give rise to additional time to respond. We are not aware of any systemic problems with this practice; indeed, we understand at least anecdotally that practitioners in New York are so accustomed to electronic service being treated as equivalent to service by hand that many do not take advantage of the three extra days in federal court.”

**AP-2014-0002-0038: Walter K. Pyle.** Opposes the proposal. “[T]he same concern exists today [as in 2002] – particularly for the small law office – that an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not.” Mr. Pyle reports personal experience with lawyers who “invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve

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complex motion papers electronically.” Nor is the computation of the three added days difficult.

**AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers.** Opposes the proposal as based on “arid logic.” Criminal defense lawyers are overburdened and many work solo or in small firms with little support. Many “do not see their ECF notices – much less open and study the linked documents – immediately or even on the same day they are ‘received’ at the attorney’s email address.” These attorneys need the extra three days when served electronically. The change would increase the number of motions for extra time.

“[I]f the 3-day addition is to be retained,” NACDL proposes adding “a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within which the party must act is determined by the date the document is deemed filed by the clerk, unless a new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document.”

**AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee.** Opposes the proposal. Encloses a memo regarding the “Report of the PBA Federal Practice Committee Subcommittee on Proposed

Amendments to Appellate Rules.” The memo expresses “concern[] that electronic service may happen at any time of day or any day of the week,” and argues that “the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times.”

**AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP.** Acknowledges that the three-day rule for electronic service “is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously.” But argues that, if electronic service is excluded from the three-day rule, Rule 31(a)(1)’s deadline for reply briefs should be augmented by 3 days in order to retain what is now the “de facto” 17-day deadline (“fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)”). The 17-day period “allow[s] counsel sufficient time to draft such briefs, coordinate with clients or other parties, and avoid burdening courts with an increase in requests for extensions of time.”

**AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice (DOJ).** Notes that “in most cases” there may no longer be a need for three extra days when service is made electronically, but that the extra time may be necessary if a filing is made in a different time zone, late at night, on a Friday, and/or before a holiday weekend. Otherwise attorneys might have “as little as five business days ... to respond to substantive or

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complicated jurisdictional motions.” Government lawyers “typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases.”

Proposes that, if Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) are amended to exclude electronic service from the three-day rule, the Committee Notes should contain language to the following effect:

“This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party.”

**AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation.** “[L]argely support[s]” the proposal, because “the three-day rule ...

makes little sense in the context of electronic service.” But many lawyers “file and serve briefs ... late in the day,” after their opponents have gone home. The proposal should be revised to provide “that if electronic service is sent to other counsel after 6 p.m. in that counsel’s time zone, a paper served electronically will be deemed to have been delivered on the next business day (Monday through Friday, excluding holidays) following the date of service stated in the proof of service.”

**AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O’Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP.** “We agree that a paper served electronically should be treated as delivered on the date of service.” But if Rule 26(c) is amended to eliminate the three-day rule where service is made electronically, the deadline for reply briefs should be extended to 17 or 21 days. “The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread.” Lawyers need the extra time when “juggling competing deadlines[,] representing incarcerated ... clients,” or briefing complex cases. And a longer deadline can be shortened when necessary and, in other cases, will “reduc[e] the number of extension requests.” As a point of comparison, “the Supreme Court sets a thirty-day deadline for merits reply briefs.”

**AP-2014-0002-0058: John Derrick on behalf of the State Bar of California’s Committee on Appellate Courts.** “[A]s appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c)” (and not the parallel proposals for the Civil, Criminal, and Bankruptcy rules). “Although the Committee would support a reduction of the current three days, the Committee does not support a rule that would add zero days.” In contrast to personal service (which must be made at counsel’s office during business hours), electronic service can occur at any hour, wherever the intended recipient may be, yet “only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device.” The Rules should not presume “[a]n ‘instantaneous’ review of all incoming electronic transmittals.” There should be “some time” added when electronic service is used, in order to forestall “gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically).”

**AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center.** Opposes the proposal, which the commenters assert “would eliminate the 3-day rule.” “The practical effect of the proposed changes is to reduce the times for submitting [motion] responses and replies to a short period that will be, in many instances, inadequate.” The change will not appreciably expedite motions’ resolutions but it will burden courts and litigants with motions for extra time and “will prevent attorneys from fully presenting their

reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions.” The problem will be acute with respect to “dispositive motions (such as motions to dismiss) and motions to stay government regulations pending judicial review.” Such motions can gravely affect both the litigants and the public – for example, when the question is whether to stay “government regulations that limit emissions of toxic pollution.”

Observes that without the three-day rule, “responses to a motion filed at 11pm on the Friday before a holiday weekend would be due ... just 5 working days later.” Asserts that “[w]here responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – again, just 5 working days later.” Observes that “[e]ven in the absence of an intervening holiday, the proposed revision would allow just 6 working days to respond to a motion filed on a Friday, and 5 working days for a reply to a response filed on a Friday.”

Asserts that, prior to 2009, there was a 10-day period for motion responses, calculated by skipping intermediate weekends and holidays; and asserts that, prior to 2009, there was a 7-day period for motion replies, calculated by skipping intermediate weekends and holidays. Based on those assertions, argues that “although the proposed rule change appears to be intended to restore the actual times that were provided for responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules.”



1 **Rule 26. Computing and Extending Time**

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

6 \* \* \* \* \*

7 **(4) “Last Day” Defined.** Unless a different time is  
8 set by a statute, local rule, or court order, the last  
9 day ends:

10 (A) for electronic filing in the district court, at  
11 midnight in the court’s time zone;

12 (B) for electronic filing in the court of appeals, at  
13 midnight in the time zone of the circuit  
14 clerk’s principal office;

15 (C) for filing under Rules 4(c)(1), 25(a)(2)(B),  
16 and 25(a)(2)(C)—and filing by mail under

17 Rule ~~13(b)~~13(a)(2)—at the latest time for  
18 the method chosen for delivery to the post  
19 office, third-party commercial carrier, or  
20 prison mailing system; and  
21 (D) for filing by other means, when the clerk’s  
22 office is scheduled to close.

23 \* \* \* \* \*

**Committee Note**

**Subdivision (a)(4)(C).** The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

**No Public Comment**

As a technical amendment, this proposal is being forwarded for final approval without public comment.

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**Advisory Committee on Appellate Rules  
Table of Agenda Items — May 2015**

<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
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
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
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

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-H	Consider issues of “manufactured finality” and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/15
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
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
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
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
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

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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
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
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
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 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
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in <i>Morris v. Atchity</i> (No. 13-1266)	Margaret Morris	Awaiting initial discussion
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion
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
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion

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The Draft Minutes of the April 23-24, 2015 Meeting of the Advisory Committee on Appellate Rules will be distributed separately.

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# TAB 5

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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

DAVID G. CAMPBELL  
CIVIL RULES

REENA RAGGI  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

**MEMORANDUM**

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

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

**DATE:** May 6, 2015

**RE:** Report of the Advisory Committee on Bankruptcy Rules

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**I. Introduction**

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California. The draft minutes of that meeting are at Bankruptcy Appendix C.

The principal matter before the Committee at its spring meeting was the package of proposed rule amendments and form amendments that was published for comment in August 2014. The Committee received 137 comments in response to the publication of these amendments, some of which addressed multiple rules and forms. Eight witnesses—all addressing the proposed chapter 13 plan form and related rules—appeared at a Committee hearing in Washington, D.C., on January 23. The Committee considered the public comments and testimony in a series of conference calls and email discussions prior to the spring meeting, as well as at the meeting itself.

The Committee now seeks the Standing Committee's final approval of one proposed new rule and five rule amendments that were published in August 2014. In addition, the Committee seeks final approval of the last major group of forms that were revised as part of the Forms

Modernization Project (“FMP”). The Committee also seeks final approval of its recommendation to renumber and make minor revisions to several modernized forms that the Standing Committee previously approved. The Committee requests that the entire set of approved modernized forms be forwarded to the Judicial Conference with a request that the forms go into effect on December 1, 2015.

After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements. A status report on the Committee’s deliberations regarding the chapter 13 plan form is included below as an information item.

Finally, the Committee approved a proposed rule amendment to Rule 1006(b) (relating to filing fees) for which it seeks publication.

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

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2014—

- Rules 1010, 1011, 2002, and new Rule 1012;
- Rule 3002.1;
- Rule 9006(f);
- new Official Form 401;
- Official Form 410A; and
- modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B;

(A2) Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication—modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107;



(A3) Existing forms for which the Committee seeks approval of renumbering without modernization—Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D;

- B. Previously Approved Items for Transmission to the Judicial Conference
  - Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427; and
- C. Item for Publication in August 2015
  - Rule 1006(b)(1).

Part III of this report consists of an information item regarding the proposal for a chapter 13 plan form and related rules.

## II. Action Items

### A. Items for Final Approval

*A1. Rules and Official Forms published for comment in August 2014. The Committee recommends that the Standing Committee approve the proposed rule and form amendments and the new rule and official form that were published for public comment in August 2014 and are discussed below.* Bankruptcy Appendix A1 includes the rules and forms that are in this group.

**Action Item 1. Rules 1010, 1011, and 2002, and proposed new Rule 1012 (governing responses to, and notices of hearings on, chapter 15 petitions for recognition).** These amendments and addition to the Bankruptcy Rules are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Only one comment was submitted regarding the proposed rule changes. The Pennsylvania Bar Association expressed general approval of the proposed amendments, but suggested that Rule 1012 (Responsive Pleading in Cross-Border Cases) contain a cross-reference

to Rule 1004.2 (Petition in Chapter 15 Cases). The latter rule prescribes a procedure for challenging the designation in a chapter 15 petition of the debtor's center of main interests. The Bar Association explained that "Rule 1004.2(b) sets forth those parties that should be served in connection with challenges to a debtor's designation in a petition." It suggested that objections and responses to a petition under proposed Rule 1012(b) should be served in the same manner.

The Committee voted unanimously to approve the proposed rules as published. It concluded that the Bar Association's comment should be treated as a new suggestion that the notice provisions of Rule 1004.2(b) should be made applicable to all objections and responses to a chapter 15 petition rather than just to challenges to the designation of the debtor's center of main interests. The Committee has added this suggestion to its list of matters for future consideration.

**Action Item 2. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).** This rule, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges while the bankruptcy case is pending. The rule was promulgated in 2011 in order to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments that were published last summer seek to clarify three matters on which courts have disagreed:

- 1) The rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured.
- 2) The rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee.
- 3) The rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which payment amount changes are frequent and often de minimis. The other comments were supportive of the amendments.

The Committee voted unanimously to approve the amendments to Rule 3002.1 as published. The issue of the rule's applicability to home equity lines of credit was considered by the Committee at the fall 2014 meeting, and publication of a proposed amendment to address that issue will be sought later as part of a larger package of related amendments.

**Action Item 3. Rule 9006(f) (Computing and Extending Time).** Among the proposed amendments published last summer was an amendment to Rule 9006(f) that would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the Standing Committee's CM/ECF Subcommittee. It was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c).

Five comments were submitted on the proposed bankruptcy rule amendment. One expressed support for the amendment, and two raised questions about how this time computation change would apply to pending cases or would interact with other rules. A fourth comment, submitted by a bankruptcy clerk, expressed concern about having different deadlines for parties in response to service of a single document. The final comment was submitted by the Department of Justice and was similar to the comments it submitted on the other advisory committees' parallel amendments. The comment raised concerns about possible prejudice caused by end-of-day or beginning-of-weekend electronic service and suggested an addition to the Committee Note that would note the court's authority to grant extensions of time to prevent unfairness in such situations.

The Committee voted unanimously to approve the amendment as published. While the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

**Action Item 4. Official Form 401.** The proposed Official Form is a new petition form for commencing chapter 15 cases. Currently all voluntary bankruptcy cases are initiated by the filing of Official Form 1, the Voluntary Petition. The U.S. Trustee Program recommended that the Committee create a separate petition form for chapter 15 cases. Doing so allows the deletion of chapter-15-specific information from Official Form 201, the new voluntary petition for non-individual debtors.

The SEC's Office of General Counsel submitted the only comment in response to the publication of Official Form 401. The comment stated that the creation of a separate chapter 15 petition would result in the omission of a requirement that the petitioner file what is now Exhibit A to the Voluntary Petition. This exhibit requires the reporting of information that the comment said is valuable to investors and the SEC. It therefore requested that a similar attachment be required for a chapter 15 petition when the debtor is a company that must file periodic reports with the SEC.

The Committee voted unanimously to approve Official Form 401 as published and to request that it go into effect on December 1, 2015, along with the other modernized forms, as

discussed under Action Item 9. Under current Form 1, only reporting companies that are requesting relief under chapter 11 are required to file Attachment A. The creation of a separate chapter 15 petition has therefore not caused any change in the requirement. Should a foreign representative file a chapter 11 petition, the attachment would then have to be filed if the debtor is a reporting company.

**Action Item 5. Official Form 410A.** Official Form 410A (currently Form 10A) is the Mortgage Proof of Claim Attachment. In an individual debtor case, a creditor that asserts a security interest in the debtor's principal residence must file the form with its proof of claim. The current form requires a statement of the principal and interest due as of the petition date; an itemization of prepetition fees, expenses, and charges that remain unpaid; and a statement of the amount necessary to cure any default as of the petition date. The revised form that was published for public comment last August would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts.

Six comments were submitted regarding Official Form 410A or its instructions. Two of the comments suggested wording changes to the form's instructions, which the Committee accepted. Another comment said that the form should not be required when a debtor files a proof of claim on behalf of a creditor whose claim is secured by a security interest in the debtor's principal residence. The Committee considered the comment to be a suggestion for an amendment to Rule 3001(c)(2)(C), rather than a comment on the proposed form, and has added the suggestion to its list of matters for future consideration. A fourth comment opposed the simultaneous implementation of the new attachment form and a proposed amendment to Rule 3002(c). The comment is mistaken about the timing of the implementation of the form. Official Form 410A will go into effect on December 1, 2015, and the amendment to Rule 3002(c) will not go into effect before December 1, 2016. Therefore, the Committee decided to take no action in response to this comment.

The remaining two comments were the only ones that addressed the substance of the form. One questioned the division of escrow payments into two components in calculating the amount of any arrearage. The Committee determined that it was not necessary to make a change. As the comment itself acknowledged, the total arrearage amount would not be affected. Moreover, mortgage industry representatives did not express any concerns about the proposed method of reporting the escrow arrearage.

The Department of Justice expressed a preference for the current form, which requires an itemization of fees, expenses, and charges ("fees") in accordance with a specified list. It stated that, because the proposed form omits the listing of specified types of fees, creditors might aggregate fees into a single entry. As a result, the DOJ argued, there will be less transparency, accuracy, and efficiency in the bankruptcy claims process. The Committee disagreed. This form was revised in response to arguments by several constituencies that a loan-history attachment

would be preferable to the existing form. According to these constituencies, disclosure of the information on a loan history would enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others, and the proposed loan-history form would be better for creditors because its completion could be automated, unlike the existing form that must be completed by hand. The Committee also noted that each entry of a fee or other charge in the loan history must be accompanied by a description.

The Committee voted unanimously to approve Official Form 410A as published (with changes only to the instructions that are issued by the Administrative Office (“AO”). It requests that the amended form go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

**Action Item 6. Modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B.** These forms—the last major group of Official Forms produced by the FMP—were published for public comment in August 2014. They consist primarily of case opening forms for non-individual debtor cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also published were two revised individual debtor forms and an announcement of the proposed abrogation of two Official Forms.

The response to the publication of this set of forms was milder than the response to the previously published individual debtor forms. Eleven comments were submitted,<sup>1</sup> ranging in length from one paragraph addressing a single form to 20 pages addressing multiple forms. Almost all of the comments made very specific suggestions for changes to wording, format, or substance, rather than questioning the wisdom of the project or its overall results. No comments were submitted on Official Forms 106J, 106J-2, 207, 314, 424, or the proposed abrogation of Official Forms 11A and 11B.

*General Comments.* The National Conference of Bankruptcy Judges (“NCBJ”) commented that the titles of all of the forms numbered in the 200s should include the word “non-individual” so that they will not be confused with forms to be used by individuals. The Committee noted that while many of the 200-numbered forms do include “non-individual” in the title, the schedules do not. To avoid making the titles of those forms unwieldy, the Committee decided that they should not be revised. Users are not likely to confuse the individual and non-

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<sup>1</sup> This count does not include comments submitted only on the mortgage proof of claim attachment (Official Form 410A), the chapter 15 petition (Official Form 401), the chapter 13 plan form (Official Form 113), or previously published individual debtor forms (Official Forms 106A/B and 106E/F). Those comments are addressed elsewhere in the report under separate action or information items.

individual forms due to the different form numbers for the two sets of forms and because all of the non-individual forms will be packaged together and separately from the individual forms in software, in paper copy booklets, and on the U.S. Courts' website.

A comment submitted on behalf of the National Association of Bankruptcy Trustees expressed disappointment that it now appears that electronic data from the new forms will not be made available to users outside the judiciary. The prospect for access to this data was a selling point for the modernized forms at the outset, the comment said, and the ability to produce customized reports was explained as offsetting the necessity of dealing with longer forms. The Committee noted that this comment raised policy issues that are outside its purview and that the possibility that such data could be made available to outside users at some time in the future has not been foreclosed. The Committee concluded that the new forms provide sufficient benefits to users to outweigh the inconveniences of adapting to them, even if electronic data is not immediately made available to outside users.

*Official Form 201—Voluntary Petition for Non-Individuals Filing for Bankruptcy.* The Committee voted to make a minor wording change to question 11 about venue and to require only a 4-, rather than 6-, digit NAICS (North American Industry Classification System) code to be provided in question 7. The latter change was made in response to a comment by a bankruptcy clerk that questioned the need for the code and predicted that the requirement would lead to confusion and incorrect information. The AO informed the Committee that this information, which is not currently sought on the petition, would assist it in fulfilling its reporting duties to Congress, but that it would be better to ask for a 4-digit code. According to the AO, the broader classification would provide sufficient information for AO statisticians, might be easier for unsophisticated debtors to select accurately, and is preferable to the AO programmers.

The Committee made no change in response to two comments that asserted that questions at line 8 about small-business-debtor status are redundant. The Committee agreed that the question about the amount of noncontingent, liquidated debts is subsumed within the question about whether the debtor falls within the statutory definition of a "small business debtor." Nevertheless, Congress requires the AO to report how many debtors satisfy the debt limit but do not identify themselves as small business debtors. As a result, the AO plans to collect data on both questions. An academic commenter stated that empirical evidence shows that small business debtors do a poor job of self-reporting their status. She suggested changes to several forms that would "walk[] debtor's counsel step by step through the process for determining small business status." The Committee decided to treat the comment as a new suggestion that it will consider more fully in the future.

*Official Form 202—Declaration Under Penalty of Perjury for Non-Individual Debtors.* This form is for officers and authorized agents of non-individual debtors to execute declarations that information in certain documents is true and correct. As published, the form had

checkboxes to indicate for which of six specified Official Forms the declaration applies, as well as a checkbox for “Other document that requires a declaration.” The Committee received a comment that pointed out that Official Form 204 (Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders) no longer has a space for the debtor’s declaration. Because that form was not specifically listed on Form 202, the commenter thought that debtors would be confused about whether they are still required to make such a declaration. The Committee agreed and added a checkbox for Official Form 204 to the list of forms in Official Form 202.

*Official Form 206A/B—Schedule A/B: Assets – Real and Personal Property.* The Committee made some adjustments to the form’s instructions about executory contracts and unexpired leases and expanded several questions to encompass the leasing of property. The NCBJ commented that Schedule G (Executory Contracts and Unexpired Leases) and its instructions indicate that executory contracts and unexpired leases with a net value should also be listed on Schedule A/B, but there is no specific category on the latter form for doing so. It suggested that a new category be added to Schedule A/B for that purpose. The Committee decided that, rather than adding a new category to the form, an instruction should be added to question 70 (other assets not yet reported), stating, “Include all interests in executory contracts and unexpired leases not previously included on this form.” After a lengthy discussion, the Committee decided that all executory contracts and unexpired leases should be reported on Schedule A/B, rather than just those with net value, and that the instructions to this form and to Schedule G should be revised accordingly. The Committee also voted that Schedule A/B should ask about property the debtor leases, in addition to property it owns, at questions 27, 38, 46, and 54.

In response to other comments by the NCBJ, the Committee also deleted the question at line 24 about possible Perishable Agricultural Commodities Act claims and added references in Part 6 to fishing-related assets.

*Official Form 206D—Schedule D: Creditors Who Have Claims Secured by Property.* In response to the NCBJ’s comments, the Committee revised the column headings and eliminated the checkbox labeled “liquidated and neither contingent nor disputed.”

*Official Form 206E/F—Schedule E/F: Creditors Who Have Unsecured Claims.* In response to the NCBJ’s comments, the Committee revised the form’s instructions for Part 2 about what to do if no other entities need to be notified, and it reworded the instruction at the beginning of the form.

*Official Forms 309A-I—Bankruptcy Case Commencement Notices.* Two comments objected that the revised forms no longer include “deadlines” and “meeting of creditors” in the titles. In response, the Committee revised the bolded instruction at the top of each form to draw attention to the fact that the forms include information about those topics and that both pages

should be read carefully. The Bankruptcy Noticing Working Group commented that a proof of claim form is no longer sent with the commencement notice. The Committee revised the instruction about obtaining a proof of claim form.

*Official Form 410—Proof of Claim.* The NCBJ made several editorial suggestions that the Committee accepted. The NCBJ also questioned the basis for the instruction in question 7 to state only the amount of default for lease claims. It said that, like most other claims, a claim based on a lease could include future amounts due, and it noted that the response to this question would duplicate the response to question 10, which asks for the amount required to cure any default on a lease as of the date of the petition. The Committee agreed and deleted the instruction in question 7.

*Official Form 410S1—Notice of Mortgage Payment Change.* The NCBJ pointed out that the instruction at the beginning of the form was not consistent with the proposed amendment to Rule 3002.1(a). The Committee agreed and revised the instruction to use the rule's language about when notice of a payment change must be given. An attorney suggested that this form and Official Form 410S2 should not require a creditor's agent to attach a power of attorney, because the proof of claim form no longer requires such an attachment. The Committee agreed. Because Rule 9010(c) provides that a power of attorney evidencing the authority of an agent to represent a creditor is not required for a proof of claim, a power of attorney is also not required for a supplement to a proof of claim. Therefore, the Committee removed the direction to attach a power of attorney.

*Official Form 410S2—Notice of Postpetition Mortgage Fees, Expenses, and Charges.* The Committee made the same changes to this form as to Official Form 410S1.

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The Committee voted unanimously to approve the Official Forms listed under this action item as they appear in Bankruptcy Appendix A1 and to abrogate Official Forms 11A and 11B. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

*A2. Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication.* Bankruptcy Appendix A2 includes the forms that are in this group.

**Action Item 7. Modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107.**



*Renumbering.* Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2 are already in effect. Now that the entire set of modernized forms is going to be promulgated, the Committee requests the renumbering of these forms as follows:

<u>Current Form</u>	<u>Renumbered Form</u>
3A	103A
3B	103B
6I	106I
17A	417A
17B	417B
17C	417C
22A-1	122A-1
22A-1Supp	122A-1Supp
22A-2	122A-2
22B	122B
22C-1	122C-1
22C-2	122C-2

The Committee also seeks approval of the renumbering of one modernized form that is not yet in effect. At the May 2014 meeting, the Standing Committee gave final approval to Official Form 112 (Statement of Intention of Individuals Filing Under Chapter 7). Because of a subsequent decision to make the numbers of all the modernized forms as similar as possible to the numbers of the forms they are replacing, the Committee asks that Official Form 112 be renumbered as Official Form 108. The modernized form replaces Official Form 8.

*Minor revisions.* (1) Means test forms (Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2)—The Committee approved several formatting and line numbering changes and the correction of a few errors in the listed forms. It also made a change to Official Forms 22A-2 and 22C-2 in response to the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295, which authorized contributions to qualified ABLE accounts, as defined by 26 U.S.C. § 529A(b), to be included in the means test deduction for contributions to the care of household or family members.

(2) Individual debtor schedules (Official Forms 106A/B, 106D, 106E/F, 106G)—The Committee approved changes to these individual debtor schedules that are consistent with changes to the parallel non-individual debtor schedules. In Official Form 106A/B, the Committee also added qualified ABLE accounts to the list of accounts in question 24 that may be excluded from the estate.

(3) Committee Note to Official Form 107 (Statement of Financial Affairs for Individuals Filing for Bankruptcy)—An incorrect reference to Official Form 106F has been changed to Official Form 106H.

These changes have been incorporated into the forms that appear in Bankruptcy Appendix A2, and the Committee now seeks approval of the forms as revised. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

*A3. Existing forms for which the Committee seeks approval of renumbering without modernization.* Bankruptcy Appendix A3 includes the forms that are in this group.

**Action Item 8. Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D.**

The Voluntary Petition form currently in effect includes an exhibit—Exhibit A—that must be completed by chapter 11 debtors that are required to file periodic reports with the SEC. When the modernized forms go into effect, Exhibit A will be a separate form designated as Form 201A. Because the Committee is considering whether to make substantive changes to the form, it decided that the existing Exhibit A form should be renumbered with its current formatting and style and that any modernization of the form should be delayed until the Committee completes its consideration of the exhibit.

Official Forms 16A, 16B, and 16D are Captions that are for use in a bankruptcy case, contested matters, and adversary proceedings. In August 2014 modernized versions of the captions were published for public comment as Official Forms 416A, 416B, and 416D. The NCBJ and the Pennsylvania Bar Association filed comments opposing adoption of the new caption forms. The NCBJ commented that it did not perceive a need for altering a format that has been used by litigants and the courts for decades or adopting a format that differs from the caption format used in the district courts and courts of appeal. The Bar Association stated that while the Forms Modernization Project is to be commended, changing the style of the caption from a standard legal caption to a form-based caption denigrates the dignity of the bankruptcy court and suggests that its filings are purely administrative in nature. The Committee agreed with these objections and voted to withdraw the proposed new caption forms and to retain the current caption forms, renumbered as Official Forms 416A, 416B, and 416D.

The Committee voted unanimously to seek approval of the renumbering without modernization of the existing forms listed under this action item. It requests that these renumbered forms go into effect on December 1, 2015, along with the modernized forms, as discussed under Action Item 9.

**B. Previously Approved Items for Transmission to the Judicial Conference**

**Action Item 9.** The Committee seeks approval of the full implementation of the Forms Modernization Project. Along with the forms discussed in Action Items 4-8, the Committee requests that the Standing Committee transmit to the Judicial Conference the modernized forms

that it approved at the May 2014 meeting: **Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427.**

*Effective date.* When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time as bankruptcy courts began using the redesigned case management system, known as NextGen. A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants. This is in effect a database program that can run different reports designed by the user. The FMP, working hand-in-glove with the AO's NextGen project team, redesigned the bankruptcy forms to facilitate data collection and to make them easier to understand.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the Committee has learned that the roll-out of NextGen is proceeding more slowly than expected. Assuming that the AO stays on its current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016 NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors, using the modernized forms (about 70 percent of bankruptcy cases). And by December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors, using the modernized forms. The AO also expects that by December 2017 all or nearly all of the bankruptcy courts will be capable of being on the NextGen case management system, although the actual timing of migration to the new system is dependent on the decision of each court.

Notwithstanding the delays in the implementation of NextGen, the Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations led to the Committee's decision to proceed with promulgation of the modernized forms rather than wait for full implementation of NextGen. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even if additional data is not collected or customized reports cannot be produced. Notably, by designing different sets of case opening forms for use in individual and non-individual debtors' cases, the FMP was able ask questions in a way that makes more sense to each category of debtor.

Second, the Committee has been publishing and receiving public comments on the modernized forms since 2012. The bankruptcy community and software vendors have been alerted to the likelihood of the promulgation of new forms. A delay of one or two years in promulgation of the forms could cause confusion and the loss of support for the project.

Finally, there are technological reasons to go forward now with the modernized forms. If the modernized forms take effect on December 1, 2015, the AO will be able to build a backend

database that will store the information from the modernized forms. This is much more cost effective than the AO's prior plan to create a backend database for the current forms, and then redo the backend database for the modernized forms. The AO also reports that adopting this effective date will not affect the AO's current ability to capture the 80 data points required by the 2005 bankruptcy legislation. The Committee informed the AO regarding this decision, and the AO had no objections.

**The Committee therefore recommends that the Official Forms listed in Action Items 4-9 take effect on Dec. 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.<sup>2</sup>**

The Committee considered one potentially serious disadvantage to implementing the modernized forms in 2015. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program, and it has been expanded to include two other courts—the United States Bankruptcy Court for the Central District of California and the United States Bankruptcy Court for the District of New Mexico. At present, only the New Jersey bankruptcy court is very active; it has at least 102 eSR cases open. The Central District of California and New Mexico bankruptcy courts have only 14 and 10 cases open respectively, but they have not been publicizing the availability of this program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project.

The eSR program is linked to the current Chapter 7 forms. The eSR data-entry screens and database will not work with modernized forms, and the AO has stated that it cannot readily reprogram the eSR program so that it will be able to produce the modernized forms for filing. Accordingly, if the modernized forms become effective in December 2015, the eSR program will not be able to function until 2017, unless the eSR courts are permitted to continue using the current forms. The AO estimates that by 2017, eSR will work with the new forms.

The Committee concluded that there is no legal obstacle to allowing existing forms to remain the Official Forms for use in the eSR program only. Bankruptcy Rule 9009 authorizes the Judicial Conference to prescribe obligatory Official Forms, but it does not restrict that authority to issuing only a single set of forms.

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<sup>2</sup> The Committee recognizes that it will sometimes not be just or practicable to use the new forms in cases that are pending at the time the forms are adopted. For example, when a debtor amends a case-opening form such as the petition or the schedules, the amendment may be easier to understand if the debtor uses the originally filed, superseded form to show the change.

A *pro se* debtor using the eSR system for initiating a chapter 7 case uses an on-line program that elicits information used to populate the following existing forms (referred to collectively by the courts as the “electronic bankruptcy package”):

- Official Form 1 (Petition);
- Official Forms 6A-J and summaries (Schedules);
- Official Form 7 (Statement of Financial Affairs);
- Official Form 8 (Individual Debtor’s Statement of Intention);
- Official Form 22A-1, and if applicable Official Forms 22A-1Supp and 22A-2 (Means Test forms); and
- a mailing matrix as prescribed by local rule or form.

The debtor does not see those forms when supplying the required information electronically. Instead, the debtor answers a series of questions, and completed forms are produced at the end of the process. Hard copies of only the signature pages must be later presented to the court for filing (within a specified number of days after submitting the electronic bankruptcy package).

Because of the almost invisible use of the case-opening forms, the continued use of existing forms for eSR filings should not cause undue confusion in the three bankruptcy courts after the modernized forms go into effect generally. The existing forms will not be posted on the courts’ websites or available in paper form in the clerk’s office. Non-eSR chapter 7 debtors, whether represented or *pro se*, will have official access only to the modernized forms.

**Because the Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asks the Standing Committee to seek approval of the following authorization by the Judicial Conference:**

Notwithstanding the approval of new Bankruptcy Official Forms to take effect on December 1, 2015, the following forms in effect on November 30, 2015, will remain Official Forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by *pro se* debtors who initiate a chapter 7 case by using the court’s Electronic Self-Representation (eSR) system: Official Form 1, Official Forms 6A-J and summaries, Official Form 7; Official Form 8; and Official Forms 22A-1, 22A-1Supp, and 22A-2.

**C. Item for Publication in August 2015**

**Action Item 10. Rule 1006(b)(1) (Filing Fee).** This provision 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 a suggestion (12-BK-I) from the Bankruptcy Judges Advisory Group (“BJAG”) that proposed amending Rule 1006(b) to clarify that courts may require a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. BJAG further suggested that any requirement for an initial installment payment at the time of filing be limited to 25% of the total filing fee.

Over the course of several years, the Committee has given careful consideration to this suggestion. As part of its consideration, 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.

The FJC study revealed that the difference between the percentage of chapter 7 cases in which a fee waiver application was filed in districts requiring an upfront installment payment and in districts not requiring such a payment was not statistically significant. The FJC study also revealed that just over one-third of the bankruptcy courts (33) require an installment payment at the time of filing the petition and the application to pay the filing fee in installments. The amount of the required initial payment ranges from \$40 to \$135, and for courts that specify the required payment as a percentage of the total fees due upon filing, the percentage ranges from 25% to 50%. Many of the courts do not specify the consequences of failing to make the required payment. Of those that do, a few courts state that the application to pay in installments may or will be denied if the initial installment is not paid at filing. A greater number of courts provide for the possible dismissal of the case or rejection of the petition, by the clerk or by the court, with or without further notice.

The Committee concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application. Rule 1006(b)(1) requires a petition to be “accepted for filing if accompanied by the debtor’s signed application” to pay the filing fee in installments. This means that a court cannot refuse to accept a petition because of the failure to make an initial installment payment, but the rule does not prohibit requiring such a payment. Therefore, the Committee decided not to make a revision to the rule in response to the BJAG suggestion.

Nevertheless, the FJC study raises 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 is proposing the amendment to Rule 1006(b)(1) that appears in Bankruptcy Appendix B. The amendment is intended to emphasize 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 voted unanimously to request publication for public comment of the proposed amendment in August 2015.

### **III. Information Item**

**Status report on the proposed chapter 13 plan form and related rules.** As the Committee has previously reported, it has undertaken a multi-year project to create an Official Form for plans in chapter 13 cases. The Committee sees the adoption of a form for chapter 13 plans as bringing greater coherence to the presentation of information in chapter 13 cases and improving the procedures for preparing, reviewing, and confirming chapter 13 plans.

The form (Official Form 113) was published for public comment in August 2013 along with related amendments to nine Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). After considering the public comments, many of which were critical of the undertaking, the Committee proposed a number of changes to the plan form and rule amendments. Revisions of the plan were intended in part to clear up misunderstandings of the purpose and function of the chapter 13 plan form. For example, the Committee added a prominent warning to the front of the form to emphasize that the presence of an option on the form does not necessarily mean that the option would be acceptable to a debtor’s local court. The revisions also addressed specific issues raised about some of the provisions of the proposed form.

The revised form and rules were republished in August 2014, along with an invitation to comment on whether the rule amendments should be adopted even if the form is not. Like the initial round of publication, republication produced a large, although slightly diminished, volume of public comments—approximately 120 that addressed the chapter 13 project.

*Comments.* A substantial majority of comments opposed adoption of the plan form as a mandatory form. A number of commenters also opposed Rule 3002 (altering the time to file

proofs of claim) and Rules 3015 and 9009 (requiring use of the chapter 13 plan form and limiting alterations to an Official Form). Relatively few comments addressed the other rule amendments, and even fewer specifically addressed the question whether the rule amendments should be adopted only in conjunction with adoption of the plan form.

In general, comments opposing the adoption of the plan form raised the same objections articulated by negative comments in the first round of publication: (i) that the form diminishes the freedom of debtors to propose lawful chapter 13 plans and infringes upon the authority of local bankruptcy courts to adjudicate and administer chapter 13 cases; (ii) that the form will be ill-suited for the local variations in chapter 13 practice across the country; (iii) that current, non-uniform chapter 13 practice is satisfactory or even ideal, and therefore the plan form is a solution in search of a problem; (iv) that the form will not achieve the goal of greater uniformity in chapter 13 law because local variations will inevitably persist; (v) that the form will impose serious transition costs for lawyers, trustees, and court staff and cause uncertainty and litigation; (vi) that the form will encourage the growth of a national chapter 13 practice for creditors and debtors at the expense of the benefits derived from the expertise and accessibility of the local bar; and (vii) that the form, in seeking to capture the range of options in chapter 13 practice around the country, is too long and complicated and will be costly to complete, review, and administer. The comments showed that the revision efforts did not make an appreciable difference in the level of opposition.

Of particular significance, an ad hoc group called the Committee of Concerned Bankruptcy Judges submitted a letter opposing the plan form. The letter was signed by 144 bankruptcy judges—about 40% of the bankruptcy bench. The letter raised some specific concerns about features included (or not included) in the form. More broadly, the letter took aim at the Committee’s reasons for pursuing a single national form for chapter 13 plans. At bottom, the group expressed the view that there is no need to move toward uniformity in chapter 13 practice and that attempting to do so without a consensus would be detrimental to the bankruptcy system.

There were notable comments in favor of the plan form and rule amendments. One bankruptcy judge, who is the author of the leading treatise on chapter 13 practice, strongly endorsed the project and testified in support of it at the public hearing. He acknowledged that there will be a transition period after the plan form and rule amendments go into effect, but he saw significant benefits in the prospect of greater clarity in chapter 13—clarity in the treatment of claims and clarity in the case law when disputes are no longer tied to the peculiarities of local forms. A leading academic expert on chapter 13 expressed strong approval of greater uniformity in chapter 13 practice. In her experience, mortgage creditors had difficulties in training, supervising, and auditing workers servicing bankruptcy cases because of the vast differences in local chapter 13 practices. In her view, “[a] uniform national chapter 13 plan would greatly increase creditor compliance with bankruptcy law,” which in turn would redound to the benefit of debtors, as well as to the integrity of the system. A group of 34 bankruptcy judges submitted



a letter in support of the national plan form. They noted that the proposed form sets out a variety of options in order to accommodate almost all existing chapter 13 practices. They asserted that adoption of a national form would significantly reduce costs in the long run.

*Compromise proposal.* Near the close of the public comment period, three bankruptcy judges, three lawyers who represent creditors, and three chapter 13 trustees submitted a proposal for an alternative to the approach taken by the Committee. They proposed that the Committee adopt a chapter 13 plan form, but allow districts to opt out if they adopted a local form that met certain criteria. In broad strokes, the compromise included the following: First, each bankruptcy court could choose to adopt one local plan form or to accept Official Form 113. A district could also choose to do both. Second, a local plan form would have to conform to specified requirements regarding the contents of the form and the manner of the local form's adoption. Third, every chapter 13 plan—whether submitted on Official Form 113 or on a conforming local plan form—would have to include an information statement disclosing whether the plan contained particular features. Fourth, the time to file a proof of claim in Rule 3002(c) would be changed to 70 days after the order for relief instead of the currently proposed 60 days.

The drafters of the compromise proposal report that they have canvassed and received support for their efforts from a broad group of interested parties who hold differing views about the merits of the national plan form. They say that they have contacted: (i) lenders who service the vast majority of residential mortgages that would be affected by chapter 13 plans; (ii) lenders who are among the largest automobile financiers holding claims in chapter 13 cases; (iii) prominent consumer debtor attorneys; (iv) multiple states' attorneys who handle consumer bankruptcy cases; (v) a large number of chapter 13 trustees; and (vi) multiple bankruptcy judges who have opposed the national plan form, as well as multiple bankruptcy judges who have supported the plan form. Some of those contacted support the compromise as the best approach. Others favor the national plan form or the status quo but find the compromise proposal an acceptable, second-best alternative.

*The Committee's deliberations.* At the spring meeting, the Committee members discussed a number of options relating to the chapter 13 national form and associated rules. None of the Committee members favored abandoning the project altogether. None favored proceeding with the amendments to the rules alone. Although there was widespread agreement regarding the benefit of having a national plan form, the Committee members generally did not want to proceed with a mandatory Official Form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the Committee members were generally inclined to explore the possibility of a compromise along the lines suggested by the commenters. As several members noted, a compromise that resulted in reducing the number of local chapter 13 plan forms (there are currently around 200) would be preferable to the status quo and would achieve some of the underlying goals of this project. After a full discussion, the Committee voted unanimously to give further consideration to pursuing a compromise proposal

that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of the Official Form if certain conditions were met.

The Committee has referred this matter to a subcommittee to study and refine the compromise proposal and also to obtain further input from a broad spectrum of the bankruptcy community. In addition, the appropriate subcommittees will consider the detailed substantive comments submitted on the republished Official Form and related rules. At the fall meeting, the Committee will consider the subcommittees' recommendations regarding the implementation of a compromise as well as substantive revisions to the Official Form and related rules.

The Committee will also consider whether to recommend republication of the proposed form or any of the rules. That decision will affect the timing of the eventual implementation of a national chapter 13 plan form. Assuming that the Official Form and related rules remain as a package, republication of any part of that package in August 2016 means that the form and rules would be on track to go into effect on December 1, 2018. On the other hand, if republication is not deemed necessary, the chapter 13 plan form and rules could be promulgated a year earlier, if normal procedures are followed. At the Committee's spring meeting, Judge Sutton raised the possibility of a shortened timeline for promulgation if republication is not sought. Under that scenario, the Committee would seek final approval of the Official Form and related rules at the January 2016 Standing Committee meeting. If approved, they would be transmitted to the Judicial Conference for approval at its March 2016 meeting. Then, with the Supreme Court's permission, the rule amendments would be submitted to the Court for issuance by May 1, 2016, which would allow the form and rules to go into effect on December 1, 2016.

Because a compromise proposal that allows districts to opt out of using the chapter 13 national form would reduce the impact of the original proposal for a mandatory national form, the Committee believes it would be appropriate to go forward without republishing amendments to the form and rules a third time. The Committee may nevertheless decide it is preferable to republish the amended form and rules in an abundance of caution, because the compromise represents a different approach to this project. At its fall meeting, the Committee will consider whether to recommend that the Standing Committee republish the form and associated rules or move forward without republication.

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

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

**DATE:** May 7, 2015

**RE:** Report of the Advisory Committee on Evidence Rules

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**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on April 17, 2015 at Fordham University School of Law in New York City.

The Committee seeks approval of two proposed amendments for release for public comment:

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

## II. Action Items

### A. Proposed Abrogation 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 considered whether Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and 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 so 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 to admit only 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 Committee considered four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. It ultimately determined, unanimously, that Rule 803(16) should be abrogated. In support of that determination, the Committee drew the following conclusions:

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable — an analysis which today would have rendered it admissible as residual hearsay. So the only real “use” for the exception is to admit unreliable hearsay — as has happened in several reported cases.
- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.
- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.



- The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for authenticity of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

- The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception — i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay — and if it is unreliable it should be excluded no matter how “necessary” it is.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it — the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception. In particular, there was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and would be difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

***The Committee unanimously approved the proposal to abrogate Rule 803(16), together with the following Committee Note to explain that abrogation:***

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to

be available and will likely satisfy a reliability-based hearsay exception — such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

**Recommendation: The Committee recommends that the proposed abrogation of Evidence Rule 803(16) be issued for public comment.**

### **B. Proposed Amendment to Evidence Rule 902**

At its previous meeting, the Committee approved in principle 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. (Those changes were discussed as an information item at the January, 2015 Standing Committee meeting). At its Spring 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, media 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.

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 litigation 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 had uniformly held that certificates prepared under Rules 902(11) and (12) 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. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). In this regard, the Note approved by the Committee emphasizes that the goal of the amendments is narrow one: to allow electronic information that would otherwise be established by a witness instead to be established through a certification by that same witness.

***Proposed Rule 902(13) — as unanimously approved by the Committee with the recommendation that it be released for public comment — 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 by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

***The Proposed Committee Note to Rule 902(13) provides as follows:***

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 intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

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

*Proposed Rule 902(14) — as unanimously approved by the Committee with the recommendation that it be released for public comment — 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:

\* \* \*

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

***The Proposed Committee Note to Rule 902(14) provides as follows:***

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 unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. 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.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. 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.

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

### **III. Information Items**

#### **A. Symposium on the Hearsay Rule and Its Exceptions**

The Committee is preparing a symposium to take place on the morning of its Fall meeting (Friday October 9) in Chicago, at the John Marshall School of Law. The Committee will be exploring recent proposals to loosen the strictures of the federal rule against hearsay. One proposal calls for broader admissibility of prior statements of testifying witnesses, on the ground that the declarant is by definition produced for trial and is under oath, and subject to cross-examination about the prior statement. The other proposal, made by Judge Posner, is to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) — meaning that the admissibility of hearsay would be dependent on a judge finding the statement reliable under the particular circumstances presented. The Committee is inviting judges, lawyers and professors to present information and recommendations at the symposium. The symposium proceedings will be published in the Fordham Law Review. As with the prior symposium on electronic evidence, the Committee hopes that the symposium will provide a foundation for future Committee recommendations regarding the hearsay rule and its exceptions.

#### **B. Consideration of Proposal to Amend the Notice Provisions in the Federal Rules of Evidence**

The Committee has recognized that there inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision.

The Committee considered a proposal that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Committee extensively discussed the proposed changes, and determined that an attempt to make the notice provisions completely uniform should not be pursued. The Committee determined that some of the disuniformities may have been intentional, such as the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress); such substantive decisions should not be changed simply to make those provisions uniform with other notice provisions. Moreover, local rules provide notice requirements and there would be transaction costs if the national rules

are changed. Finally, any change to the notice rules could come with other unintended consequences.

The Committee did determine, however, that two provisions were problematic and should be changed, independently of any interest in uniformity. The two provisions are:

- Rule 404(b) conditions notice from the government on the defendant's request. A request requirement does not exist in any of the other notice provisions; and the Committee concluded that it is an unnecessary requirement 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 limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

- Rule 807, the residual exception, requires pretrial notice, without any exception for good cause. This has 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 particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

The Committee will be considering formal proposals to amend Rules 404(b) and 807 at its next meeting.

### **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 at this time not to do so. 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 has, however, unanimously agreed 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. 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. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule. The Committee will be working with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center. Drafts have already been prepared and reviewed by the Committee on authentication of email. Drafts will be submitted for the next meeting on text messages and social media postings. In addition, Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

#### **D. 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 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 eHearsay either being excluded or improperly admitted by misapplying the existing exceptions. The Committee is also interested in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Committee received valuable input from Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.



The review on recent federal case law involving eHearsay indicates that there is no instance 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. 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.

#### **E. 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 2015 Meeting**

The draft of the minutes of the Committee's Spring 2015 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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# APPENDIX

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1                   **Appendix to Report to the Standing Committee from the Advisory Committee on**  
2   **Evidence Rules**

3  
4   **May 2015**

5  
6   **Rule 803. Exceptions to the Rule Against Hearsay --- Regardless of Whether the Declarant**  
7   **Is Available as a Witness**

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

10   \* \* \*

11  
12                   ~~(16) — *Statements in Ancient Documents.* A statement in a document that is at~~  
13   ~~least 20 years old and whose authenticity is established. — **[Abrogated].**~~

14  
15  
16   **Committee Note**

17  
18                   The ancient documents exception to the rule against hearsay has been abrogated. The  
19   exception was based on the flawed premise that the contents of a document are reliable merely  
20   because the document is old. While it is appropriate to conclude that a document is *genuine*  
21   when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply  
22   does not follow that the contents of such a document are truthful.

23

24           The ancient documents exception could once have been thought tolerable out of necessity  
25 (unavailability of other proof for old disputes) and by the fact that the exception has been so  
26 rarely invoked. But given the development and growth of electronically stored information, the  
27 exception has become even less justifiable and more subject to abuse. The need for an ancient  
28 document that does not qualify under any other hearsay exception has been diminished by the  
29 fact that reliable electronic information is likely to be available and will likely satisfy a  
30 reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient  
31 documents exception is not necessary to qualify dated information that is reliable. And abuse of  
32 the ancient document exception is possible because unreliable electronic information could be  
33 easily accessible, and would be admissible under the exception simply because it has been  
34 preserved electronically for 20 years.



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

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

32         A proponent establishing authenticity under this Rule must present a certification  
33 containing information that would be sufficient to establish authenticity were that information  
34 provided by a witness at trial. If the certification provides information that would be insufficient  
35 to authenticate the record if the certifying person testified, then authenticity is not established  
36 under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule  
37 901(b)(9) to be established by a certification rather than the testimony of a live witness.

38         A certification under this Rule can only establish that the proffered item has satisfied the  
39 admissibility requirements for authenticity. The opponent remains free to object to admissibility  
40 of the item on other grounds. For example, if a webpage is authenticated by a certificate under  
41 this rule, that authentication does not mean that the assertions on the webpage are admissible for  
42 their truth. It means only that the item is what the proponent says it is, i.e., a particular web page  
43 that was posted at a particular time. Likewise, the certification of a process or system of testing  
44 means only that the system described in the certification produced the item that is being  
45 authenticated.



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

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48 **Advisory Committee on Evidence Rules**

49 **Proposed Amendment: Rule 902(14)**

50

51

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

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

55 \* \* \*

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

61

62

63 **Committee Note**

64 The amendment sets forth a procedure by which parties can authenticate data copied from  
65 an electronic device, storage medium, or an electronic file, other than through the testimony of a  
66 foundation witness. As with the provisions on business records in Rules 902(11) and (12), the  
67 Committee has found that the expense and inconvenience of producing an authenticating witness  
68 for this evidence is often unnecessary. It is often the case that a party goes to the expense of

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

73 Today, data copied from electronic devices, storage media, and electronic files are  
74 ordinarily authenticated by “hash value.” A hash value is a unique alpha-numeric sequence of  
75 approximately 30 characters that an algorithm determines based upon the digital contents of a  
76 drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the  
77 fact that they are exact duplicates. This amendment allows self-authentication by a certification  
78 of a qualified person that she checked the hash value of the proffered item and that it was  
79 identical to the original. The rule is flexible enough to allow certifications through processes  
80 other than comparison of hash value, including by other reliable means of identification provided  
81 by future technology.

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

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

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

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

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## **Advisory Committee on Evidence Rules**

Minutes of the Meeting of April 17, 2015

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 17, 2015 at Fordham University School of Law.

*The following members of the Committee were present:*

Hon. William K. Sessions, Chair  
Hon. Brent R. Appel (by phone)  
Hon. Debra Ann Livingston  
Hon. John T. Marten  
Hon. John A. Woodcock, Jr.  
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 C. Wesley, Liaison from the Committee on Rules of Practice and Procedure  
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Kenneth S. Broun, Consultant to the Committee  
James C. Duff, Director of the Administrative Office  
Professor Daniel Coquillette, Reporter to the Standing Committee  
Catherine R. Borden, Esq., Federal Judicial Center  
Timothy Lau, Federal Judicial Center  
Rebecca A. Womeldorf, Chief, Rules Committee Support Office  
Professor Stephen A. Saltzburg, Representative of ABA Section of Criminal Justice  
John Haried, Esq., Attorney, Department of Justice  
Frances Skilling, Rules Committee Support Office

## **I. Opening Business**

### ***Welcoming Remarks***

Judge Sessions welcomed everyone to the Committee meeting. He thanked Director Duff for attending the meeting and expressed the pleasure of everyone that Director Duff has returned to the Directorship of the Administrative Office. Director Duff stated that he was honored to be back at the AO and to work with the Committee.

### ***Approval of Minutes***

The minutes of the Fall, 2014 Committee meeting were approved.

### ***January Meeting of the Standing Committee***

Judge Sessions reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Sessions stated that he reported to the Standing Committee on the Committee's agenda on electronic evidence. He noted the positive response of Committee members on the proposals regarding ancient documents (Rule 803(16)) and self-authentication of certain electronic evidence (Rules 902(13) and (14)). He also noted support for the Committee's undertaking a project on the hearsay rule and admissibility of prior statements of testifying witnesses.

Judge Sessions and Judge Sutton reported on some of the pilot projects that were presented at the Standing Committee meeting. These pilot projects include voluntary disclosure, rocket docketing, and streamlined procedures in simpler cases.

### ***FJC Video***

The FJC has determined that a good way to instruct judges on rule amendments is to produce videos in which the Chair and Reporter of an Advisory Committee would discuss a recent amendment. The FJC asked Judge Sessions and Professor Capra to be the first to prepare such a video. The video covered the 2014 amendments to Evidence Rules 801(d)(1)(B) and Rules 803(6)-(8). That video is now accessible to judges on the FJC website. The video was played for members at the Committee meeting.

## II. Possible 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, it is admissible for the truth of its contents. At the Fall, 2014 meeting the Committee considered the Reporter’s memorandum raising the possibility that Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter’s memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only 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 lot of *reliable* electronic data available to prove any dispute of fact.

At the Fall 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. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

At the Committee’s direction, the Reporter prepared a memorandum for the Spring meeting that provided four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances.

Committee discussion indicated that some members who had thought it unnecessary to amend Rule 803(16) at this time had changed their mind. Committee members raised the following arguments against retaining the current Rule 803(16):

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable --- an analysis which today would have rendered it admissible as residual hearsay. So the only real “use” for the exception is to admit unreliable hearsay --- as has happened in several reported cases.

- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

- The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for *authenticity* of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

- The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception --- i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay --- and if it is unreliable it should be excluded no matter how “necessary” it is.

The discussion indicated general agreement that the Committee should act now to propose a change to Rule 803(16). The question then turned to which of the four proposals to adopt. There was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --- the appropriate remedy would be to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

**A motion was made and seconded to recommend to the Standing Committee that a proposal to abrogate Rule 803(16) be issued for public comment. That motion was approved unanimously.**

The Committee approved the Committee Note prepared by the Reporter, with an additional suggestion that the Note emphasize that other hearsay exceptions (particularly Rules 807 and 803(6)) would be available to provide for admissibility of ancient documents that are reliable.

*The Committee Note approved by the Committee provides as follows:*

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception — such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

### **III. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence**

The Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Reporter's memo suggested that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Reporter's memo also suggested that any attempt to provide uniformity to the notice provisions should not include Rule 412 (the rape shield rule) because the detailed notice and motion requirements in that rule are

designed to protect privacy interests of rape victims, whereas none of the other notice provisions raise that sensitive issue.

The Committee extensively discussed the Reporter's memorandum, and the following points among others were made:

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 particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The absence of a good cause exception in the text of Rule 807 may be due to the fact that Congress wanted the residual exception to be used only rarely, and so imposed strict procedural requirements on its invocation. But perhaps it is now time to consider whether the strictures of the residual exception --- both procedural and substantive --- should be loosened. Judge Posner has argued for an expansion of the coverage of the residual exception, so it might be a good idea to break out the residual exception from the rest of the rules with notice provisions, and to consider not only whether to add a good cause exception but also whether to loosen the standards of reliability and necessity found in the current Rule 807.

3) Judge Sutton contended that rules should not be changed simply for the purposes of uniformity, if substantive changes must be made to do so. Rather, the Committee should proceed rule by rule and determine whether the substantive requirements in any particular rule make sense and are working. He argued, for example, that the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress) may have been the result of a substantive decision that should not be changed simply to make those provisions uniform with other notice provisions. A member of the Committee speculated that the length of the notice provisions in Rules 413-15 may have been due to the fact that those rules are applicable mostly to litigation arising in Indian country, and so the specified time period may have been intended to account for special considerations in those locations. (Unfortunately there is no legislative history to indicate why Congress opted for the 15-day notice provision).

4) The DOJ representative stated that the Department is opposed to any attempt to provide uniformity in the notice provisions. She suggested that Congress might be concerned about changes to the Rules that it enacted directly --- i.e., Rules 413-415 --- and that any changes to those rules would not be worth the cost because they are so seldom used. She noted that local rules provide notice requirements and that there would be transaction costs if the national rules are changed. And she stated that any change to the notice rules could come with other unintended consequences.

5) A few Committee members objected to the proposal that the requirement of written notice should be deleted from the two rules that impose that requirement --- Rules 609(b) and 902(11). They noted that the requirement of a writing was a way of avoiding disputes as to whether notice was actually given. The Reporter responded that in those cases in which the opponent received actual notice but not written notice, the courts have excused the writing requirement anyway, so it is questionable whether having a requirement of written notice in a rule does anything more than impose litigation costs and a trap for the unwary. In any case, the Committee determined that the question that should be considered is whether written notice should be required in all the notice rules or none, and that this was a difficult question that required further consideration.

6) Committee members were in agreement that the request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary requirement that serves as a trap for the unwary. The DOJ representative noted that 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 limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

In the end, the Committee agreed that amendments that would make the notice provisions more uniform raised a number of difficult questions that required further consideration. The Committee did determine, however, that any further consideration of uniformity in the notice provisions should exclude Rules 412-15. 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 Reporter was directed to provide a memorandum to the Committee for the next meeting that would explore possible amendments to the remaining Rules that contained notice provisions --- Rules 404(b), 609(b), 807, and 902(11). Three of the proposals for possible amendment are independent from any interest in uniformity. They are:

- Deleting the requirement that notice be requested under Rule 404(b);
- Adding a good cause exception to Rule 807; and
- Broadening Rule 807 to admit more hearsay not covered by other exceptions.

Two of the proposals are grounded in uniformity. They are:

- Either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 807; and
- Amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).

#### **IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence**

At its last meeting, the Committee approved in principle 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, media 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. 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.

At the previous meeting, the Committee 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 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 litigation 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 had uniformly held that certificates prepared under Rules 902(11) and (12) 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. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)).

At the Committee's direction, the Reporter prepared formal proposals for amending Rule 902. The Committee reviewed the proposals at the meeting and provided a number of suggestions for improvement. Among them were:

- Clarifying, in proposed Rule 902(14) that what will be admitted through the certification is not a copy of an electronic device, but rather a copy of data taken from an electronic device.

- Streamlining the draft by tying the requirements of notice to those already set forth in Rule 902(11). This change had the added advantage that, if the notice provisions of Rule 902(11) were to be amended as part of a uniformity project, Rules 902(13) and (14) would not have to be changed.

- Streamlining the draft by tying the certification requirements to those already set forth in Rule 902(11) as to domestic certifications and Rule 902(12) as to foreign certifications.

- Adding material to the proposed Committee Note to Rule 902(13) to clarify that the goal of the amendment was a narrow one: to allow electronic information that would otherwise be established by a witness under Rule 901(b)(9) to be established through a certification by that same witness.

**A motion was made and seconded to recommend to the Standing Committee that the proposed amendments to Rule 902, together with the proposed Committee Notes, be issued for public comment. The motion was unanimously approved by the Committee.**

*Proposed Rule 902(13) as sent to the Standing Committee 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 by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

### ***Proposed Committee Note to Rule 902(13)***

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 intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the

assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

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

*Proposed Rule 902(13) as sent to the Standing Committee 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:

\* \* \*

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

### ***Proposed Committee Note to Rule 902(14)***

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 unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. 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.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. 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.

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

## **V. Consideration of Prior Statements of Testifying Witnesses and the Rule Against Hearsay**

For many years there has been a dispute over whether prior statements of testifying witnesses should be treated as hearsay when they are offered for their truth. The Federal Rules of Evidence treat such statements as hearsay, and provide for relatively narrow hearsay exceptions. The argument against treating prior witness statements as hearsay is that the declarant is on the stand testifying under oath and subject to cross-examination. Moreover, the prior statement is nearer in time to the event and so likely to be more reliable than trial testimony. And finally, admitting prior witness statements for substantive effect dispenses with the need to give a nonsensical instruction that the prior statement is admissible only for credibility purposes and not for its truth.

The Reporter prepared a memorandum for the Committee that raised the arguments both in favor of the current federal treatment and against it. The memorandum also described different approaches taken in some of the states. Finally, the memorandum discussed whether, if prior statements are to continue to be treated as hearsay, the current exceptions to the rule should be broadened. The most important question on this sub-question is whether the Congressional

limitation on substantive admissibility of prior inconsistent statements --- that they must have been made under oath at a former proceeding --- should be retained, limited, or abrogated.

At the meeting, the Reporter emphasized that there was no proposed amendment currently on the table. The treatment of prior statements of testifying witnesses under the hearsay rule is a complex question that has been debated for many years, and any proposed change would require significant study. The question for the Committee was whether a project to consider broader substantive admissibility of prior witness statements was worth undertaking. The Chair stated that the first step in that project would be to hold a symposium on the morning of the Fall 2015 Committee meeting in Chicago, at which scholars, judges and practitioners in the Chicago area could discuss these matters for the benefit of the Committee.

In discussion of the project, the Committee raised the following points among others:

- Most of the focus should be on prior inconsistent statements. The Committee has already expanded the substantive admissibility of prior consistent statements in the 2014 amendment to Rule 801(d)(1)(B). That amendment provides that a prior consistent statement is admissible when --- but only when – it properly rehabilitates the witness. Tying substantive admissibility to rehabilitation imposes an important limitation: that prior consistent statements should not be admissible if all they do is bolster the witness’s credibility. That limitation also assures that parties will not try to generate prior consistent statements for trial. Thus, any further expansion of prior consistent statements will be problematic.

- The Committee should look at the practice in the states that did not adopt the Congressional limitation, i.e., where prior inconsistent statements are broadly admissible for substantive effect. The Reporter noted that Wisconsin is such a state and experts about the practice in Wisconsin can be invited to a symposium in Chicago. The Reporter also stated that he would provide information on the practice in the other states that admit prior inconsistent statements substantively without limitation.

- One concern with broader substantive admissibility of prior inconsistent statements is that they potentially could be found to provide sufficient evidence to convict a criminal defendant. The Committee should explore whether there might be limits on sufficiency that could be placed on substantively admissible prior inconsistent statements. Another possibility would be to expand substantive admissibility of prior inconsistent statements in civil cases only.

- Another concern from the criminal defense side is that if counsel impeaches a government witness with an inconsistent statement, there may be other assertions in that statement that could be used substantively. So any rule should take account of that risk.

- An oft-stated concern about admitting prior inconsistent statements is that the witness rendering the statement may just be making it up. That was at least one reason why Congress required that the prior statement be made at a formal hearing --- as there would then be no doubt that the statement was made. The Reporter noted, however, that the concern about fabricating the statement is not a hearsay concern, because the alleged fabricator is in court testifying under oath and subject to cross-examination that the statement was made. The Reporter also noted that

several states have rules with less stringent requirements than the Congressional limitation, designed to assure that the statement was actually made. For example, some states limit substantive admissibility to prior statements that are written or recorded. Illinois is one such state, and someone familiar with the Illinois practice could be invited to a symposium in Chicago.

- A project to consider expanding admissibility of prior witness statements might usefully be paired with a project that was discussed earlier in the meeting --- whether the residual exception should be amended to provide an easier road to admissibility for reliable statements that do not fit under standard hearsay exceptions. One Committee member noted that Judge Posner has advocated for a revision of the Federal Rules of Evidence that would scrap most or all of the hearsay exceptions in favor of a broadened version of the residual exception. The Chair remarked that if the Committee approved the idea of a symposium, there could be two panels --- one on prior witness statements and the other on the residual exception --- and that Judge Posner would be invited to make a presentation on his proposal.

The Committee approved the proposal that a symposium be held in Chicago on the morning of the Fall 2015 meeting. That symposium would contain two panels. Panel one would consider expansion of substantive admissibility of prior witness statements, with an emphasis on prior inconsistent statements. Panel Two would consider expansion of the residual exception.

## **VI. Best Practices Manual on Authentication of Electronic Evidence**

At the Electronic Evidence Symposium in 2014, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat 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. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules were intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. The Committee decided that it would not propose extensive amendments to the authenticity rule to cover electronic evidence. Such proposals 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 did, however, unanimously agree that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with

technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.

At the Spring meeting, the Reporter submitted two preliminary drafts of best practices: authenticating email, and use of judicial notice. He informed the Committee that the FJC had already commissioned a best practices manual to be prepared by Greg Joseph and Judge Paul Grimm --- and they had both enthusiastically agreed to include the Committee on this project. When the project is completed, the Committee and the Standing Committee would then have to decide whether it should be designated as a Committee project or described in some other way.

The Reporter informed the Committee that the next drafts would cover social media postings, and would be submitted to the Committee for its next meeting. He also noted that Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

## **VII. Recent Perceptions (eHearsay)**

At the Fall 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 at the Fall meeting decided not to proceed with the recent perceptions exception, mainly out of the concern that the exception would lead to the admission of unreliable evidence. 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. The Committee also expressed interest in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Reporter submitted an extensive report that was graciously prepared by Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.

The Reporter also 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 excluded, nor that it is being improperly admitted under 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.

The Committee expressed its profound thanks to Professor Blinka. And the Committee asked the Reporter and Professor Broun to continue to monitor both federal and state case law to monitor how personal electronic communications are being treated in the courts.

### **VIII. 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 has recently heard arguments on a case involving whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. This forthcoming decision, 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. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

### **VI. Next Meeting**

The Fall 2015 meeting of the Committee is scheduled for Friday, October 9 in Chicago.

Respectfully submitted,

Daniel J. Capra