

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Phoenix, AZ
January 3, 2017**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 3, 2017**

AGENDA

I. Opening Business

- A. Welcome and opening remarks – Judge David G. Campbell
- B. Report on rules and forms effective December 1, 2016 – Judge David G. Campbell
- Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, new Form 7, and new Appendix
 - Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, and 9033, and new Rule 1012, and Official Forms 410S2, 420A, and 420B
 - Civil Rules 4, 6, and 82
 - Criminal Rules 4, 41, and 45
- C. Report on September 2016 Judicial Conference session and proposed amendments transmitted to the Supreme Court on September 28, 2016
- Rebecca Womeldorf, RCSO
- Bankruptcy Rules 1001, 1006(b), and 1015(b)
 - Evidence Rules 803(16) and 902
- D. Report on rules and forms published for public comment in August 2016
- Rebecca Womeldorf, RCSO
- Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4
 - Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, 8023, and Part VIII Appendix (New); and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426
 - Civil Rules 5, 23, 62, and 65.1
 - Criminal Rules 12.4, 45, and 49
- E. **ACTION:** The Committee will be asked to approve the minutes of the June 6, 2016 Committee meeting

II. Inter-Committee Work

- A. Coordination efforts – Scott Myers, RCSO
- Report on proposed rules amendments that affect multiple Advisory Committees
- B. Discussion of five-year review of committee jurisdiction
- Rebecca Womeldorf, RCSO
- In 1987, the Judicial Conference established a requirement that “[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or

that it be abolished.” JCUS-SEP 87, p. 60. This review is scheduled to occur again in 2017, and each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

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

- A. **ACTION:** The Committee will be asked to recommend to the Judicial Conference for approval a technical amendment to Rule 4(m)
- B. Pilot Projects Working Group
- Judge John D. Bates, Judge Jeremy Fogel, Judge Paul W. Grimm, and Emery G. Lee III will report on the status of the Mandatory Initial Discovery Pilot and the Expedited Procedures Pilot, both of which were approved by the Judicial Conference in September 2016
- C. Information items
- Report on proposed rules published for public comment in August 2016 and public hearings
 - Rules 5, 23, 62, and 65.1
 - Report on the work of the Rule 30(b)(6) Subcommittee
 - Ongoing projects
 - a. Redacting improper filings: Rule 5.2(i)
 - b. Jury trial demand: Rules 38, 39, and 81(c)(3)(A)
 - c. Service of subpoenas: Rule 45(b)(1)

IV. Report of the Advisory Committee on Appellate Rules – Judge Neil M. Gorsuch

- A. **ACTION:** The Committee will be asked to recommend to the Judicial Conference for approval a technical amendment to restore Rule 4(a)(4)(B)(iii) (*materials will be provided as a supplement to the agenda book and posted to the website when available*)
- B. Information items
- Electronic filing and service of notice of appeal – amendment under consideration to eliminate references to “mailing” in Rule 3(d)
 - Civil Rule 62/appeal bonds – amendment under consideration to clarify the recently published draft of Rule 8(b) regarding the liability of security providers
 - Disclosure statements – amendment under consideration to conform Rule 26.1 to the recently published draft of Criminal Rule 12.4 to impose additional disclosure requirements
 - Class action settlement objectors – decision that amendments to Civil Rule 23 do not require conforming amendments to the Appellate Rules
 - Electronic filing by pro se litigants – decision not to alter the approach taken in the recently published draft of Rule 25

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

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

- Chapter 13 Official Plan Form and related rules amendments
 - Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113
- Technical and conforming amendment to Rule 7004(a)(1)
- Technical and conforming amendment to Official Form 101

B. Information items

- Possible amendments to Rule 8011 to conform with proposed amendments to Appellate Rule 25 published in August 2016
- Report on noticing project and electronic noticing issues

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

- Information items
 - Report on the symposium held in conjunction with fall meeting
 - Ongoing projects:
 - a. Possible amendment to Rule 807
 - b. Possible amendment to Rule 801(d)(1)(A)
 - c. Possible “e-hearsay” exception
 - d. *Crawford v. Washington* and the hearsay exceptions in the Evidence Rules
 - e. Manual on authentication of electronic evidence
 - Suggested amendment to Rule 702 and possible symposium on expert evidence

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

- Information items
 - Report on the work of the Cooperator Subcommittee
 - Report on the work of the Section 2255 Rule 5 Subcommittee
 - Report on the work of the Rule 16 Subcommittee

VIII. Report on the Cooperator Task Force – Julie Wilson, RCSO

IX. Legislative Report – Judge David G. Campbell, Professor Daniel R. Coquillette, and Rebecca Womeldorf

X. Next Meeting: June 13, 2017 in Washington, DC

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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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.

Members	Position	District/Circuit	Start Date	End Date
David G. Campbell Chair	D	Arizona	2016	2019
Jesse Matthew Furman	D	New York (Southern)	2016	2019
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Daniel C. Girad	ESQ	California	2015	2018
Susan P. Graber	C	Ninth Circuit	2013	2019
Frank Mays Hull	D	Eleventh Circuit	2016	2019
Peter D. Keisler	ESQ	Washington, DC	2016	2019
William K. Kelley	ACAD	Indiana	2015	2018
Amy J. St. Eve	D	Illinois (Northern)	2013	2019
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Sally Quillian Yates*	DOJ	Washington, DC	----	Open
Robert P. Young	CJUST	Michigan	2016	2019
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio

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Effective: October 1, 2016

Committee Chairs and Reporters

Revised: October 25, 2016

Committee on Rules of Practice and Procedure | January 3, 2017

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Liaison for the Advisory Committee on Bankruptcy Rules	Judge Susan P. Graber <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i> Peter D. Keisler, Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge James C. Dever III <i>(Criminal)</i> Judge Solomon Oliver, Jr. <i>(Civil)</i> Judge Richard C. Wesley <i>(Standing)</i>

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TAB 1

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

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

The following attended on behalf of the advisory committees:

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

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain “ancient” hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as “ESI”) first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee’s fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent “exceptional circumstances.” The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS’S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that “excited utterances” are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory 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.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

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

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term “supersedeas bond.” The language would be changed to “bond or other

security” as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word “a” before “stipulation” on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase “surety or other security provider” and whether “security provider” contained within it the term “surety” and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee’s approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge’s disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a).**

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4.**

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of “person” versus “party” throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court’s electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court’s electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms “person” and “party” throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment.**

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5.**

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow’s leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment.**

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the “gap” between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court’s authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word “automatic” would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment. It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62.**

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant’s initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word “supplemental” from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the “civility rule” by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee’s recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is “entered” for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the “opt-out” proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

RULE 8018.1 – This new rule would help guide district courts in light of the Supreme Court’s *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court’s erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court’s approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee’s two information items. The first item was about the status of the Advisory Committee’s proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee’s decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee’s *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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MEMORANDUM

TO: The Rules Committees

FROM: Scott Myers -- Rules Committee Support Office

RE: Rules Coordination Report

DATE: November 30, 2016

At its June 2016 meeting, the Standing Committee asked the Rules Committee Support Office (RCSO) to identify and coordinate proposed rule changes that have implications for more than one set of rules. The proposed changes listed below implicate more than one rule set.

Rules published for comment in 2016

Electronic filing. Proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49 to address electronic filing, signatures, service and proof of service.

The advisory committees coordinated proposed amendments to their electronic filing rules using the same language to the greatest extent possible. The proposed amendments address standards for electronic filing, signatures, service, and proof of service. The advisory committees will consider comments at their spring 2017 meetings, and make recommendations for final approval. The rules are on track to go into effect December 1, 2018.¹

Two additional bankruptcy rules are implicated: Rule 7005 and Rule 8011. Rule 7005 incorporates Civil Rule 5 in adversary proceedings. The Bankruptcy Rules Committee has recommended no changes to Rule 7005. Rule 8011 is the bankruptcy rule counterpart to Appellate Rule 25. At its fall 2016 meeting, the Bankruptcy Rules Committee recommended amendments to conform Rule 8011 to the published amendments to Appellate Rule 25. Due to the technical nature of the proposed Rule 8011 amendments, the Bankruptcy Rules Committee recommends that they be approved without publication, which would allow them to go into effect the same time as the other electronic filing amendments.

Stay of Proceedings to Enforce a Judgment. Proposed amendments to Civil Rules 62 and 65.1, Appellate Rules 8, 11, and 39, and Bankruptcy Rules 8007, 8010, and 8021.

Among other things, the proposed amendment to Civil Rule 62 published for comment in August 2016 would substitute the phrase “bond or other security” for the antiquated term “supersedeas bond.” The Appellate Rules Committee published conforming amendments to its Rules 8, 11, and 39 that eliminate the term “supersedeas bond,” and also broaden related references to the term “surety” to include other security providers. Parallel changes are reflected in amendments proposed for Civil Rule 65.1. The Bankruptcy Rules Committee expects to

¹ The Bankruptcy Committee is also evaluating additional potential amendments concerning electronic service and notice. See *Infra*, at page 4, under “Bankruptcy Rules Study Agenda.”

consider at its spring 2017 meeting amendments to its appellate rules 8007, 8010, and 8021. The Bankruptcy Rules Committee considers its proposed amendments as technical conforming changes (basically substituting the phrase “bond or other security” in three places where “supersedeas bond” currently appears) and therefore does not anticipate a need for publication. If the civil rules and the conforming appellate and bankruptcy rules changes are recommended for final approval by the Standing Committee at its June 2017 meeting, the amendments would all be on track to go into effect December 1, 2018.

Proposed Amendments to Criminal Rule 12.4 (Disclosure Statement).

The Criminal Rules Committee published amendments to its Rule 12.4(a) and (b) this past summer. The proposed changes, on track to go into effect December 1, 2018, have implications for various subsections of the appellate, bankruptcy, and civil disclosure rules.² Any conforming changes to the appellate, bankruptcy, and civil disclosure rules, if published in the summer of 2017, would be on track to go into effect December 1, 2019.

CR 12.4(a)

The proposed amendment to Rule 12.4(a) provides an exemption to the government’s requirement to disclose organizational victims where the impact of the crime on the victim is relatively small. The Appellate Rules Committee discussed a parallel amendment to Rule 26.1(a) at its fall 2016 meeting.

CR 12.4(b)

The proposed amendment to Criminal Rule 12.4(b) makes two changes. It changes the time for making disclosures from “upon the initial appearance” of the party to “within 28 days from the initial appearance,” and it clarifies that a supplemental filing is required not only when information that has previously been disclosed changes, but also when additional information subject to disclosure comes to light.

Changes conforming to CR 12.4(b) could be made to Appellate Rule 26.1(b), Civil Rule 7.1(b) (Disclosure Statement), and Bankruptcy Rules 7007.1(b) (Corporate Ownership Statement) and 8012(b) (Corporate Disclosure Statement). At its fall 2016 meeting, the Appellate Rules Committee considered a conforming amendment to its Rule 26.1(b) that would adopt the second (but not the first) proposed change to Criminal Rule 12.4(b). The Bankruptcy and Civil Rules Committees have not yet considered any changes to their disclosure rules, but could do so at their spring 2017 meetings and still publish next summer.

Rules Under Active Consideration by the Advisory Committees

Proposed Bankruptcy Rule 9037(h) – a new subpart to the bankruptcy privacy rule in response to suggestion 14-BK-B from CACM.

² The Appellate Rules Committee is coordinating with the Bankruptcy Rules Committee concerning an unrelated amendment to its disclosure rule. *See Infra*, at page 3, under the heading “Proposed Appellate Rule 26.1(e) (Disclosure Statement).”

In response to a suggestion from CACM,³ the Bankruptcy Rules Committee recommended proposed Rule 9037(h) for public comment at its spring 2016 meeting, but held submission to the Standing Committee in order to give the other advisory committees time to consider parallel amendments to their privacy rules. It expects to submit a final version of proposed Rule 9037(h) to the Standing Committee next summer.

The Civil Rules Committee considered a parallel amendment to Civil Rule 5.2 at its fall 2016 meeting, and concluded that there was no independent need for a national rule to correct an inappropriate filing in the civil context. The number of inappropriate filings is not significant in the civil context and courts are able to address requests to redact prior filings without a national rule. The Civil Rules Committee also concluded that the interests of uniformity across rule sets does not support adoption a civil rule redaction amendment to emulate proposed Bankruptcy Rule 9037(h). Although the need for such a rule in the bankruptcy context is significant, it is not necessary in the civil rules context. The Criminal Rules Committee discussed the need for a conforming amendment to Criminal Rule 49.1 at its spring 2016 meeting and most members did not believe a parallel amendment was necessary. Because Appellate Rule 25 is derivative, the Appellate Rules Committee plans no changes.

The Bankruptcy Rules Committee's determination that there is a need for a rule amendment to address the redaction of privacy information in previously filed documents in the bankruptcy arena, and the determination by the Civil and Criminal Rules Committees that there is not a similar need for such a rule in the civil and criminal arenas, presents a question for the Standing Committee. Given the need to amend the bankruptcy privacy rule, does the general goal of uniformity across rule sets extend to the adoption of similar provisions that the Civil and Criminal Rules Committees believe are not needed in the context of civil or criminal practice?

Proposed Appellate Rule 26.1(e) (Disclosure Statement)

In addition to proposed amendments to its disclosure rule that would conform to some of the published amendments to Criminal Rule 12.4, the Appellate Rules Committee also discussed an additional amendment to Appellate Rule 26.1(e) that would require disclosures of certain actors when an appeal originates from a bankruptcy proceeding. It tabled its recommendation until its spring 2017 meeting to consult with the Bankruptcy Rules Committee.

Formal or Informal Suggestions (*yet to be considered, or on Advisory Committee Study Agendas*)

Appellate Rules Committee Study Agenda

[Nothing Reported].

³ The CACM suggestion arose out of a request to the AO from a national creditor for help facilitating an automated process to redact privacy information from thousands of proof of claims attachments filed in thousands of bankruptcy cases. Resolving the matter caused, among other things, CACM to recommend and the Judicial Conference to adopt a special case reopening fee to redact privacy information in closed bankruptcy cases, and to require courts to notify certain case participants when previously filed documents are replaced with redacted versions. CACM subsequently suggested that the Bankruptcy Rules Committee amend its privacy rule to account for the change in Judicial Conference policy. CACM did not make a similar suggestion to the other advisory committees.

Bankruptcy Rules Committee Study Agenda

In addition to the electronic filing amendments currently out for public comment, the Bankruptcy Rules Committee is evaluating a potential amendment to Bankruptcy Rule 5005 and/or 9036 that would allow electronic service and noticing on registered users generally and non-registered users who opt into electronic service and noticing on a bankruptcy proof of claim or similar form. The proposed amendment would recognize and account for the multiple parties involved in federal bankruptcy cases who are not registered users, but who are still entitled to receive numerous papers and notices in bankruptcy cases. The amendment would address bankruptcy-specific issues, but may affect the Appellate Rules Committee, the Civil Rules Committee, and the Criminal Rules Committee because the amended bankruptcy rule would govern issues similar to those in the proposed and pending amendments to Appellate Rule 25(c), Civil Rule 5(b)(2), and Criminal Rule 49(a)(3).

The Bankruptcy Rules Committee has received formal suggestions to amend Bankruptcy Rule 7004(b)(3), which speaks to service of process on business entities, and Bankruptcy Rule 8003(c)(1), which requires the clerk to serve the notice of appeal. Potential amendments may affect the Appellate Rules Committee and the Civil Rules Committee because Bankruptcy Rule 7004(b)(3) is analogous the language of Civil Rule 4(h) and Bankruptcy Rule 8003(c)(1) is analogous to Appellate Rule 3(d).

Civil Rules Committee Study Agenda

[Nothing Reported].

Criminal Rules Committee Study Agenda

[Nothing Reported].

TAB 3

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TAB 3A

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

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

TO: Hon. David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

DATE: December 9, 2016

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 3, 2016. Draft Minutes of this meeting are attached.

Proposals to amend Civil Rules 5, 23, 62, and 65.1 were published for comment in August. The Rule 5 proposals coordinate with similar proposals published for comment on recommendations by the Appellate, Bankruptcy, and Criminal Rules Committees. The Rules 62 and 65.1 proposals work in tandem with coordinating proposals published for comment on recommendation of the Appellate Rules Committee. Written comments are beginning to come in. The first scheduled hearing on the Civil Rules proposals was held on November 3 in conjunction with the Civil Rules meeting. The Rule 23 proposals have been the focus of most of the written comments and the witnesses at the hearing. The comments and testimony have been interesting, informative, and helpful. The second hearing will be held in Phoenix on January 4. The third hearing, set for February 16, will be held by teleconference rather than in person.

One action item is presented. Part I recommends that Rule 4(m) be submitted to the Judicial Conference as a technical amendment to restore a provision inadvertently omitted from the proposal that took effect on December 1, 2016.

Other rules proposals discussed at the meeting are in different stages of development. Part II presents three topics:

First, the Committee has concluded that there is no need to amend Civil Rule 5.2 to add a specific provision for correcting papers that are filed without redacting personal identifying information as required by the rule. But the Committee understands that the Bankruptcy Rules Committee will recommend adding a specific provision as Bankruptcy Rule 9037(h), and is prepared to consider the question further if the importance of uniformity among the rules is found to outweigh the lack of any independent need for a civil rule.

Second, consideration of the procedure for demanding jury trial has been expanded. The topic was opened up in response to a concern that the Style Project amendment of Civil Rule 81(c)(3) may have inadvertently created an ambiguity for cases removed before making a jury demand in state court. Discussion in the Standing Committee last June led to a post-meeting suggestion by two Standing Committee members that the demand procedure be reconsidered for all cases. Work has begun on this suggestion.

Third, Rule 45(b)(1) provides that a subpoena is served by “delivering a copy to the named person.” The majority view is that personal service is required, although some courts have recognized other means of delivery, most often by mail. The question whether other means of delivery should be recognized in the rule has been added to the civil agenda.

Part III describes the efforts of the Rule 30(b)(6) Subcommittee to determine whether it is feasible and useful to address by rule text some of the problems that bar groups have regularly identified with depositions of entities. The question was studied carefully a decade ago; the conclusion then was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later; the conclusion that time was that the earlier work was persuasive. Now the questions have been renewed by 31 active participants in the American Bar Association Section of Litigation. The Subcommittee has not yet formed any recommendation as to whether the time has come to attempt development of new rules text with a recommendation for publication. But it has begun work, focused by tentative initial drafts that illustrate the challenges presented.

Finally, the Committee and the Pilot Projects Working Group are finishing work on the Expedited Procedures and Mandatory Initial Discovery pilot projects. Recruiting courts to participate in the projects is under way. Part IV is a report on these projects.

I. ACTION ITEM: RULE 4(m)

Rule 4(m) was amended on December 1, 2015, and again on December 1, 2016. The intended result of the two amendments is clear. But the proposed 2015 amendment was inadvertently overlooked in preparing the proposal that led to adoption of the 2016 amendment. This action item recommends approval of the intended rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court this spring.

The proposed rule text revises the final sentence of Rule 4(m). Rule 4(m) establishes a presumptive time for serving the summons and complaint, allowing for extension by the court. The final sentence of the rule should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The two-step process of amending Rule 4(m) went astray in this way: The 2015 amendment began as part of a large package designed in part to accelerate the initial steps in a civil action. The published proposal shortened the presumptive time for service from 120 days to 60 days; after hearings and comments, the time was set at 90 days. While this change was being considered, the Department of Justice recommended that the exemptions be expanded to add Rule 71.1(d)(3)(A) notices of a condemnation action. This recommendation was accepted without controversy. As of December 1, 2015, service of a notice under Rule 71.1(d)(3)(A) was excluded from Rule 4(m).

The 2016 amendment added Rule 4(h)(2) to the set of exemptions. The addition was made in response to many comments on the published proposal that eventually became the 2015 amendment. These comments reflected uncertainty, even confusion, as to Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. Rule 4(h)(2) allows such service “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Invoking Rule 4(f) might bring service under (h)(2) within the Rule 4(m) exemption for service under Rule 4(f). That result makes sense—the problems with effecting prompt service outside the United States are much the same, and are augmented by shortening the presumptive time from 120 days to 90 days. But the rule text is ambiguous. So Rule 4(h)(2) was added to the exemptions.

The problem arose from preparing the Rule 4(h)(2) proposal by working from Rule 4(m) as it was in 2014, before the 2015 amendment. Adding the exemption for service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. That change was inadvertently not included in the proposal that, as subsequently published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The possibility of correcting the rule text as a scrivener's error was explored with Congress. The outcome is that the official print for the House of Representatives Committee on the Judiciary will include this footnote:

Rule 4(m) is set out above as it appears in the Supreme Court order of Apr. 28, 2016. As amended by the Supreme Court order of Apr.29, 2015, the last sentence of Rule 4(m) reads as follows: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The language added to the last sentence in 2015, "or to service of a notice under Rule 71.1(d)(3)(A)", probably should be part of Rule 4(m), but does not appear in the 2016 amendment.

The omission of Rule 71.1(d)(3)(A) from the list of exemptions should be corrected through the Rules Enabling Act process. The provision has already been published, reviewed, and adopted. Because the omission resulted from sheer inadvertence, the correction can be recommended for adoption without further publication.

A redline text showing the proposed technical amendment to Rule 4(m) is included as Attachment 1.

II. ONGOING PROJECTS

(A) Rule 5.2(i)

Civil Rule 5.2 provides privacy protection by allowing court filings that "include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number."

Rule 5.2 was developed in a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

Inevitably, some filings (especially in bankruptcy proceedings) include information that should have been redacted. The Bankruptcy Rules Committee has taken the lead in drafting a new Rule 9037(h) that would establish a procedure for replacing an improper filing with a properly redacted filing.

A separate memorandum prepared by Administrative Office staff describes in detail the process that has led the Civil and Criminal Rules Committees to consider whether to recommend provisions that would parallel proposed Rule 9037(h). (Appellate Rule 25(a)(5) adopts, as relevant, the Bankruptcy, Civil, and Criminal Rules. The Appellate Rules Committee has not undertaken an independent study of this issue.)

The Civil Rules Committee has concluded that there is no independent need to add to Rule 5.2 a specific procedure for correcting an inappropriate filing. The district courts seem to be managing the problem well. Once a lawyer becomes aware that redaction is needed, the lawyer is eager to substitute a redacted filing. The Committee has further concluded that the interests of uniformity alone do not counsel adoption of a new provision to emulate proposed Bankruptcy Rule 9037(h). The need for a uniform national procedure appears to be greater in the bankruptcy courts, both because they experience high volumes of improper filings and because the same improper filings may be made in different courts. When the Court Administration and Case Management Committee recommended that the Bankruptcy Rules Committee take up this question, it did not make the same recommendation to the other advisory committees. In addition, the interest in “uniformity” divides into at least two dimensions. If different sets of rules adopt provisions addressing a common problem, it is important to address the common problem in common ways, always recognizing the need for departures that reflect different circumstances in the context of different rules sets. But adoption of a provision in one set of rules does not create as strong an interest in adopting a parallel provision in other sets of rules that do not confront the same problem in the same way.

What remains open is further consideration whether the interest in uniformity counsels adoption of Civil and Criminal Rules provisions that parallel Bankruptcy Rule 9037(h). Not much work will remain if parallel provisions are to be pursued. The draft Rule 5.2(i) that has been considered by the Civil Rules Committee has advanced to the point of reconciling most of the differences between earlier drafts of Rule 9037(h) and Rule 5.2(i). It should be possible this spring to work out any remaining differences in time to reach recommendations to publish.

(B) Rules 38, 39, 81(c)(3)

Rule 81(c)(3) governs demands for jury trial in actions removed from state court. Subparagraph (c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand “[i]f the state law did not require an express demand.” Before the Style Project amendments of 2007, this provision excused the need to make a demand if state law does not require a demand. Most courts, recognizing the convention that Style Project changes do not affect meaning, continue to read the rule to excuse a demand after removal only if state law does not require a demand at any point. But it has been urged that “did not” creates a new ambiguity that may mislead a party who wants a

jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

The question whether to develop an amendment of Rule 81 to address this issue, and perhaps other questions about the effect of removal on demands for jury trial, was presented to the Standing Committee in June, 2016. Nothing was decided then. Shortly after the meeting, however, Judge Gorsuch and Judge Graber suggested that it is time to reconsider the demand requirement. Their suggestion, 16-CV-F (included as Attachment 2), is that, as in Criminal Rule 23(a), jury trial should be the standard. A case would be tried without a jury only if all parties waive jury trial. Like Rule 23(a), it would be possible to require that the court approve the waiver.

Several reasons are offered for the proposal. The revised rule might increase the number of jury trials, an outcome that is important to those who lament “the vanishing jury trial.” It also would avoid a procedure that may be a trap for the unwary litigant who wants a jury trial but fails to make a timely demand and fails to persuade the court to allow an untimely demand under Rule 39(b).

The Rules Committee Support Office is undertaking research to support further consideration of the demand procedure. It will attempt to explore the reasons that led the original Advisory Committee to adopt a demand procedure, and to set the time for demand early in the action. Local federal-court rules will be examined, and experience with the wide range of different state procedures will be studied. An attempt will be made to find out how often parties who want a jury trial fail to get one for failing to make a timely demand.

A different kind of practical wisdom also will be sought. Any procedure that may lead to forfeiture of a desired practice may be considered a “trap.” But many rules have that result because they serve important purposes. Requiring an early jury demand may be justified by the value to the court and the parties of knowing from the outset whether the case is to be tried to a jury. Advice will be sought where it can be found.

Many alternatives will be considered if the initial research suggests that the demand procedure should be reconsidered. The most modest approach would simply extend the time to make a demand, conceivably to very close to trial. The presumption that all cases will be tried to a jury could be implemented by a rule that requires a joint written waiver by all parties, or by variations that allow a single party to initiate waiver by inviting other parties to join. As with the criminal rule, the court’s approval might be required. And some thought could be given to the complications that arise when it is not clear whether any part of the case falls within a statutory or constitutional right to jury trial. The complications that arise when only some parts of the case fall within a right to jury trial also might be addressed.

This project is in an early stage. Advice on whether to proceed, and on the approaches that might be taken, will be welcome.

(C) Rule 45: Serving a Subpoena

Rule 45(b)(1) says simply this: “Serving a subpoena requires delivering a copy to the named person * * *.” Nothing further is said about what “delivering” means. A majority of courts interpret the word to require personal service. Others have accepted other means that actually deliver the subpoena to the named person. Mail is the means most frequently approved.

Personal service can be an expensive nuisance. Rule 45 was studied in depth only a few years ago. One of the questions considered was the method of serving a subpoena. An extensive memorandum prepared by Andrea Kuperman, the Rules Committee Law Clerk, explored the division of rulings on what constitutes delivery. The Discovery Subcommittee, having studied the question, recommended that no changes be made. The Committee accepted that recommendation. One of the reasons was that personal service is a dramatic event that emphasizes the importance of compliance.

The question has been renewed by a suggestion of the State Bar of Michigan Committee on United States Courts. They suggest that serving a subpoena is not as central to an action as serving the summons and complaint that commence the action and initiate the process that can lead to an adverse judgment. For this reason, they suggest that any of the means of serving a summons and complaint authorized by Rule 4(e), (f), (g), (h), (i), and (j) be allowed as well for serving a subpoena. Their proposal also would allow “alternate means expressly authorized by the court.”

The first step will be to decide whether to take up again a topic that was recently considered and put aside. The simplest reason to go forward would be to establish a uniform and clear practice. Adopting the majority requirement that service be made in person would be the easiest way to do that.

Still, it is tempting to believe that substantial advantages could be found in accepting other means of service. If we can trust service of a summons and complaint by “leaving a copy * * * at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there,” Rule 4(e)(2)(B), why not also trust such service for a subpoena? Or what of service by mail—is the risk not so much the possibility that properly addressed postal mail might go astray as the possibility that increasing numbers of people rely on e-mail and other means of communication and simply ignore real mail?

If this project goes forward, setting the level of ambition may prove the greatest challenge. An amendment might be limited to service on a natural person in the United States, whether or not a party to the action. It might venture beyond personal service only to “abode” service and perhaps

conventional or return-receipt-required mail. The questions whether those modes of service should be added seem straightforward questions of practical effect.

It also would be easy enough, and perhaps quite helpful, to add a provision authorizing service by any means approved by the court. Some additional guidance might be attempted in rule text, but might not be necessary.

Venturing beyond those simple starting points could lead to uncertain problems. It might be useful to distinguish between service on parties and nonparties. For a party, it would be worthwhile to consider service on a party's attorney, as Rule 5(b)(1) authorizes for many papers after the summons and complaint, although the limited use of Rule 45 subpoenas directed to parties could limit the value of that distinction.

Full-scale absorption of the many provisions of Rule 4 would present several issues. One simple illustration is provided by Rule 4(e)(1), which authorizes service on an individual "by (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." California, for example, authorizes service of a summons and complaint by first-class mail with a return receipt process. Rule 45(a)(2) directs that a subpoena must issue from the court where the action is pending. A single action may involve many subpoenas to be served on many persons in many states. Although incorporation of state practice has some advantages, the potential complications may outweigh the potential advantages.

This project will command further work, but remains in a tentative phase. The recent Committee decision to put it aside will be weighed carefully in deciding whether now to go ahead. Again, advice will be welcome.

III. RULE 30(b)(6) SUBCOMMITTEE

Rule 30(b)(6) authorizes a party to "name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity." The notice "must describe with reasonable particularity the matters for examination." The organization must designate real persons to testify, and "may set out the matters on which each person designated will testify." "The persons designated must testify about information known or reasonably available to the organization."

Rule 30(b)(6) has come back to the agenda for the third time in 12 years. In 2004 a Committee of the New York State Bar Association submitted a lengthy suggestion that problems with implementing Rule 30(b)(6) in practice should be studied with an eye to rule amendments. A Rule 30(b)(6) Subcommittee was formed. Its work included a survey of many bar groups—a

summary of the responses filled 27 pages. In the end both the Subcommittee and the Committee concluded that although Rule 30(b)(6) may be misused in a number of different ways, amendments of the rule text could do little to alleviate the problems.

In 2013 a committee of the New York City Bar expressed concerns that were in part similar to the 2004 suggestions, but that added some new concerns. The Committee again concluded, in part in light of the recent thorough examination, that it should not attempt to develop new rule provisions.

Now 31 members of the ABA Section of Litigation Federal Practice Task Force, acting “in our individual capacities only,” have opened the familiar questions once again. Rather than advancing specific recommendations, they request that the Committee examine Rule 30(b)(6) once more, “with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.”

A new Rule 30(b)(6) Subcommittee has been appointed to examine these questions. Its work is well begun, but remains far from reaching any conclusion whether to recommend changes in rule text. The work is being undertaken because of the cumulative force of three thoughtful suggestions from three different groups, each of which have distinguished themselves by making helpful contributions to the Committee’s work over many years. The eventual outcome may be to recommend several substantial amendments, a few minor amendments, or no amendments at all.

Draft rule sketches have been prepared to illustrate the range of questions that are being considered. They are only “pencil-scratch” drafts, useful to focus discussion without attempting to forecast what actual rule text might look like. They serve that function well, particularly when discussion shows that particular provisions should be dramatically revised or abandoned. The Subcommittee has begun discussion of many, but not all, of the drafts. Discussion at the November Committee meeting covered only a few of the topics, but was aided by thoughtful contributions from several observers.

Additional work by the Subcommittee will be assisted by further research, drawing on the facilities of the Rules Committee Support Office. Among other approaches, there will be a literature search that looks primarily at practitioner resources such as CLE materials that may reflect actual practice issues rather than more abstract academic commentary. Local district rules will be surveyed to determine whether they address possible problems in useful ways; individual standing orders may also prove useful (one example has already been examined by the Subcommittee). State practices will be studied as well. And among the many questions, one in particular will be explored—recognizing that the testimony of a person designated to testify for an organization is admissible in evidence, can the testimony be given any greater binding effect as a “judicial admission”?

The draft rules texts are set out in Attachment 3, which provides materials presented at the November 3, 2016 meeting, with a reminder that they are designed only to illustrate a number of issues, not to be a basis for actual recommendations. It is far too early to be doing anything more than attempting to determine what issues, if any, deserve to be pursued through the hard work that would be required to develop proposals that could be recommended for publication.

A first point can be made quickly. For whatever reason, Rule 30(b)(6) has become an important means, at least in some types of litigation, to identify the documents to be requested and the persons to depose in further discovery. It was strongly commended to the Committee as an effective, low-cost tool routinely used without difficulty in individual employment litigation.

A second and contrasting point can be made as quickly. There are regular complaints that notices of Rule 30(b)(6) depositions do not live up to the requirement of describing with reasonable particularity the matters for examination, and often describe far too many matters. There may be little point in attempting to find rule text that would be more effective than “describe with reasonable particularity.” Attempting to set a limit on the number of matters described might easily lead to broader, less particular descriptions—as with other discovery discussions, it may often be better to confront a greater number of better-described matters for examination.

There is a third familiar issue. It is common to complain that the organization named as deponent does not actually satisfy the requirement that it educate the persons who testify “about information known or reasonably available to the organization.” It does not seem likely that better preparation can be elicited by more demanding rule language, although the language of Rule 33(b)(1)(B) may be somewhat stronger—a party’s agent responding to an interrogatory “must furnish the information available to the party.”

Beyond those starting points, it may help to identify some of the more challenging questions illustrated by the initial draft, without attempting any indication of relative importance or reasonable prospects for effective rule amendments. Simple identification may suffice for most of these questions. Resort to the draft rule text, identified by the relevant subparagraph, likely will suffice for others.

(A) Time for Notice: The organization deponent is obliged to prepare one or more persons to testify to information known or reasonably available to it. Rule 30(b)(1) requires only “reasonable written notice” of a deposition. Should (b)(6) specify a particular time calculated to provide a reasonable opportunity to gather the information, determine which persons may be best able to convey it, and educate them to testify?

(B) Matters for Examination: This provision incorporates verbatim the present requirement that the notice describe with reasonable particularity the matters for examination.

(C) Objections to Notice: Should there be an express provision for objections, similar to the Rule 45(d)(2)(B) provision for a subpoena that commands production of documents by a nonparty? Rule 45 suspends production until a court orders it. So 30(b)(6) could suspend the deposition. Objections might go to such matters as the number of subjects designated, failure to designate the matters with reasonable particularity, or proportionality. One advantage of adopting an express objection procedure would be to require the parties to meet and confer before a motion to compel is made.

(D) Pre-deposition Disclosure of Exhibits: A party who has noticed a Rule 30(b)(6) deposition is free now to provide the deponent organization with documents that will be used to examine the persons who testify. This practice may clarify the matters for examination, and facilitate effective preparation of the witness. One approach would be to encourage this practice by a rule that says simply that a party “may” do this. A more forceful approach would require advance provision of all exhibits to be used. That approach could easily lead to providing a great mass of exhibits, for fear of omitting something that might be useful. The effect would be to stir objections, and (at least sometimes) massive over-preparation. It also could diminish the opportunity for useful “surprise” questions.

(E) Designation of Persons to Testify: The first new part of this subparagraph requires the organization to provide notice, _ days before the deposition, of the identity of the persons who will testify; if more than one person is named, the organization must state which matters each person will address. Further provisions would make the designation a certification that the persons named have been properly prepared to provide all information known or reasonably available to the organization, and provide for renewal of the deposition at the organization’s expense if the named person is unable to provide information. A final provision would allow an organization to give notice that it is unable, after good faith efforts, to provide information on a designated matter.

(F) Questions Beyond Matters Designated: This provision would limit questioning to the matters for which the organization’s witness was designated to testify. This is a preliminary effort to address the common circumstance that the witness has direct knowledge of facts that are relevant to the litigation but that are beyond the matters designated in the notice addressed to the organization.

(G) Contention Questions: This draft seeks to force contention discovery into Rule 33(a)(2) by providing a mirror negative: “The witness may not be asked to express an opinion or contention that relates to fact or the application of law to fact.” There are indications that some lawyers attempt to force an organization’s witness to describe the organization’s legal positions. And at least at the outset, this practice seems undesirable.

(H) Judicial Admissions: The effects of a designated witness’s testimony as “binding” the organization is frequently discussed. One effect is that the testimony is admissible in the same way as deposition testimony of an individual party. That means the organization can contradict the

testimony, a practice that ties to the question of supplementing the deposition testimony. Another possible effect is that the testimony can somehow become a “judicial admission” that the organization cannot contradict. There are strong arguments that the judicial-admission approach is sensible, if at all, only as a sanction for a serious failure to prepare the witness. The draft sketch approaches this effect indirectly: the court may not treat any answer as a judicial admission by the organization if it finds the witness was adequately prepared.

(I) Supplementation: It is not surprising that even a carefully prepared witness may not be able to answer all of the questions that may be covered by the matters described for examination. Rule 26(e) does not require supplementation of deposition testimony, except for the deposition of an expert required to give a report under Rule 26(a)(2)(B). It could be useful to add a duty to supplement Rule 30(b)(6) testimony. Supplementation can be useful not only when the designated person has not been adequately prepared to answer a specific question but also when continuing preparation by the organization uncovers information not known before the deposition, and when the organization had not understood the matters described for examination in the same way as the person who puts the question. There is an offsetting concern that a duty to supplement would be seized as an opportunity to answer “I do not know. We will get back to you later on that.” The draft approaches the issue by creating a duty to supplement, apparently on paper, coupled with permission for resuming the deposition with regard to the supplemental information. Bracketed language would direct that the resumed deposition is at the organization’s expense.

(J) Number and Duration of Depositions: This subparagraph would bring into rule text advice now provided in Committee Notes: A Rule 30(b)(6) deposition is counted as one toward the presumptive limit of 10 depositions per side, no matter how many persons are designated to testify for the organization. But the deposition of each person designated is treated as a single deposition for purposes of the presumptive limit to one day of seven hours.

IV. PILOT PROJECTS WORKING GROUP

Since its inception in the fall of 2015, the Pilot Projects Working Group has focused on the development of two pilots.¹ The first is the Mandatory Initial Discovery Pilot (“MIDP”), and the second is the Expedited Procedures Pilot (“EPP”). While the goal of both pilots is to measure whether improvements can be achieved in the pretrial management of civil cases to promote the just, speedy and inexpensive resolution of cases, they aim to do so in different ways. The Judicial Conference of the United States approved both pilot projects at its September 2016 meeting. The target for implementation of both pilots is Spring 2017.

The goal of the EPP is to expand practices already employed successfully by some judges and thereby promote a change in culture among federal judges generally by confirming the benefits of active management of civil cases through the use of the existing rules of civil procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90% of cases, and within 18 months of service or appearance in the remaining cases. The overarching design of the EPP is for the pilot courts to achieve this target objective of having 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months.

The Working Group held numerous planning calls to refine the contours of the EPP. Analysis of civil filings across the federal courts reflects that most often discovery lasts between 120 and 180 days, but the Working Group realizes that some cases may require more time to complete discovery. The Working Group is of the view that EPP pilot judges should have flexibility in determining exactly how to informally resolve most discovery disputes, so long as they do so without the delay and expense associated with formal briefing. While the Working Group recognizes that a short deadline for ruling on dispositive motions may deter some districts (especially those with large civil dockets) from participating, it believes that a 60-day deadline from the filing of the reply is usually a sufficient amount of time for judges to rule, and that a longer deadline would jeopardize meeting the 14/18 month trial targets. Finally, the Working Group believes that EPP judges should have flexibility to determine the point at which to set a firm trial date in their civil cases (for

¹ The Working Group includes members from the Standing Committee, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management. It is currently chaired by Judge Paul Grimm, a former member of the Civil Rules Committee.

example: when the initial scheduling order is issued; when discovery is complete; when dispositive motions have been filed; or when dispositive motions have been decided), so long as the trial date is within the 14/18 month target.

The Working Group finalized its recommendations regarding the details of the EPP in October, and the Advisory Committee on Civil Rules has now given its approval to the pilot. A “user’s manual” is being developed to give guidance to EPP judges, and model forms and orders as well as other educational materials will be developed before the EPP is ready for implementation. Mentor judges will be made available to support implementation in the pilot courts. The goal is to have the project in place in 2017, to run for a period of three years. The current description of the EPP is included as Attachment 4.

The goal of the MIDP is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce cost, burden, and delay in civil litigation. The MIDP will require a party to respond to a court order to produce specific items of information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case and including information that is both favorable and unfavorable to the responding party. In developing the MIDP, the Working Group drew on the positive experience of various state courts and the Canadian courts that have adopted mandatory disclosures of relevant information. If the MIDP results in a measurable reduction of cost, burden and delay in civil litigation, then this may provide empirical evidence supporting a recommendation that the Advisory Committee propose amendments to the civil rules to adopt mandatory initial discovery in all civil cases (except for a defined subset of cases where discovery generally does not take place).

The details of the MIDP have been set out in a proposed standing order that will be issued in the pilot courts, as well as a “user’s manual” that supplements the standing order. The proposed MIDP standing order is included as Attachment 5. Some features of the MIDP are: the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss the initial discovery with the parties at the Rule 16(b)(2) case management conference, and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised. Hence, answers, counterclaims, crossclaims and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to answer, etc. in order to consider a motion based on: lack of subject matter jurisdiction; lack of personal jurisdiction; sovereign immunity; absolute immunity; or qualified immunity.

As with the EPP, the Working Group is developing a “user’s manual” and other educational materials to assist participating judges. For both pilots, the Federal Judicial Center is developing training. An early draft of a “Mini-Curriculum for an Intensive Case Management Pilot Program” is included as Attachment 6. The FJC will also be conducting data collection and analysis regarding each pilot. A memorandum from Emery Lee outlining that proposed effort is included as Attachment 7.

The Working Group is drawing to the close of its efforts to specify the details of the EPP and the MIDP, and has begun the task of recruiting district courts to participate. The hope is to have 5 to 10 districts of various sizes from diverse parts of the country that are willing to participate in each pilot, and then to begin implementation of the pilots in the Spring of 2017. Each pilot will last for a period of three years. Communication with the chief judges of districts interested in participating, or with other contact judges in those districts, is underway. Several districts are set to participate, but a few more are sought.

The Working Group hopes that the Standing Committee will provide further feedback that may be helpful as the details of the EPP and MIDP are finalized, and that members of the Committee will themselves reach out to other districts that might be willing to participate, or make the Working Group aware of possible districts. Such efforts should be coordinated through Judge Grimm (D. Md.). We are looking for five to ten districts for each pilot; no one district would be selected for both projects. Districts of different characteristics should be involved, both large, medium, and small, and from different parts of the country. Although it will be desirable to have participation by every judge on each pilot court, there is some flexibility about engaging a court that cannot persuade every judge to participate.

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ATTACHMENT 1

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

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), or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

This is a technical amendment that integrates the intended effect of the amendments adopted in 2015 and 2016.

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MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.

ATTACHMENT 3

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Building a "stand-alone" Rule 30(b) (6)

A primary thrust of the Sept. 1 conference call was to include many specifics in Rule 30(b)(6) that either are found elsewhere in the rules or not included in the rules at all. This treatment might work better as a new Rule 30.1, or something of the sort. For present discussion purposes, however, it is presented as an extensive amendment to present 30(b)(6). The Subcommittee is not urging this approach, but instead offering the following sketches to show how such a rule might appear, and also to introduce various specifics that might be added to the current rule in a less comprehensive manner than this draft presents. For ease of discussion, this presentation will treat each sub-part of the sketch separately. They could be combined, but a mix-and-match treatment is also possible.

(6) Notice or Subpoena Directed to an Organization.

~~In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency, and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules. When a deponent is named under this paragraph (6), the following rules apply:~~

This revision is not designed to delete the specifics now in the rule, but rather to relocate them in the sub-parts presented below.

(A) *Minimum notice of examination.* The notice or subpoena must be served [at least ___ days] {a reasonable time} before the date scheduled for the deposition.

Paragraph (A) could raise the more general question why we don't have a specific notice period for all depositions. Rule 30(b)(1) says only that there must be "reasonable written notice to every party." One answer to this question is that although there is no rule-imposed requirement to prepare for other depositions, there is an obligation under the rules to prepare the witness for this kind of deposition.

As noted below, several other sketches seem to assume a minimal notice period of some period of days to permit other actions to be taken within the defined time before the deposition. Those provisions might not be pursued, but if they are it would seem that some overall minimum notice period would follow.

An alternative to specifying a period in the rule, indicated in braces, is to say that a "reasonable time" is required. That might be explained in a Committee Note to be a sufficient time to permit the other things the new rule would require to be done to be completed, if those additional things are indeed included. But saying a "reasonable time" may be too oblique for that purpose. Putting that direction in 30(b)(6) might also seem odd because it is already in 30(b)(1).

Under the law of some states there is a specific notice period for a deposition. That period may differ in different places. Within the Civil Rules, one might note that Rule 33 provides a 30-day period for responding to interrogatories and Rule 34 sets 30 days for production of documents. Is that clearly enough time for this purpose? In any event, if other things must be done more than a certain number of days before the deposition (as provided in (D) and (E)(iii) below, for example), those requirements must be taken into account in setting the overall minimum notice period.

(B) Matters for examination. The notice must describe with reasonable particularity the matters for examination.

(B) attempts to carry forward the current language on specificity of the list of matters. One could also add a numerical limit on those matters. As noted below, one could alternatively make the effect on the ten-deposition limit depend on how many matters are listed. For example, if the notice listed more than ten matters, the deposition might be counted as two (or three, if more than twenty matters were listed). But as with Rule 34, it may be that there is a tension between a numerical limit and the desire for more pointed "rifle shot" designation of topics for examination. For the present, (B) does not confront these issues that are raised by subsequent sub-parts.

- (C) *Objections to notice.* The organization may object in writing within __ days of service of the notice by stating with specificity the grounds for objecting, including the reasons.
- (i) Upon service of an objection, the party that served the notice or subpoena may move under Rule 37(a) for an order compelling testimony.
- (ii) Testimony may be required only as directed in the order[, and the court must protect the organization against disproportionate burden or expense resulting from compliance].

(C) is designed to work like the provision in Rule 45(d)(2)(B) excusing compliance with a document subpoena on objection by the nonparty. It might be noted that those subpoenas are already subject to the 30-day rule of Rule 34(b)(2)(A), but that the objection period is only 14 days after service of the subpoena. That may be something of a trap for the unwary, but it does perhaps suggest the need to take account of the relation between specified time periods under the current rules. Presumably it is desirable to have a shorter period for the objections, so those are known before the deposition is scheduled to occur.

One topic handled only by implication is the need to meet and confer to resolve objections; invocation of Rule 37(a) seems sufficient to do that. But perhaps an explicit reminder in the rule would be desirable.

Rule 26(g)(1) already provides that making an objection certifies that the objector has a valid basis for the objection. There seems no need to repeat that here.

Another topic is proportionality. There is a small effort in (C)(ii), in brackets, to introduce that topic. Rule 33 already is limited to "any matter that may be inquired under Rule 26(b)," and Rule 34 provides for "a request within the scope of Rule 26(b)." Both those rules therefore already invoke the principles of proportionality in Rule 26(b)(1) and (2). Is there a value to re-raising them here, and if so would an invocation of Rule 26's scope provisions be sufficient? If some reference to proportionality is in order, would a statement in the Committee Note suffice?

It may be that there is no need for the rule to provide a specific method for objecting, for lawyers already know how to object. It might be that the method presented in this sketch is important because it suspends the deposition until the objection is resolved. But that could easily be overkill; an objection to only one matter on a list would suspend inquiry altogether.

Alternative One

- (D) Disclosure of exhibits. At least ___ days before the date scheduled for the deposition, the party noticing the deposition must provide the organization with copies of all exhibits to be used as exhibits during the deposition.

Alternative Two

- (D) Disclosure of exhibits. At least ___ days before the date scheduled for the deposition, the party noticing the deposition may provide the organization with copies of exhibits to be used during the deposition. If such notice is given, the witness must be prepared to provide information about [the exhibits] {the topics raised by the exhibits}.

There are two alternative approaches to the idea of providing advance specifics regarding exhibits to be used during the deposition. Alternative One may be too demanding and restrictive. Alternative Two might serve much the same purpose in a more flexible manner.

One concept behind this provision is that, because there is a preparation obligation with this sort of deposition, additional notice of the topics to be addressed is important. Too often, perhaps, the list of matters served with the notice does not adequately notify the organization about what the party serving the notice actually plans to ask about during the deposition. As a consequence, the organization may be handicapped in identifying a suitable person to designate to testify, and also in preparing that person for the deposition.

Another concept behind it is derived from some experience in very complex litigation. For example, in *In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988), the district court imposed a deposition protocol in a litigation in which there had been massive document production and it was anticipated that around 2,000 depositions would be taken. To expedite the depositions, the district court ordered that the questioning party must provide a list of all exhibits to be used during the deposition five days before it was to occur.

The Plaintiffs' Steering Committee obtained appellate review of this order, arguing that it intruded on work product protection. Stressing the dimensions of this massive litigation and invoking Rule 16 and an earlier version of Rule 26(f), the First Circuit affirmed (*id.* at 1015):

When case management, rather than conventional discovery, becomes the hammer which bangs against the work

product anvil, logic demands that the district judge must be given greater latitude than provided by the routine striking of the need/hardship balance [under Rule 26(b)(3)((A)(ii))].

Below, a "case management" approach sketching possible changes to Rules 16 and 26(f) is offered as an alternative to either of the alternatives above. The Subcommittee's reaction to (D) is that would be a big change. Particularly if "all" were retained in Alternative One, it might result in a deluge of material from litigants who worried that they might be foreclosed from using an exhibit not provided. In addition, if the deposition included document production, such a rule provision would seem to forbid asking the witness about the documents produced at the deposition.

Alternative Two might avoid many problems that Alternative One could produce. It could provide the party noticing the deposition an opportunity to provide a manageable number of documents. One idea is that the organization has a better idea what will come up in the deposition once it sees the documents. It might also provide that supplying such advance notice has consequences for the duty to prepare. At the same time, if there is an advantage to surprise even in this sort of deposition, the interrogating party need not reveal its "surprise" exhibits. That might, of course, prompt objections to answering questions about such documents on the ground that they are "surprise" exhibits.

Whether a rule provision addressing such advance notice is a good idea remains very much open. In part, it may be that experience with such regimes could prove important in evaluating their utility. If they are only justified in extraordinary cases like the San Juan DuPont Plaza litigation, it seems dubious to include a provision in the rules for all cases. But if experience with this sort of requirement shows real benefits, it may be that those benefits could be general enough to warrant inclusion in the rules. Of course, the case management approach below could suggest, in a Committee Note, that one measure a court might include in a Rule 16 order when appropriate would be such an advance notice requirement.

It might also be noted that there is nothing now precluding a party that notices a 30(b)(6) deposition from doing what Alternative Two says, although no rule now says that providing advance notice in this manner directly affects the witness-preparation obligation. As an antidote to confronting "I don't know" answers at the deposition, it might be a very good idea.

(E) Designation of persons to testify.

(i) The organization must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf about [information] {facts} known or reasonably available to the organization.

(ii) A subpoena must advise a nonparty organization of its duty to make this designation.

(iii) At least ___ days before the deposition, the organization must notify the party that noticed the deposition of the identity of the person or persons it has designated. If it has designated more than one person, it must also state which matters each person will address.

(iv) By designating a person or persons to testify on its behalf, the organization certifies under Rule 26(g)(1) that each witness [is capable of providing] {has been properly prepared to provide} all [information] {facts} known or reasonably available to the organization about that matter. [If the witness is unable to provide [information] {facts} on a matter, the organization must prepare the witness [or another witness] after the deposition is adjourned, and the deposition may resume at the organization's expense to address that matter.]

(v) If the organization is unable, after good faith efforts, to locate [information] {facts} on a matter for examination, or a person with knowledge of that matter, it must so notify the party that served the notice or subpoena [at least ___ days before the date scheduled for the deposition]. That party may then move the court under Rule 37(a) for an order compelling testimony on this matter, but such testimony may only be required as directed by the court.

Subparagraph (E) attempts to do a lot of things. In item (i), it tries to carry forward the current provision about designation of a witness or witnesses. Item (ii) similarly tries to carry forward the directive that a subpoena advise a nonparty of this obligation. (This provision would not be needed if 30(b)(6) depositions were limited to parties.) And item (iii)

then calls for notifying the party taking the deposition about who will actually be testifying, and (if more than one person is designated) about which topics. How much notice should be required? Is it correct that this notice should not be required until some time after the disclosure of exhibits called for by Subparagraph (D) (if that idea were to be pursued)? How much time is necessary after that designation pursuant to (D) to enable the responding organization to employ the insights derived from the exhibits to select the right person or persons to testify?

Items (iv) and (v) try to balance obligations, and to alert users of this rule of their Rule 26(g) obligations. Item (iv) offers two articulations of what is certified -- proper preparation or actual ability to answer -- that may serve to underscore the possible delicacy of the task the rule commands the organization to accomplish. Item (v) is designed to work like Subparagraph (C) when the organization claims ignorance. But won't there be many situations in which the organization has some information and the party seeking discovery wants more?¹

One alternative introduced in the sketch above is whether to change from "information" to "facts." From time to time, it has been urged that inquiries in 30(b)(6) depositions should not go beyond locating facts or sources of evidence. In part, that concern may resemble the concern lying behind subparagraph (G) on contention questions. One might, in this connection, note that Rule 26(a)(2)(B)(ii) was recently changed to require disclosure of "the facts or data considered by the witness in forming [opinions]." Formerly, it had required disclosure of the "data or other information considered by the witness," and this change was designed to guard against undue intrusion into attorney/expert communications. Whether this situation is similar could be debated.

But making a change here might produce unfortunate discontinuities. Rule 26(b)(1), for example, refers to discovery of "information," not "facts." In regard to pleading requirements, there was a heated debate about what was an allegation of "fact" a century ago. Revisiting such debates would not likely be productive.

¹ Note: One might somewhere try to require the organization to select the "most knowledgeable" witness, but this sketch does not do that. To do that may be a major challenge for the organization, and could also introduce the issue presented in *Wultz v. Bank of China*, 293 F.R.D. 677 (S.D.N.Y. 2013) -- what happens when that person is located overseas? If this sketch's route is adopted, it might be worth saying in a Committee Note that the organization cannot designate a person who is far away and then refuse to produce the person based on the distance limitations in Rule 45(c).

Regarding (E)(iii), it seems that something like this exchange of identities of designated witnesses happens with some frequency, which suggests that it can work. Perhaps it would work better via a party agreement or a Rule 16 court order (in the case management model introduced below). But if (F) below is also adopted (limiting questioning to listed matters), there might be complications with a person who is also a fact witness familiar with additional topics.

(E)(iv) may cause more problems than it solves. Often, it seems, parties who make a genuine effort to prepare their witnesses find that the questioning eventually reaches topics or sub-topics on which the witness has not been prepared. To suggest that the party is then in violation of Rule 26(g) seems overly strong medicine. Moreover, Rule 26(g) is basically a sanction provision. Treating all such shortfalls of preparation on something as an occasion for a sanctions motion seems like overkill and may invite gotcha litigation. Perhaps such a provision would put a premium on asking surprise questions that have a tenuous link to matters on the list. That would surely put pressure on the particularity of the list. It might be better to speak of remedies. One approach along that line might be a provision like the direction in brackets that the deposition be adjourned instead of completed, with a continuation at the organization's expense to explore the matter in question.

Regarding (E)(v), one question might be whether that is needed. It might be bolstered by a requirement that the party giving such notice also provide specifics on the efforts made to obtain responsive information or facts. If the argument is that another form of discovery -- interrogatories, for example -- would be a better way of inquiring about this topic, we already have a provision in Rule 26(b)(2)(C) that seems to speak to this situation and to specify what is to be done. Does adding a rule provision here with timing and other complications improve matters? Could a Committee Note reference to Rule 26(b)(2)(C)(i) suffice for the purpose?

Additionally, should something like (E)(v) be pursued, it is likely that the question could arise whether the entire subject is off limits during the deposition. Presumably some inquiry should be allowed about the efforts made to obtain responsive information (or facts). Moreover, the sketch seems to invite a motion to compel. Is it clear how that is to work? "You can't get blood from a stone" might be one reaction.

An alternative location for a provision about this problem, if there is reason to give serious consideration to such a provision, might be in (C), which deals with objections to the notice. But this sort of notice is not so much an objection as a report.

(F) Questioning beyond matters designated. A witness may be questioned only about the matters for which the witness was designated to testify.

(F) takes one position on the "questioning beyond the notice" issue. Another could be to affirm that such questioning is allowed but try to specify how that impacts either the one day of seven hours or the second deposition problem (should it later be suggested that this person should sit for an "individual" deposition). One thing such a provision would do responds to something the ABA submission raised -- it would provide an explicit basis for objecting to such questioning. But a rule of this sort may be a very blunt instrument for that purpose.

One blunt aspect of this instrument would emerge when the person designated also has personal knowledge of other topics relevant to the action. Surely there are many cases in which that is true and it would not make sense to pretend otherwise. And insisting either that the 30(b)(6) deposition count as two depositions (one organizational and the other individual), or that the witness must return another time for an "individual" deposition, seems senseless.

Another blunt instrument aspect of such a rule provision is that it may invite an even longer list of topics. One concern that has been raised is that lawyers may be using overlong lists already. But if a party must "pay" for a short list by using up two of its ten depositions, that seems an unfortunate result of such a provision.

Yet another concern is whether the dividing line between listed matters and other topics will often be unclear. Of course, that could arise again in the "judicial admissions" topic addressed next below. Moreover, if something like (D) above (about advance provision of exhibits) were adopted, would that mean the witness nonetheless could not be asked questions about what was in those exhibits unless the topic of the questions directly related to a matter on the list?

(G) Contention questions. The witness may not be asked to express an opinion or contention that relates to fact or the application of law to fact.

(G) is modeled on Rule 33(a)(2). A Committee Note might say that this rule provision recognizes that there is a big difference between answering a contention interrogatory and responding spontaneously in a deposition setting. What's more, Rule 33 invites deferral even of the interrogatory answer, which shows that this sort of questioning is inappropriate in the hothouse deposition setting. A Committee Note might also affirm that it is not appropriate to ask such a witness to elect between the versions of events described by other witnesses, something we have heard is sometimes attempted under current Rule 30(b)(6).

It might be noted in connection with (G) that there is no attempt in the rule sketch to say that Rule 26(b)(3) applies. There is a tension between questioning to verify that the witness has been properly prepared for the deposition and the sort of intrusion into attorney preparation that we certainly do not want to enable. A Committee Note could probably make this point, but it seems odd to say in this rule that 26(b)(3) applies to this form of discovery because it applies to all forms of discovery already.

Note that the Subcommittee has not yet discussed (G).

(H) Judicial admissions. If it finds that the witness has been adequately prepared under Rule 30(b)(6)(E)(iv), the court must not treat any answer given in the deposition as a judicial admission by the organization.

(H) deals with the judicial admission question. Whether that term is well enough understood to be used in this way in a rule might be an issue. Tying that to adequate preparation seems consistent with cases dealing with failure to prepare, or at least seemed that way a decade ago when the Committee last dealt with this rule. Adding such a qualification may be unnecessary because Rule 37(c)(1) is always there to support a court order foreclosing presentation of material that should have been disclosed, provided in response to discovery, or provided by supplementation under Rule 26(e). It might also be argued that the condition in this sketch implies that the court will use that power whenever there is a failure to prepare. Frankly, it seems that courts do not lower the boom unless the failure to prepare is fairly flagrant.

One reaction to these issues has been mentioned above -- the need for research about the existing case law on judicial admission treatment of 30(b)(6) deposition responses. Except for noting that need for research, **the Subcommittee has not yet discussed (H)**.

The Subcommittee has not yet discussed the topics presented below. Accordingly, this is only a Reporter's sketch designed to facilitate discussion.

- (I) Supplementation. An organization that has designated a person to testify on its behalf must supplement or correct the testimony given [in a timely manner] {no later than the date pretrial disclosures are due under Rule 26(a)(3)} [no more than ___ days after completion of review by the witness under Rule 30(e)] if it learns that the testimony was incomplete or incorrect in some material respect. The party that took the deposition may then retake [reopen] {resume} the deposition of the witness with regard to the supplemental information [at the expense of the organization].

(I) raises a number of issues. The first is familiar -- is this an invitation to say "We'll get back to you"? If so, it may actually weaken the duty to prepare. The stronger (E)(iv) and (H) are on the requirement to prepare the witness, the less that risk, perhaps.

But the timing feature causes difficulty. Tying the date for supplementation to the 26(a)(3) date has some appeal, in terms of preparation for trial, but it seems far too late for something that may require further discovery even if discovery is closed by then. Tying it to when the deposition transcript is completed may be too early for genuinely belated discoveries. Moreover, Rule 30(e) review occurs only in cases in which there is a request for review by the deponent or a party. Though that would likely occur most of the time for 30(b)(6) depositions, it might not occur all the time.

Another possible concern would be with matters covered by (E)(v) -- if the organization gave notice that it had no information on a given matter and later happened upon information by some fortuity, is there a duty to supplement? Were (E)(v) not pursued, this would not be an issue, but if it is pursued it could become an issue.

(J) Number and duration of depositions. For purposes of Rule 30(a)(2)(A)(i), each deposition under paragraph (6) is counted as one deposition, but for purposes of Rule 30(d)(1), the deposition of each person designated is treated as a separate deposition.

(J) sets out the deposition-counting and duration directions now in the 1993 and 2000 Committee Notes. Those could be changed. How one deals with questioning beyond the matters listed could present problems of this sort. If (F) is not adopted, questioning beyond the list could be regarded as meaning that one deposition of one individual would be counted as two depositions for the ten-deposition limit, even if it were relatively short. So being this specific in the rules could sometimes tie the parties in knots. Trying to connect the number of depositions allowed to the number of matters on the list might be included here, but might produce unfortunate strategic behaviors.

(K) Additional depositions of same organization.
Notwithstanding Rule 30(a)(2)(A)(ii), any party
may notice an additional deposition [or additional
depositions] of the same organization on matters
not listed in the notice for the first [a prior]
deposition of the organization under paragraph
(6). But any such deposition is counted as an
additional deposition under Rule 30(a)(2)(A)(i).

(K) adopts the idea that a second deposition of the organization on different subjects is permitted, but that it counts against the ten-deposition limit. Those starting points could be changed. And there may be difficulties in deciding whether the second deposition is really on "matters not listed in the notice" for the first such deposition. That could become cloudier if questioning beyond the matters listed is allowed (as (F) says it is not).

Focusing on Case Management As a Method of Regulating Rule 30(b)(6) Depositions

As an alternative to the approach above, or to parts of it, one might instead focus mainly on case management solutions to the problems under discussion. That approach could involve considerably less detail in rules, and might be preferable. For one thing, the detail provided in the rule sketch above could be regarded as rather rigid. In a sense, it provides default positions that might be bargaining chips in the jockeying that may sometimes attend this discovery activity.

The Subcommittee has not yet discussed these topics. At least some members of the Subcommittee are initially inclined to prefer this approach to the issues raised rather than a detailed stand-alone rule. The Subcommittee solicits input from the full Committee on these ideas.

One approach would involve a modest addition to Rule 26(f)(3):

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;

(E) any issues about [contemplated] Rule 30(b)(6) depositions, including _____;

~~(F)~~ what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(G) any other orders that the court should issue under

Rule 26(c) or under Rule 16(b) and (c).

A question under this approach would be whether to include in the rule reference to the sorts of topics included in the very specific "stand alone" rule sketched above. (C), for example, commands the parties to include discussion of the form or forms in which electronically stored information must be provided and invites a report on any other issues the parties might have identified. Various of the items set out in the stand-alone rule might instead be mandatory topics for reporting in Rule 26(f). Whether one could be specific about those topics at that early point in the litigation is not clear, however.

Even so brief a rule provision as the one sketched above could theoretically support a very substantial Committee Note addressing many of the items included in the comprehensive sketch of an amended Rule 30(b)(6) above. But absent the force of being in the rule, much of that Note might not carry the weight we might desire. And the dimensions of such a Note might well raise eyebrows. We are to be leery of "rulemaking by Note."

In addition, Rule 16(b)(3) could be amended to highlight the utility of judicial management of Rule 30(b)(6) depositions. Building on the experience with time limits for noticing such depositions, one could amend Rule 16(b)(3)(A):

- (A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, notice Rule 30(b)(6) depositions, complete discovery, and file motions.

But that may well overemphasize this form of discovery. Alternatively, Rule 16(b)(3)(B) could be amended along the following lines:

- (B)** *Permitted Contents.* The scheduling order may:
- (i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1);
 - (ii)** modify the extent of discovery;
 - (iii)** provide for disclosure, discovery, or preservation of electronically stored information;
 - (iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
 - (v)** include specifics about any Rule 30(b)(6)

depositions, including minimum notice of examination, limitations on the number of matters for examination, specifics on objections, disclosure of proposed depositions exhibits, questioning of witnesses beyond the matters designated in the deposition notice, supplementation of deposition testimony, duration of such depositions, or additional depositions of organizations that have already been deposed;

(vii) * * * * *

Such a detailed rule change might seem excessive. Though Rule 30(b)(6) depositions are important in many cases, it is probably difficult to say that they are so important that they warrant being featured in this way in general rules about litigation management. But it is worth noting that these changes to Rules 26(f) and 16(b) might be added measures even if the detailed stand-alone rule approach were taken. Indeed, a Committee Note could advert to the long list of particulars on the stand-alone rule as possible topics for a Rule 16 scheduling order to address. The real goal is probably to cajole the parties -- in the spirit of amended Rule 1 -- to discuss and resolve these problems without the need for "adult supervision" by the court.

ATTACHMENT 4

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Expedited Procedures Pilot Project

Acting on the recommendation of the Civil Rules Advisory Committee and the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States has authorized two pilot projects to test whether civil cases can be resolved more quickly, with less expense. One of the pilots is the Expedited Procedures Pilot Project (EPP). The EPP will begin in early 2017 and last for three years. It is designed to test whether more active use of certain case-management measures that employ the existing Rules of Civil Procedure can expedite the resolution of civil cases in a more just, speedy and inexpensive manner. There are five central features of the EPP, each of which will be described briefly below.

First, as required by Fed. R. Civ. P. 16(b)(2), EPP judges will hold a scheduling conference and issue a scheduling order as soon as possible, but in no case later than the earlier of 90 days after service of any defendant, or 60 days after entry of appearance of any defendant. In cases involving multiple parties, the scheduling conference and issuance of the scheduling order will be triggered by the service or entry of appearance of the first defendant.

Second, the scheduling orders issued by EPP judges will set a definite period for discovery, not to exceed 180 days, which will not be extended more than once and then only upon a showing of good cause, as required by Fed. R. Civ. P. 16(b). Good cause requires a showing that the parties have been diligent in their efforts to complete discovery within the deadline set in the scheduling order but that despite their diligence, the deadline could not be met. It is axiomatic that carelessness, inattention, or neglect are not good cause.

Third, EPP judges will resolve discovery disputes expeditiously and informally, as permitted by Fed. R. Civ. P. 16(b)(3)(B)(v). This can be accomplished in many ways, including conferences with the judge (by telephone, in chambers or in court), and the use of short submissions explaining the parties' positions in lieu of formal briefing.

Fourth, EPP judges will rule on all dispositive motions within 60 days of the filing of the reply brief. This deadline will be met even if the judge hears oral argument on the motion.

Fifth, EPP judges will set a firm trial date that will not be changed in the absence of exceptional circumstances. They will have flexibility to decide when to set the trial date (for example, when the scheduling order is issued, after discovery has ended, or when dispositive motions have been filed or resolved) but must set it so that in 90% of their cases trial is scheduled to take place within 14 months of the earlier of service on or appearance by any

defendant and, in the remaining 10% of cases, so that trial is scheduled to take place within 18 months.

A “users’ manual” will be developed to provide additional guidance for EPP judges, and training will be provided by the Federal Judicial Center. Sample orders and other written materials also will be prepared for use by EPP judges. Finally, throughout the duration of the EPP, mentor judges will be available on request to assist EPP judges.

ATTACHMENT 5

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MANDATORY INITIAL DISCOVERY PILOT PROJECT

One of the pilots approved by the Judicial Conference of the United States is the Mandatory Initial Discovery Pilot (“MIDP”). It will be implemented by a standing order and apply to all civil cases not specifically exempted. Parties will be required to respond to the mandatory initial discovery, and will not be permitted to opt-out. The discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), and must be completed before the commencement of party-initiated discovery under Rules 30-36 and Rule 45. When making mandatory initial discovery responses, the parties will be required to disclose both favorable and unfavorable information that is relevant to their claims or defenses, regardless of whether they intend to use the information in their case, and the responses will be filed with the court to enable the presiding judge to monitor and enforce compliance with the standing order. The standing order appears below.

Standing Order

The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order supersede the disclosures required by Rule 26(a)(1) and are framed as court-ordered mandatory initial discovery pursuant to the Court’s inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party’s response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party’s response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party’s knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties’ claims and defenses, whether favorable or unfavorable, and regardless of whether

they intend to use the information in presenting their claims or defenses. The parties also must provide relevant legal theories in response to paragraph B.4 below. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the Court orders otherwise. If a party limits its response on the basis of any other objection, including an objection that providing the required information would involve disproportionate expense or burden, considering the needs of the case, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the Court may for good cause defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss based on: lack of subject-matter jurisdiction; lack of personal jurisdiction; sovereign immunity; or absolute immunity. In that event, the time to answer, counterclaim, crossclaim, or reply shall be set by the Court based upon entry of an order deciding the motion, and the time to serve responses to the mandatory initial discovery under paragraph 4 shall be measured from that date.

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if

they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pretrial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims

or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information (“ESI”), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party’s claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described

items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. *Hard-Copy Documents.* Hard-copy documents must be produced as they are kept in the usual course of business.

2. *ESI.*

a. *Duty to Confer.* When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

- i. requirements and limits on the preservation, disclosure, and production of ESI;
- ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;
- iii. the form in which the ESI will be produced.

b. *Resolution of Disputes.* If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. *Production of ESI.* Unless the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form.

d. *Presumptive Form of Production.* Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

Instructions for Pilot Courts

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the

mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

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A “MINI-CURRICULUM” FOR AN INTENSIVE CASE MANAGEMENT PILOT PROGRAM

General Principles

Effective professional education is guided by two related concepts. First, the substance that is taught leads concretely and measurably to the development of specific competencies—knowledge, skills and attributes—relevant to a given professional task. Second, the method of instruction engages the learner in active participation—e.g., discussion, exercises and role plays—rather than passive reading or listening. A successful curriculum is competency-based, and successful instructors have both a deep understanding of the competencies they are teaching and the ability to draw out and involve learners in the learning process.

Competencies Related to Active Case Management

- Knowledge:** Applicable case law
Applicable national and local rules
Management theory
Exemplary protocols, forms and procedures
- Skills:** Active listening
Chambers management
Communication (oral and written)
Courtroom technology
Courtroom management
Procedural fairness
Resolving conflicts (including mediation skills)
- Attributes:** Decisiveness
Emotional intelligence
Flexibility
Temperament
Mindfulness
Seeing the big picture

Method of Instruction for an Intensive Program on Active Case Management

Small group sessions at a 1-2 day live workshop for judges in pilot districts

Assigned pre-reading and pre-work re knowledge competencies, followed by brief review at workshop

Practice of skill competencies using hypotheticals and role plays

Self-assessment and development of desirable attributes through video or other peer observation and discussion

Follow-up distance learning focused on recurring problems

Password-protected forum for participating judges to discuss case management issues and exchange ideas

If circumstances warrant, “advanced” live workshop at midpoint of pilot

Evaluation

Measurable learning objectives presented at the beginning of each session (e.g., “participants will learn to listen actively and identify the acknowledged and unacknowledged interests that underlie parties’ litigation positions”)

Post-session learner assessment of how well learning objectives were met (both immediately following the session and several months thereafter)

Appropriate coordination with study by FJC Research Division on long-term impact of training

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MEMORANDUM

TO: Judicial Conference Committee on Rules of Practice and Procedure
FROM: Emery G. Lee III
DATE: November 29, 2016
RE: Pilot Project Data Needs

Preliminary Points (Some Obvious, Some Less So)

The two projects are different, with little overlap in terms of data collection.

Success will require buy-in from the clerk's offices, but I do not anticipate that this will be an issue in the volunteer districts. I have never had difficulty working with clerk's offices. At the same time, it will be important to minimize the burden on the clerk's offices. Again, I don't anticipate this being a problem, but I wanted to raise it.

The major lingering issue, as I see it, is that even if we can collect reliable data on the pilot districts, there is the question of comparison districts. In terms of the Expedited Procedures Pilot (EPP), it may be possible to measure within-judge change. E.g., do judges in the EPP move their cases faster as they implement the EPP? This raises the "judge-specific data" problem—but there is no need to report anything other than aggregate numbers. The Mandatory Initial Discovery Pilot (MIDP) is more complicated on this front. The comparison is to roughly similar districts using standard disclosure rules? Once we have a full slate of volunteer districts, defining the "roughly similar districts" will be necessary. Also, comparison districts are less likely to be "volunteer" districts (although N.D. Ohio may count as a volunteer comparison district, through Judge Oliver), so there is the sensitivity of accessing their CM/ECF data to consider.

Districts are never doing just one thing. (Nor, one might add, are judges just doing one thing.) This is not a laboratory experiment with only one variable changed between the treatment and control group. The example I would offer here is that one of the largest employment protocol districts has an aggressive mediation program as well. So, yes, they settle a lot of the pilot cases. But is that because they use the protocols, thus simplifying the discovery process, or because they send almost every pilot case to mediation? I've raised this before, but it will be necessary to consider local rules, procedures, and norms.

Multivariate analysis: The rule of thumb is that one generally needs 10-20 cases per variable in a multivariate analysis. I raise this just to reiterate my focus on the number of cases in the pilots as opposed to the numbers of districts or judges participating. Moreover, it is likely that some kind of multilevel modeling will be needed, which likely means we would need even larger numbers to meaningfully analyze district-level effects.

The “three year” pilot concept: As discussed on the calls, we will not stop collecting data on cases filed in the third year of the pilots but will instead track them (or, at least, most of them? 90%?) until they resolve in district court. If a case in the EPP is filed in the last month of the third year, and then a month or so later the trial date is set 18 months in the future, then that pushes into a fifth year. Realistically, assuming that the pilots are underway by June 2017 in the desired number of districts, data collection will not be completed and final reporting will not take place until 2022 or 2023. Interim reports can begin much sooner, of course.

Interim reports present interpretation problems, however, when one is studying terminated cases. The interim reports cannot capture data on the cases that take the longest—trial cases, protracted cases in which discovery disputes are likely to arise. The spoliation study from 2011¹ showed that many discovery disputes arise (or appear on the docket, at least) only at the motion *in limine* stage. Needless to say, an interim report in 2018 or even 2019 is going to miss most of those disputes in cases filed in 2018. Interim reports are likely to underestimate case disposition times. Subsequent interim reports will almost always show longer disposition times than previous ones, as the “long tail” of cases reach resolution.

Despite any concerns raised in this memorandum, the Research Division of the Federal Judicial Center is committed to studying the pilots and providing useful information to the committee.

Expedited Procedures Pilot (EPP)

The overarching goal is to have firm trial dates (and thus trials) set within 14 months from service on any defendant in 90% of cases and within 18 months in the remaining cases included in the pilot.

My initial observation is that service (or appearance of any defendant) is docketed, so this should be possible to track. I do not have much experience doing this, but this should be possible.

I have some hesitation about the “flexibility” built into the pilot on when the clock starts running on the 14-month/18-month timeframe. It should be possible in the pilot districts to have some kind of docket language or CM/ECF case event that triggers the clock. The problem will be in comparison districts, if any. If there is not a clear point at which the clock starts running, then comparison data will have to be based on a number of assumptions. (I.e., if the clock started at the service of the first defendant, or if the clock started at the first scheduling conference, what percentage had a trial date set within 14 months?)

The median civil case terminates in about a year (12 months) *after filing*. So in at least half of cases—and given exclusions in the EPP, and the fact that the clock starts at a later point, perhaps many more than half—the 14-month goal will be met even without the pilot. Most cases that go to trial (outside of the pilot) do so after 14- or 18-months *after filing*. The median disposition time of the employment protocol cases that went to trial was 24 months (admittedly, 24 months after *filing* and not service). That’s a small sample size, but it is informative.

¹ Available at [http://www.fjc.gov/public/pdf.nsf/lookup/leespoli.pdf/\\$file/leespoli.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/leespoli.pdf/$file/leespoli.pdf).

“Firm” trial dates strike me as difficult to study, empirically. As discussed on the calls, a “firm” trial date is one that, once set, doesn’t change. My guess is that in the run-of-the-mine case, trial dates are rarely reset, and they are probably only reset in cases that have reached a late stage in the case (decision of dispositive motions, scheduling of a final pretrial conference). So, for example, a case that settles in 11 months may (and should) have a final pretrial conference date set in the initial scheduling order, but was that is not the same as a “firm” trial date. In other words, to the extent trial dates (or final pretrial dates) are being set today, almost all of them are probably “firm” by this definition.

It will be necessary to take early resolution cases out of the denominator, so to speak. The firm trial date aspect of the study will have to focus on a limited subset of cases—i.e., cases in which the trial date *could have been* extended, whether it was or was not. How large that subset of cases will be is difficult, at this time, to gauge. It is not likely to be more than 25% of pilot cases (my estimate). This raises the numbers issue from the first section of the memorandum—it will be necessary to have enough cases *in this subgroup* to do meaningful analysis. The “top-line” number of cases is not the number that matters. In the final analysis, what matters is how many cases are in this category.

This category is perhaps not that difficult to define. It clearly includes cases that do not terminate early. It includes cases where discovery is completed—where the discovery cut-off date is reached. It includes cases in which one or more summary judgment motions are filed. This can be refined.

Most of the goals in the EPP should be easy to track through CM/ECF: the prompt case management conference, the discovery cut-off, resolution of discovery disputes by telephonic conferences (which are usually docketed now), decision on the summary judgment motion within 60 days of the filing of the reply brief. I think that some minor adjustments to docketing of these events will have to occur in CM/ECF, but none of these present significant hurdles.

I am hesitant about the one extension of the discovery cut-off with “good cause.” I don’t think I can gauge the “good cause” issue—judges granting the extension will find good cause, and it is not my place to second guess the judges. It will also be necessary to determine how each participating district docket extensions. This is one area where district practice varies a great deal. But this should always trigger a resetting of deadlines in CM/ECF, so this should be workable.

Mandatory Initial Discovery Pilot (MIDP)

The model order for this pilot, requiring notice of and filing of discovery with the court, solves many of the data collection problems. In many ways, this is similar to the employment discovery protocols, where standard docketing language guides our research. This has been well thought out. Standard docketing language or CM/ECF case events will need to be developed, but that is probably a one-day task.

Supplementation of the mandatory discovery is an interesting issue. There should be some standard notice language for supplementation as well.

In terms of metrics, the idea here seems to be to streamline the discovery process. It should be possible to measure the discovery period, filing of dispositive motions, filing of discovery motions, and the like. Time to disposition is the simplest of all measures.

As mentioned above, the major issue here is comparison districts. Again, once we have a full slate of pilot districts, I can begin to consider what the relevant comparisons are.

Automated Attorney Surveys

One promising possibility, which I have learned about as part of the employment protocol study, is automating attorney surveys through CM/ECF. One district in the employment protocol study has a special CM/ECF case event that is triggered by the case-closing event. This event redirects the attorneys to an outside survey vendor to provide feedback on the closed case.

A colleague and I have had conversations with the court staff in this district and are interested in trying to implement this as part of the EPP and MIDP. The CM/ECF side of the process does not seem to be that hard, so this should not put much of a burden on clerk's offices. There are some issues still to be worked out, but we can discuss this at a later stage.

Attorney surveys in closed cases have been one of the Research Division's go-to research strategies for many years, but the compilation of the email list has always been one of the most time- and resource-intensive parts of the process. If that task can be automated through a very minor modification of a district's CM/ECF case event dictionary, there are efficiencies to be captured. There are many details to be worked out, but if one district is already doing this, we should be able to make it work on a larger scale.

Needless to say, attorney surveys in the closed cases will be necessary to measure certain aspects of the pilot projects that will not be docketed. For example, attorneys can report whether the frontloading of some discovery affected the procedural fairness of the case, or stimulated earlier resolution. Obviously, the development of these survey instruments will be an important step in the process. Thought must be given to the kinds of questions that should be asked.

TAB 3C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 3, 2016

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts on November 3, 2016. (The
3 meeting was scheduled to carry over to November 4, but all business
4 was concluded by the end of the day on November 3.) Participants
5 included Judge John D. Bates, Committee Chair, and Committee
6 members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge
7 Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse,
8 Esq.; Professor Robert H. Klonoff; Judge Sara Lioi; Judge Scott M.
9 Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice
10 David E. Nahmias; Judge Solomon Oliver, Jr.; Virginia A. Seitz,
11 Esq.; and Judge Craig B. Shaffer. Professor Edward H. Cooper
12 participated as Reporter, and Professor Richard L. Marcus
13 participated as Associate Reporter. Judge David G. Campbell, Chair,
14 and Professor Daniel R. Coquillette, Reporter, represented the
15 Standing Committee. Judge A. Benjamin Goldgar participated as
16 liaison from the Bankruptcy Rules Committee. Laura A. Briggs,
17 Esq., the court-clerk representative, also participated (by
18 telephone). The Department of Justice was further represented by
19 Joshua Gardner, Esq. Rebecca A. Womeldorf, Esq., Lauren Gailey,
20 Esq., and Julie Wilson, Esq., represented the Administrative
21 Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the
22 Federal Judicial Center. Observers included Joseph D. Garrison,
23 Esq. (National Employment Lawyers Association); Alex Dahl,
24 Esq. (Lawyers for Civil Justice); Professor Simona Grossi; Brittany
25 Kauffman, Esq. (IAALS); William T. Hangle, Esq. (ABA Litigation
26 Section liaison); Frank Sylvestri (American College of Trial
27 Lawyers); Derek Webb, Esq.; Ted Hirt, Esq.; Henry Kelsen, Esq.;
28 Ariana Tadler, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq.;
29 Henry Kelsen, Esq.; and Julie Yap, Esq.

30 **HEARING**

31 Business began with a hearing on proposed amendments published
32 for comment in August 2016. Judge Bates announced the time that
33 would be available to each witness, and thanked them all for
34 attending and providing their insights and suggestions.

35 Eleven witnesses testified. The hearing ran through the
36 morning to noon. A full transcript is available at uscourts.gov.

37 **COMMITTEE MEETING**

38 Judge Bates began the Committee meeting by introducing new
39 member Judge Sara Lioi of Akron in the Northern District of Ohio.
40 He also welcomed Judge David G. Campbell, who is returning to
41 Committee meetings in his new role as Chair of the Standing
42 Committee. Judge A. Benjamin Goldgar is the new liaison from the
43 Bankruptcy Rules Committee. And Lauren Gailey, the new Rules Law

44 Clerk, is attending her first Civil Rules Committee meeting.

45 Judge Bates reminded the Committee that proposed amendments to
46 Rules 5, 23, 62, and 65.1 were published for comment last August.
47 The Committee will consider all the testimony and comments; the
48 work will start with review in the Rule 23 Subcommittee, and in the
49 Rule 62 Subcommittees if there is a substantial level of comment on
50 Rules 62 and 65.1. He also noted that the Rule 65.1 proposal "came
51 about late in the game." Discussion in the Standing Committee of
52 amendments to Appellate Rule 8 that were proposed to mesh with the
53 Rule 62 proposals suggested the value of making parallel revisions
54 to Rule 65.1. Publication was approved by the Standing Committee,
55 subject to this Committee's action by an e-mail vote that approved
56 publication.

57 Judge Bates also noted a misadventure that occurred on the way
58 to implementing the amendment of Rule 4(m) to add Rule 4(h)(2) to
59 the list of service provisions excluded from the 90-day presumptive
60 limit on the time to serve. The amendment was published for
61 comment, approved, and adopted by the Supreme Court in a form that
62 failed to take account of the December 1, 2015 amendment that added
63 service of a notice under Rule 71.1(d)(3)(A) to the exemptions.
64 There was never any intent to delete the exemption for Rule
65 71.1(d)(3)(A) notices. It was hoped that because nothing had been
66 done to strike Rule 71.1(d)(3)(A) from Rule 4(m), the back-to-back
67 amendments could remain in effect. But the Office of Law Revision
68 Counsel has concluded that, assuming approval of the 2016 proposal,
69 the safe course will be to show Rule 4(m) without Rule
70 71.1(d)(3)(A) in rule text as of December 1, 2016, with a footnote
71 pointing out that the exemption for Rule 71.1(d)(3)(A) notices has
72 not been removed. The correct full rule text will be submitted to
73 the Judicial Conference in March 2017, with the expectation that it
74 can be transmitted to the Supreme Court and will be adopted in time
75 to become part of the official rule text on December 1, 2017. This
76 problem illustrates the risk of inadvertent oversights when
77 amendments of the same rule are pursued in close sequence. New
78 administrative systems will be adopted to guard against like
79 mistakes in the future.

80 Judge Bates further reported that the September Judicial
81 Conference meeting approved the Expedited Procedures and Mandatory
82 Initial Discovery Pilot Projects. Current developments in these
83 projects will be discussed later in the meeting.

84 Ongoing efforts to educate bench and bar in the 2015 discovery
85 amendments were also described. Two FJC workshops have been devoted
86 to them, emphasizing the practical skills of case management more
87 than the details of the rules texts. Presentations have been made
88 at several circuit conferences. John Barkett and Judge Paul Grimm

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89 are involved in an ABA webinar. And the discovery rules are
90 included in the topics covered by an ABA road show on motion
91 management by judges.

92 *April 2016 Minutes*

93 The draft Minutes of the April 2016 Committee meeting were
94 approved without dissent, subject to correction of typographical
95 and similar errors.

96 *Report of the Administrative Office*

97 The Administrative Conference of the United States is studying
98 appeals to the courts in Social Security cases. They are concerned
99 by disparate and at times high rates of reversals in different
100 courts around the country. A subcommittee is considering a
101 recommendation to suggest a court rule to establish uniform
102 practices. But consideration also is being given to the prospect
103 that "judicial education" may be an appropriate means of addressing
104 whatever problems may be found.

105 The immediate question is whether it would be desirable to
106 become involved with the Administrative Conference while their work
107 remains in its early and mid-stream phases. The Deputy Director of
108 the Administrative Office and the Counselor to the Chief Justice
109 are members of the Administrative Conference and could be a natural
110 communications channel.

111 Discussion began by observing that the Committee has long been
112 wary of departing from the general practice of focusing on
113 transsubstantive rules. Adopting subject-specific rules, carving
114 out what may seem to be special interests, involves special risks.
115 It may be difficult to acquire sufficiently deep knowledge of
116 specific problems in particular substantive areas. Starting down
117 this road will inevitably generate requests to adopt other
118 substance-specific rules for other topics.

119 One way to avoid the substance-specific problem would be to
120 adopt a more general provision. During the work that led to the
121 2010 amendments of Rule 56, the Rule 56 Subcommittee considered the
122 possibility of adapting Rule 56 – or perhaps a new Rule 56.1 – to
123 cover review on an administrative record. The standard of review
124 generally looks for substantial evidence on the record considered
125 as a whole. Only unusual circumstances will call for taking new
126 evidence in the reviewing court; district courts, when they are the
127 first line of review, function in much the same way as a court of
128 appeals does when it is the first line of review. The question was
129 put aside as ranging beyond the purposes that launched the Rule 56
130 project, and from a sense that courts are managing well as it is.

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131 This approach could be revived. A rule could address all review on
132 an administrative record, if further study shows that a common
133 approach is suitable. The proposal might be limited to review of
134 federal administrative agencies, perhaps with some questions about
135 distinguishing agencies from executive-branch entities. Or it might
136 be broadened to include the special circumstances that may bring
137 review of a state administrative decision on for review by a
138 federal court on the state agency's record. So too it might be
139 appropriate to consider the question whether review on ERISA
140 records might be included, or even proceedings to confirm or set
141 aside an arbitral award. The project, in short, could be expanded,
142 but also could be confined to first-line review of traditional
143 federal agencies.

144 General discussion followed, addressed to uncertainties about
145 identifying the courts with unusually high reversal rates on Social
146 Security review. There also was uncertainty as to the criteria that
147 might be used to determine what reversal rates might be
148 appropriate. The idea that a Civil Rule might undertake to
149 articulate a standard of review, whether for a particular agency or
150 more generally, was thought unattractive.

151 The discussion closed with agreement that Judge Bates and
152 Rebecca Womeldorf should consider further the question whether it
153 may be desirable to find a means of informal consultation with the
154 Administrative Conference while their work remains in a formative
155 stage.

156 *Five Year Committee "Jurisdiction" Review*

157 Judge Bates introduced a Questionnaire provided by
158 Administrative Office Director Duff that, once every five years,
159 asks for a review of Committee jurisdiction. The answers to the
160 questions seem straight-forward for the Civil Rules Committee. But
161 Committee members are urged to review the questions, and to send on
162 to Judge Bates any thoughts that may suggest a non-routine answer.
163 All suggestions and questions are welcome.

164 *Rule 30(b)(6)*

165 Judge Bates introduced the Rule 30(b)(6) discussion by noting
166 that the Rule 30(b)(6) Subcommittee has been hard at work since it
167 was appointed. Its work has included two conference calls; Notes on
168 the calls are included in the agenda materials. Rule 30(b)(6) was
169 studied carefully ten years ago, in response to a detailed
170 memorandum provided by a New York State Bar committee. The
171 conclusion then was that although there may be problems in the way
172 Rule 30(b)(6) is implemented, they do not seem amenable to
173 effective amelioration by new rule text. Questions have continued

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174 to be raised by bar groups, however. The most recent submission
175 came from a number of members of the ABA Litigation Section. Their
176 request for study is not a Section recommendation, but it details
177 several questions that have persisted over the years. The immediate
178 question is whether there is a sufficient prospect of developing
179 helpful rule amendments to justify continued work by the
180 Subcommittee.

181 Judge Ericksen introduced the Subcommittee Report by
182 emphasizing, in bold and capitals, that no decisions have been
183 made. A set of detailed Rule 30(b)(6) provisions is included in the
184 agenda materials. But "this is a pencil-scratch draft." The
185 Subcommittee has been at work only for a short while. But there
186 have been repeated cries of anguish over the years. "Are there
187 things that judges do not see?" The Subcommittee believes that
188 continued study is worthwhile, recognizing that it may lead to
189 recommendations for big changes, for modest changes, or no rule-
190 text changes at all.

191 The inquiry will include finding out what is going on at the
192 bar. Apart from traditional law review literature, it will be
193 useful to find out what lawyers are saying to lawyers through CLE
194 programs. Other sources of lawyer information also may be found. Do
195 they show a troubling level of gamesmanship?

196 Professor Marcus introduced the draft provisions by
197 emphasizing again that they are all tentative. Outreach to the
198 profession may help. And it may help to look back at the
199 information gathered more than a decade ago. A list of possibly
200 promising ideas was developed. Bar groups were asked to comment.
201 The detailed summary of the comments remains available and will be
202 studied. Repeating the outreach process may again be useful.

203 As already suggested, it will help to get a better fix on CLE
204 materials. Case law will be studied, including cases dealing with
205 the circumstances that might justify treating a witness's testimony
206 on behalf of an entity as the entity's own "judicial admission." A
207 survey of local rules will show whether there are any that deal
208 with the kinds of questions that have been raised by bar groups. It
209 also may be possible to find standing orders that address some of
210 these questions. One example is included in the agenda materials.

211 The Subcommittee has brought focus to its initial work by
212 developing a list of 16 questions, set out at pages 101 to 103 of
213 the agenda materials. Many of them derive from the suggestions of
214 bar groups. These issues are tested by the tentative rules drafts.

215 One question is whether providing new specific rule text is an
216 effective way to address these questions. An alternative approach,

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217 sketched at the end of the rules drafts, is to emphasize case
218 management by minor revisions of Rule 16(b) or Rule 26(f).

219 A Subcommittee member said that the work already done shows
220 there are recurring problems that increase cost and delay. Unlike
221 many problems, these do not seem to come to courts often in forms
222 that generate published opinions. "At least in commercial
223 litigation the problems arise all the time." And when the problems
224 do get to a judge, the responses are not uniform. "But it is hard
225 to know whether we can make it better by rule." The list of issues
226 includes many that deserve careful thought. Rules, or default
227 rules, could save a lot of the time that lawyers burn through now.
228 Continuing to develop specific rule language is a good way to test
229 the possibilities.

230 Judge Ericksen directed discussion to a specific question
231 framed by alternative drafts at page 110 of the agenda materials.
232 Both deal with submitting exhibits that may be used at the
233 deposition before the deposition happens. The first alternative
234 requires the party noticing the deposition to provide the deponent
235 organization "all" exhibits that may be used. The other simply says
236 that the party noticing the deposition "may" provide exhibits, and
237 that if exhibits are provided the organization must prepare the
238 witness to testify about the exhibits or, alternatively, the topics
239 raised by the exhibits. Either alternative may help to make clear
240 the nature of the "matters" specified for examination in the
241 notice. And either could reduce the risk that the designated
242 witness will be ill-prepared.

243 A related question was asked: need this part of the rule
244 address requests that the witness produce documents?

245 A Subcommittee member observed that most Rule 30(b)(6)
246 opinions deal with claims that the witness has not been adequately
247 prepared. Poor preparation may flow from notices that list too many
248 topics, or from poor definition of the topics. Providing exhibits
249 in advance will clarify the matters for examination. But requiring
250 advance notice of all documents may defeat the opportunity to use
251 surprise to advantage. The permissive alternative, on the other
252 hand, simply blesses and emphasizes something that a party can do
253 now, and may wish to do to achieve the advantages of clarity and
254 better preparation.

255 The alternative drafts for advance notice of deposition
256 exhibits were characterized as "a big change," with a question
257 whether there is any information about this practice? Both has it
258 been done, and has it been done successfully?

259 Professor Marcus observed that the more detail we build into
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260 the rule, the more elaborate it will become. Both of the drafts on
261 providing advance notice of exhibits include a provision for
262 submission a definite time, not yet specified, before the
263 deposition. Other drafts include time periods, as for objecting to
264 the notice. "If we have successive time periods, we get into
265 increasing regimentation." These potential complications underscore
266 the importance of getting a sense whether Rule 30(b)(6) is causing
267 problems across the board. And they likewise underscore the need to
268 consider whether other approaches may be better than attempting
269 detailed regulation by rule text.

270 A similar observation was that rule provisions can help by
271 provoking occasions for the parties to meet and confer.

272 The concern about poor preparation of witnesses designated to
273 testify for the organization was met by a counter: Often the party
274 that notices the deposition is poorly prepared. "Can we shape a
275 rule to encourage preparation on both sides?"

276 The general question recurred: "There are problems. But are
277 there uniform answers? Or is it better to leave them to resolution
278 on a case-by-case basis?"

279 A Subcommittee member responded that there is room for both
280 approaches – rules provisions can address the most common problems,
281 while case management also should be encouraged. "Tossing it
282 amorphyously into Rule 16(b) for discussion early in the case is not
283 likely to work for all cases." But it can help a lot when there is
284 a hands-on case-managing judge, working with lawyers who can
285 develop procedures for resolving future problems.

286 Another Subcommittee member observed that there are many
287 issues. "Many other Civil Rules have changed since Rule 30(b)(6)
288 was born." What does the experience of Committee members show?

289 One way to ask how other rules fit with Rule 30(b)(6) is to
290 ask whether it is different enough from other discovery rules that
291 it should be applied differently to nonparties.

292 The question of local rules recurred. A judge member noted
293 that he did not know of any local rules, but that he raises the
294 Rule 30(b)(6) question in scheduling conferences.

295 Another Committee member said that he sees many Rule 30(b)(6)
296 depositions as a litigator, in many courts around the country, and
297 has not encountered any local rules.

298 The Subcommittee noted that it does know of one standing order
299 used for Rule 30(b)(6) depositions by Judge Donato in the Northern

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300 District of California. It sets a limit of 10 matters for
301 examination, specifies the duration of examination of each person
302 designated, addresses the issue of combining the deposition of the
303 witness for the organization with deposition of the witness as an
304 individual, and specifies that the designated witness's testimony
305 is never a "judicial admission." But this may be the only judge in
306 that court that follows that practice.

307 The same member also said that the draft for making objections
308 that appears on page 109 of the agenda materials "seems a really
309 nice innovation." An objection will trigger a meet-and-confer
310 session. The initial scheduling conference occurs too early to
311 enable the parties to anticipate the problems that may arise. A
312 system that encourages a meet-and-confer is a good thing.

313 Another Committee member noted the concern that the objection
314 procedure and the pre-deposition submission of exhibits will delay
315 the deposition by 30 to 90 days. Often Rule 30(b)(6) depositions
316 are designed to set the foundation for other discovery, and should
317 occur early in the litigation. Delay here will lead to delay in
318 other discovery. So time is allowed to make an objection after the
319 notice is served. Then time must be available to meet and confer.
320 Then time may be required for court assistance in ironing out
321 disputes the parties cannot manage to work out on their own.

322 One of the draft provisions prohibits deposition questions
323 that ask for an opinion or contention that relates to fact or the
324 application of law to fact. This language is drawn from Rule
325 33(a)(2), but as prohibition rather than permission. The aim is to
326 channel contention discovery into interrogatories or requests to
327 admit. The need arises from reports that Rule 30(b)(6) is often
328 used to attempt to get lay witnesses to bind an organization to
329 legal positions. A Committee member agreed, stating that his office
330 often sees Rule 30(b)(6) used as contention interrogatories would
331 be used.

332 Judge Campbell agreed that "these are recurring problems. We
333 could not find answers ten years ago. Rule 30(b)(6) depositions
334 occur in a majority of my cases – frequent use suggests they must
335 be useful." There seem to be a lot of conferences among the
336 lawyers, but they seem to figure out how to solve their problems
337 without coming to the court. "I see one or two of these disputes a
338 year." It would be good to be able to address these problems in a
339 way that is not case-specific. But it is difficult to know how
340 often rule text can successfully do that.

341 A Subcommittee member suggested "we may well come out of this
342 concluding to leave it alone." But the topic has been raised in
343 part because of the experience "of lawyers like me," and in part

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344 because of repeated entreaties from bar groups. We know Rule
345 30(b)(6) is useful. We know there are headaches. And we know that,
346 after howls of protest, lawyers struggle to work out their disputes
347 and often succeed. A simple example is provided by the questions of
348 how to count a Rule 30(b)(6) deposition with multiple witnesses
349 against the presumptive limit on the number of depositions, and how
350 to apply the 7-hour limit, whether to each witness or to the
351 organization as the single named deponent. The Committee Notes from
352 earlier years do not provide clear guidance. The rule could, for
353 example, provide that every 7 hours of deposition time counts as a
354 separate deposition against the presumptive limit to 10
355 depositions. That, in turn, would reduce the pressure to name only
356 a few witnesses for the organization for the purpose of reducing
357 the total amount of deposition time. A rule also could address the
358 problem of questions on matters not described in the notice.

359 A judge observed that the problems of counting numbers of
360 depositions and hours comes up between the parties. He has never
361 had the question presented for resolution by the court.

362 Reporter Coquillette observed that the advisory committees
363 often face the question whether reported problems are "real"
364 problems in the sense that they recur frequently. Some guidance can
365 be found in collective committee experience. And help also can be
366 sought from the Federal Judicial Center. "This is something the FJC
367 could look at." Emery Lee responded that the kinds of problems
368 reported with Rule 30(b)(6) rarely rise to the docket-sheet level.
369 It might be possible to learn something useful from an attorney
370 survey, but it is really difficult to do that.

371 Another Committee member suggested that it might be useful to
372 look at state laws.

373 Judge Ericksen responded that these difficulties provide the
374 motive to find out whether anything can be learned by surveying CLE
375 program materials. And she asked whether there are yet other
376 problems that are not covered by the drafts.

377 One suggestion was that, in part inspired by some state
378 practices, it is common to ask whether the rule should require the
379 organization to designate the "most knowledgeable person" as its
380 witness.

381 Joseph Garrison, speaking as liaison from the National
382 Employment Lawyers Association, reported an "optimistic view" of
383 Rule 30(b)(6). It is used all the time in employment cases. "We
384 never take problems to the court." To be sure, "employment cases
385 are not big commercial litigation," but they make up something on
386 the order of 15% of the civil docket. NELA gives many seminars on

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387 Rule 30(b)(6); they will be happy to share these materials with the
388 Committee as part of the survey of what CLE programs show.

389 Rule 30(b)(6) is used to start discovery, to get it all done
390 in the least expensive way. Individual employee plaintiffs live in
391 a world of asymmetrical information. In this world, the draft that
392 provides for objections to the deposition notice is a bad idea. "It
393 would take us back before the days of the employment-case discovery
394 protocol." "We learn a lot quickly if we have effective discovery
395 early in the case." The plaintiff has no documents and cannot be
396 made to show there is a claim before having an opportunity for
397 discovery.

398 Mr. Garrison further observed that if the Committee finds a
399 dearth of local rules, that is likely to be a sign that there are
400 not many problems. And the deposition testimony can be used at
401 trial, but it is subject to impeachment – it does not bind the
402 organization. "It is rare for a judge to deny a chance to correct
403 the record." In response to a question, he agreed that it can be
404 desirable to allow supplementation of the designated witness's
405 deposition testimony. The question arises when an attempt is made
406 to bind the organization by the testimony – that's when leave to
407 supplement is requested and is allowed. In response to a question
408 whether allowing supplementation encourages sloppy preparation of
409 the witness, he said "we prepare our witnesses." Supplementation
410 issues do arise with "I don't know" responses, often when the
411 response is met by asking whether there is a way to find out an
412 answer. Often the answer is that yes, there is a way to find out.
413 Then there is supplementation. Designated witnesses in individual
414 employment cases should be well prepared. It may be different in
415 big commercial cases.

416 Responding to a further question, he said that reasons for the
417 "I don't know" responses sometimes arise from poor notices that do
418 not adequately designate the matters for examination. "Sometimes it
419 is a tactic to not prepare." If you go to court, the court wants
420 the parties to work it out. The lawyers themselves often want to
421 work it out. "The point is to have an efficient deposition. Rule
422 30(b)(6) is efficient." But "you're not going to cure bad lawyers
423 by a rule."

424 Responding to another question, Mr. Garrison said that
425 Connecticut state practice has no presumptive limit on the number
426 of depositions, and that may explain why they do not have fights
427 about whether to count an organization deposition according to the
428 number of designated witnesses. One example is provided in a letter
429 he prepared for the Committee, a case in which the employer claimed
430 that the decision to discharge the plaintiff was made by a
431 committee of ten. Counting each committee member's deposition

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432 separately would exhaust the presumptive limit set in Rule
433 30(a)(2)(A)(i).

434 He responded to another question by agreeing that there are
435 some useful ideas in the Subcommittee drafts. But it is not clear
436 that they need to be incorporated in rule provisions.

437 Further discussion echoed the point that a party noticing a
438 Rule 30(b)(6) deposition is trying to figure out what sources of
439 information exist, and may supplement that by asking for production
440 at the deposition. The lower-level provision that would simply
441 allow the party noticing the deposition to deliver exhibits before
442 the deposition by a stated time before the deposition leaves an
443 open question: suppose the exhibits are delivered after that time,
444 but still before the deposition? One answer was that they still
445 could be used, but do not command as much effect in arguments
446 whether the witness was properly prepared. This does tie to the
447 adequacy of preparation as measured by the clarity of the matters
448 designated for examination.

449 A Subcommittee member added that the draft rules crystallize
450 the thought. A party is free now to provide exhibits in advance of
451 the deposition. Putting it in the rule tells people they get the
452 advantage of greater particularity by taking this step.

453 This discussion led to a further question: The rule provides
454 that the party noticing the deposition "must describe with
455 reasonable particularity the matters for examination." Why does it
456 not work? A judge responded that he gets a lot of fights over
457 claims that the notice is too vague, too broad. Perhaps Rule
458 30(b)(6) should include a reminder of Rule 26(g) obligations. "I
459 get notices that the lawyer says were simply designed to start a
460 conversation." And they may come 30 days before the discovery
461 cutoff. "We need to figure out a way to get the gamesmanship out of
462 it." A practicing lawyer added that talking with other lawyers, he
463 hears stories of notices that specify 150 matters for examination
464 and failed attempts to negotiate it out, so the dispute goes to the
465 judge. "The plaintiff's employment bar may be using Rule 30(b)(6)
466 in ways very different from antitrust cases."

467 Asking about means to get additional information led observers
468 to offer suggestions.

469 Ariana Tadler said that it is important to seek out
470 qualitative information "across the bar." The NELA observations are
471 helpful. There are many places to go to. The mass trial bar, on
472 both sides, the American Association for Justice, and so on. Her
473 practice commonly involves asymmetrical discovery, but she also
474 works in complex litigation that involves large amounts of

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475 information on both sides. "It is rare that we cannot work it out
476 cooperatively." The new emphasis on cooperation in Rule 1 "is
477 working." The 2015 refinements in discovery practice also help.
478 "Rule 30(b)(6) is used in refined ways to find out what the other
479 side has." This can help determine whether the mass of information
480 is so large as to trigger proportionality rules; given knowledge of
481 the information available on topics a, b, c, d, and e, the inquiry
482 might be limited to topics a and e. But it would be a mistake to
483 attempt to articulate new rules on the number or duration of
484 depositions. "Depositions are costly." That provides an internal
485 restraint. And be careful about even permissive rules on advance
486 provision of deposition exhibits – they can backfire. In response
487 to a question, she said that time is needed to think whether there
488 should be a distinction between parties and nonparties for Rule
489 30(b)(6). That is an illustration of why it is important to
490 actually talk to lawyers.

491 Alex Dahl reported that the Lawyers for Civil Justice members
492 are interested. "Rule 30(b)(6) is important. We spend a lot of time
493 dealing with these depositions."

494 William T. Hanglely noted that the submission from the ABA
495 Litigation Section, although not a Section proposal, does come from
496 a large number of active participants. This is not a plaintiffs'
497 problem. It is not a defendants' problem. It is in part a problem
498 of nonuniformity in practice. In another part, it is a problem of
499 inconsistency in the Rules. Lawyers generally work it out. Practice
500 tends to be helpful, cooperative. But risks remain. It would be
501 good to clarify some of the issues.

502 Frank Sylvestri indicated that the American College of Trial
503 Lawyers federal courts committee is interested in these questions.

504 Judge Ericksen asked whether the Subcommittee should continue
505 to inquire into attempts to ask about contentions. A judge
506 responded that this does happen, but "trying for contentions in
507 deposing a lay witness just does not make sense." Another judge
508 noted that Rule 33 clearly provides that contention discovery can
509 be deferred to a late point in the case; allowing it in a
510 deposition, without that sort of court control, seems
511 inappropriate. Still another judge asked why is there a need to
512 address this kind of discovery for Rule 30(b)(6) depositions but
513 not others. The response was that is because the deponent is the
514 organization, the witness is speaking for the party, and the party
515 is obliged to prepare the witness. It is different when deposing a
516 party who is the person being examined because the individual party
517 does not have the duty to prepare that Rule 30(b)(6) imposes on an
518 organization.

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519 The Rule 30(b)(6) discussion concluded by asking whether these
520 questions should be pursued further by the Subcommittee. Should it
521 work to further develop the draft rule language? The value of
522 drafting is its role as a reality check. Working on language tends
523 to bring out problems that otherwise might be overlooked. The work
524 will continue.

525 Continued work on rule drafts does not reflect a conclusion
526 that, in the end, the Subcommittee will recommend amendments for
527 publication. Much of the discussion, and the provisions illustrated
528 by the rules drafts, can be seen as best practices, something that
529 can most effectively be addressed by education of the bench and
530 bar. The Subcommittee will pursue its literature search. And it
531 will create a repository of information. All suggestions from
532 outside observers should be made to the Administrative Office.

533 *Rules 38, 39, 81: Jury Trial Demand*

534 Consideration of the rules that provide for waiver of the
535 right to jury trial unless a proper demand is made began with Rule
536 81(c)(3), which governs demands for jury trial when a case is
537 removed from state court. A potential ambiguity may have been
538 introduced to one part of this rule by the Style Project. Before
539 the Style Project, Rule 81(c)(3)(A) provided that there is no need
540 to demand a jury trial after removal if state law "does" not
541 require a demand. The Style Project changed "does" to "did." The
542 need for clarification was suggested by a lawyer who is concerned
543 that "did" could be read to excuse the need to demand a jury after
544 removal if state law, although requiring a demand at some later
545 time, did not require a demand by the point that the case had
546 reached prior to removal. If the courts read the new language to
547 have the same meaning as the pre-Style language, the result may be
548 inadvertent forfeiture of the right to jury trial. The Committee
549 discussed this question in April and decided to ask the Standing
550 Committee for guidance. Discussion in the Standing Committee was
551 brief and did not resolve the question whether anything should be
552 done about the arguable ambiguity.

553 Shortly after the Standing Committee meeting, two of its
554 members – Judge Gorsuch and Judge Graber – suggested that this
555 Committee should consider the jury demand procedure in Rule 38 and
556 the related provisions of Rule 39. See 16-CV-F. They were concerned
557 that it is important to increase the number of jury trials, and
558 fear that the demand requirement proves a trap for the unwary.
559 Parties who wish to exercise a constitutional or statutory right to
560 jury trial may lose the right by overlooking the demand
561 requirement. They suggested that, like Criminal Rule 23(a), jury
562 trial should become the default provision. Rule 23(a) provides that
563 when a defendant is entitled to a jury trial, the case must be

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564 tried by a jury unless the defendant waives a jury trial in
565 writing, the government consents, and the court approves.

566 Exploration of these questions will begin with research by the
567 Rules Committee Support Office. One question will be historical.
568 The Committee Note for the 1938 Rules states that the demand
569 procedure was adopted after looking to models in the states and
570 other common-law jurisdictions, and that the period was set at 14
571 days after the last pleading addressed to the issue after examining
572 a wide range of periods adopted by other rules. There is a
573 reference to an article by Professor Fleming James, who served as
574 a consultant to the Committee; the article focuses on
575 administrative concerns, with a hint at concerns about strategic
576 behavior. Can more be found out about the reasons that prompted
577 both adoption of a demand procedure and an early cut-off for the
578 demand?

579 A search also will be made to determine whether there are
580 local rules that address demand procedure. And experience under
581 state rules will be explored – they vary widely, but many of them
582 allow demands to be made later in the proceedings than Rule 38
583 allows, and some, as reflected in Rule 81(c)(3)(A), do not require
584 a formal demand at any time.

585 The more elusive part of the research will attempt to
586 determine whether there is any reliable way to estimate the number
587 of cases in which a party who wishes a jury trial has lost the
588 right by failure to make timely demand and by failing to persuade
589 the court to allow an untimely demand under Rule 39(b). It may be
590 difficult to get more than anecdotal evidence on this point.

591 Another part of the inquiry must ask whether it is important,
592 or at least useful, to know early in the proceedings whether the
593 case is to be tried to a jury. Is it more than a matter of
594 convenient administrative trial-scheduling practices? Or a concern
595 that a party who was content to waive jury trial early in the
596 action may, as proceedings progress, come to want a jury because
597 its position does not seem to be winning favor with the judge?
598 (This possible concern seems likely to arise only when a case
599 remains with the same judge from beginning through trial; it seems
600 likely that practice in the 1930s was different in this respect.)

601 If the conclusion is that some relaxation of the demand
602 procedure is desirable, many drafting questions will need to be
603 addressed. The choices will range from abolition of any demand
604 requirement through a mere extension of the time when a demand must
605 be made. Adopting jury trial as the default that prevails unless
606 the parties opt out could be implemented by a procedure that
607 requires express written waiver by all parties; the court's

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608 approval might also be required, as in Criminal Rule 23(a). A
609 further drafting choice must be made whether to complicate the rule
610 by addressing the problem that it is not always clear whether there
611 is a constitutional or statutory right to jury trial. The merger of
612 law and equity has led to decisions that expand the right to jury
613 trial in comparison with pre-merger practice, but the details may
614 be murky. Issues common to legal and equitable relief must be tried
615 to the jury, and the verdict binds the judge. But it may be
616 difficult to untangle closely related but separate issues. More
617 generally, the process of analogy to the common law of 1791 may not
618 always yield clear answers when asking whether a novel statutory
619 action entails a Seventh Amendment right to jury trial. Criminal
620 Rule 23 does not address such questions, but the right to jury
621 trial in criminal cases may be free from complications similar to
622 those that occasionally arise in civil actions. One resolution
623 would be to include rule text that recognizes the right of any
624 party who prefers a bench trial to raise the question whether there
625 is a right to jury trial.

626 Discussion began with the observation of a judge that in more
627 than 20 years on the bench, he could not remember more than 2 or 3
628 litigants who had lost a desired right to jury trial. But that does
629 not diminish the value of attempting a more comprehensive inquiry.
630 It also might be asked whether a party who has forfeited the right
631 to jury trial by failing to make a timely demand will be inclined
632 to settle rather than face a bench trial. There might be an
633 independent value in adopting an all-parties waiver provision. The
634 question of court approval also should be considered. One variation
635 would be to revise Rule 39(b) to allow the court to order a jury
636 trial on its own.

637 Another judge noted similar experiences – there are few cases
638 of inadvertent forfeiture. One way to inquire further may be to
639 research cases that deal with late requests, but disposition of
640 these requests may not often make it into reports or electronic
641 repositories. And a party may react to its failure to make a timely
642 demand by settling rather than attempting to win permission to make
643 an untimely demand.

644 Turning to the question whether and why it is useful to know
645 early on about the mode of trial – to a judge or to a jury – a
646 Committee member suggested there is a lot of value in knowing. The
647 mode of trial impacts mediation. It also may affect summary-
648 judgment practice, which may be blended with "trial" when trial is
649 to be to the judge. Managing a jury calendar will be helped, and
650 trial scheduling will be helped. "I'm all for more jury trials,"
651 but no one seems to be getting trapped in practice.

652 Another Committee member said that "everyone demands jury

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653 trial so they don't waive it." They may not know until later in the
654 case whether they really want a jury trial. It may make sense to
655 extend the time for demands so better-supported choices are made
656 and so as to avoid the complications when a party who demanded jury
657 trial decides to abandon a demand that other parties may wish to
658 enforce. The removal situation is the only setting that is at all
659 likely to generate inadvertent waivers, especially on remand from
660 an MDL court to the court where the case was initially filed. The
661 need to demand a jury trial is likely to get lost from sight at
662 times. This could be addressed by a rule provision.

663 A judge agreed that the issue seems to arise only in MDL
664 proceedings. He also noted that he has had criminal cases in which
665 the defendant wants to waive jury trial but the government insists
666 on it.

667 *Draft Rule 5.2(i)*

668 Rule 5.2 was adopted as a joint project with the Appellate,
669 Bankruptcy, and Civil Rules Committees. The purpose was not only to
670 provide for omitting sensitive personal information from court
671 filings but also to achieve uniform provisions in each set of
672 rules.

673 The Committee on Court Administration and Case Management
674 suggested that the Bankruptcy Rules Committee should study the need
675 to revise Bankruptcy Rule 9037 to provide an explicit procedure for
676 redacting personal identifiers inadvertently included in court
677 filings. It made the suggestion because of reports that creditors
678 often file thousands of claims, frequently in different courts,
679 without properly abbreviating personal information as required by
680 Rule 9037. The Bankruptcy Rules Committee responded by drafting a
681 proposed Rule 9037(h). Rule 9037(h) would provide for a motion to
682 redact the improperly filed information. Although the Bankruptcy
683 Rules Committee was prepared to recommend publication of this
684 proposal last summer, it agreed to defer publication to enable the
685 Appellate, Civil, and Criminal Rules Committees to study the
686 possibility of recommending parallel proposals.

687 The draft Rule 5.2(i) included in the agenda materials
688 reflects a process of friendly cooperation among the Reporters for
689 the Bankruptcy Rules and the Civil Rules. Some drafting details
690 remain to be ironed out if Rule 5.2(i) is to proceed to a
691 recommendation to publish. The Criminal Rules Committee is
692 uncertain whether it should recommend a parallel draft, and the
693 Appellate Rules Committee is content to depend on the outcome in
694 the other Committees because Appellate Rule 25(a)(5) adopts the
695 other rules as appropriate.

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696 Three questions remain: If the Civil Rules were treated
697 independently, is there any sufficient need to add an express
698 provision governing a motion to redact? If there is no sufficient
699 independent need, should a provision be adopted nonetheless in
700 order to maintain uniformity with the Bankruptcy and Criminal
701 Rules? And if some form of Rule 5.2 is to be recommended for
702 publication, what further efforts should be made to work through
703 the drafting issues that remain following recent efforts to
704 reconcile Rule 5.2 with Rule 9037(h)?

705 The need for an express Rule 5.2 procedure for a motion to
706 redact may be less than the need in Bankruptcy. Bankruptcy may face
707 a distinctive need for a uniform procedure not only because of the
708 frequent occurrence of unredacted filings but also because the same
709 unredacted filings may be made in different courts. It may well be
710 that the problem is sufficiently less widespread in civil actions
711 that parties and the courts can work out appropriate corrections
712 without difficulty. The fact that the Committee on Court
713 Administration and Case Management addressed its concerns only to
714 the Bankruptcy Rules Committee may support an inference that
715 problems have not been widely reported for civil or criminal
716 filings.

717 The independent value of uniformity across the Bankruptcy,
718 Civil, and Criminal Rules also may be uncertain. The present rules
719 are not perfectly uniform – departures were made to reflect the
720 different circumstances that arise in each type of proceeding. That
721 fact alone may reduce whatever risk there might be that
722 inappropriate inferences might be drawn, or at least argued, from
723 the absence of provisions parallel to proposed Rule 9037(h) in the
724 Civil or Criminal Rules.

725 If a decision is made to move forward toward a recommendation
726 to publish, the remaining drafting questions will be addressed
727 under the auspices of the Administrative Office as referee and
728 arbiter.

729 Discussion began with a reminder that it is generally better
730 to avoid adding new rule text unless there is a genuine need. And
731 there are different aspects to uniformity. When separate sets of
732 rules choose to address the same problem, care should be taken to
733 adopt uniform terms to the extent that the underlying problems are
734 uniform. But it is not as important to ensure that when one set of
735 rules undertakes to address a particular problem the other sets
736 also address the problem. As here, the needs confronting one branch
737 of practice may be different from those that arise in the others.

738 A judge said that unredacted filings in civil actions result
739 from simple oversight. Lawyers typically recognize the problem and

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740 want to fix it. The draft rule seems to require a motion to permit
741 the fix, more work than is necessary for a result that can be
742 accomplished more efficiently.

743 Judge Goldgar said that unredacted filings in bankruptcy also
744 result from simple mistakes. Creditors or the debtor simply file
745 attachments without recognizing the presence of personal
746 identifiers. It is not correct to characterize the recommended
747 motion as a motion to redact. It is rather a motion to replace the
748 original unredacted filing with a redacted filing. The court does
749 not itself make the redaction. He later elaborated that the problem
750 arises in bankruptcy because "so much personal information is
751 bandied about." Creditors file lots of documents. "Debtors' lawyers
752 make this mistake all the time." If you do not provide an express
753 remedy for mistakes, you lose uniformity.

754 Doubts were expressed whether an express provision in Rule 5.2
755 is needed, coupled with uncertainty whether the interest in uniform
756 provisions among the rules outweighs the lack of any independent
757 need.

758 Laura Briggs noted that "Overall, we get them filed all the
759 time." The Clerk's Office automatically restricts access to the
760 unredacted filing so that only the parties may access it, and asks
761 the attorneys to refile. The Clerk's Office then substitutes the
762 redacted filing for the original filing. It is not clear that there
763 is any need for a new rule provision, but there is an argument for
764 uniform provisions. Her court has ECF guidelines that address
765 redaction.

766 A judge noted that her Clerk's Office does exactly the same
767 thing – it limits access and asks the parties to fix the filing.

768 Another judge suggested that the court clerks should not be
769 responsible for policing unredacted filings, and that we should be
770 reluctant to impede easy corrections through ECF procedures.

771 Another judge observed that his court sees "enough documents
772 with personal information, but I suspect bankruptcy may see more."

773 The first question put to the Committee was whether anyone
774 thought draft Rule 5.2(i) should not be pursued further. The
775 Committee voted not to proceed further by 8 votes to 6. But it was
776 agreed that the project might be resurrected if other committees
777 urgently ask for uniformity.

778 *Rule 45(b)(1)*

779 The State Bar of Michigan Committee on United States Courts
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780 has suggested that Rule 45(b)(1) be amended to expand the methods
781 for serving subpoenas. The suggestion is 16-CV-B.

782 Rule 45(b)(1) blandly directs that "[s]erving a subpoena
783 requires delivering a copy to the named person." It does not say
784 what method of delivery is required. But most courts read it as if
785 it requires delivery to the named person personally. There are
786 minority views that recognize delivery by mail, or that recognize
787 delivery by mail if diligent attempts to make personal delivery
788 fail. And occasionally a court accepts delivery by some other
789 means. One reason to consider the question would be to establish a
790 uniform meaning.

791 Identifying the best uniform meaning would remain to be
792 decided. The Michigan Bar recommendation is that service of a
793 subpoena is a less important event than service of the summons and
794 complaint that initially brings a party into a civil action. It
795 make sense, from this perspective, to allow service by any of the
796 means provided by Rule 4(e), (f), (g), (h), (i), or (j). In
797 addition, their suggestion would allow service "by alternate means
798 expressly authorized by the court."

799 The method of service was considered during the work that led
800 to the extensive revisions of Rule 45 adopted in 2013. An extensive
801 research memorandum by Andrea Kuperman, the Rules Law Clerk,
802 supplied detailed information on case-law developments that
803 confirms the research supplied to support the present suggestion.
804 The Subcommittee included service as one of the 17 questions to be
805 addressed, but concluded that no change was needed. One concern was
806 that personal service is a dramatic event that impresses on the
807 witness the importance of compliance. The Committee, without
808 extensive discussion, approved the Subcommittee recommendation that
809 revision was not needed.

810 Despite this recent history, there may be reason to consider
811 the question further. At a minimum, it might help to add an express
812 provision authorizing the court to approve service by means other
813 than in-hand service. Highly reliable means may be available in a
814 particular case that ensure actual service at lower cost and with
815 no delay.

816 Going beyond case-specific orders, there is some attraction to
817 the view that the several Rule 4 methods of service could be
818 incorporated. The provisions in Rules 4(e) and (h) for service on
819 individuals and entities may be the easiest to adopt by analogy.
820 Service on an individual by leaving a subpoena at the individual's
821 dwelling or usual place of abode with someone of suitable age and
822 discretion who resides there may be as well justified as service of
823 a summons and complaint by this means. But it is not as simple to

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824 consider service on an agent authorized by appointment or by law to
825 receive service of a subpoena. Apart from the question whether many
826 individuals have appointed agents for service of process, how often
827 does the appointment extend to service of a subpoena? And –
828 remembering that a subpoena issues from the federal court where the
829 action is pending but can be served in any state – what
830 complications might flow from following state law for serving a
831 summons in the state where the subpoena is served? Moving from
832 these common and relatively simple situations to include service on
833 an infant or incompetent person, service abroad (which may be
834 governed by conventions different from those that apply to service
835 of initiating process), and so on through the rest of Rule 4 raises
836 additional uncertainties.

837 The analogy to Rule 4 suggests a further possibility: just as
838 an intended defendant may agree to waive service of the summons and
839 complaint, there may be some value in a rule provision that
840 expressly recognizes agreements to accept service by specified
841 means or to waive formal "service" entirely.

842 Serious work on the means of service might explore still
843 greater complications. An obvious one is whether distinctions
844 should be drawn between party witnesses and nonparty witnesses.
845 When a party is represented by an attorney, for example, service of
846 other papers is made on the attorney; service of a subpoena on the
847 attorney might be still more effective than service directly on the
848 party client. It also might be sensible to provide means of
849 minimizing delay and disruption when a witness has actually
850 received a subpoena – there is something incongruous about a motion
851 to quash a subpoena on the ground that although it has been
852 received, it should be ignored and replaced by further efforts to
853 serve by formally correct means.

854 Discussion began by asking whether there is sufficient reason
855 to take up a topic that was considered and put aside a few years
856 ago. In some circumstances there may be convincing reasons that
857 justify reconsideration after only a short interval. It is not
858 apparent that sufficient reason appears here, although the Michigan
859 Bar suggestion speaks of a plague of delay and expense. Is that
860 reason enough?

861 A judge asked whether there indeed is a plague – judges do not
862 often see these questions.

863 A Committee member observed that she had thought that service
864 by mail is proper. The rule should be clarified. "I thought I knew
865 what it means. Rules should tell us these simple things."

866 A judge echoed the thought: "Why not say what 'delivery'

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867 means"? The cases offer different interpretations. That may be
868 reason enough to clarify the rule.

869 Another Committee member observed that this question was not
870 a major focus of the recent Rule 45 revision discussions. The
871 thought seemed to be only that there was no big need for change.
872 This view was seconded – the issue did not seem as important as
873 many others that commanded the attention of the Subcommittee and
874 Committee.

875 Still another Committee member noted that states often follow
876 the federal rule on service. The Michigan rule calls for
877 "delivery." Any amendment of Rule 45 is likely to make work for
878 state rules committees.

879 The conclusion was that the Administrative Office staff should
880 be asked to explore further the possible reasons for pursuing these
881 questions.

882 *Pilot Projects*

883 Judge Bates opened the discussion of pilot projects by noting
884 that the pilot projects have been developed by a working group that
885 includes members from the Standing Committee, this Committee, and
886 the Committee on Court Administration and Case Management. Judge
887 Grimm, a former Civil Rules Committee member, chairs the working
888 group. The two pilot projects have reached the final stages of
889 development and description.

890 The Expedited Procedures pilot is designed to expand the use
891 of practices that many judges adopt under the present Civil Rules.
892 No changes in rule texts are contemplated. The purpose is to
893 demonstrate the values of active case management, hoping to promote
894 a culture change. The practices aim at: (1) holding a scheduling
895 conference and issuing a scheduling order as soon as practicable,
896 but no later than the earlier of 90 days after any defendant is
897 served or 60 days after any defendant appears; (2) setting a
898 definite period for discovery of no more than 180 days and allowing
899 no more than one extension, only for good cause; (3) informal and
900 expeditious disposition of discovery disputes by the judge; (4)
901 ruling on dispositive motions within 60 days of the reply brief,
902 whether or not there is oral argument after the reply brief; and
903 (5) setting a firm trial date that can be changed only for
904 exceptional circumstances, allowing flexibility as to the point in
905 the proceedings when the date is set but aiming to set trial at 14
906 months from service or the first appearance in 90% of cases, and
907 within 18 months in the remaining cases. Work is proceeding on a
908 Users Manual. Mentor judges will be made available to support
909 implementation in the pilot courts. The goal is to have the project

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910 in place in 2017, to run for a period of three years. Means of
911 measuring the results are a central part of the project.

912 The Mandatory Initial Discovery pilot seeks to test new
913 procedures to see whether experience will support amendments of the
914 present rules. It is based on a model standing order to respond to
915 uniform discovery requests by providing information, both favorable
916 and unfavorable, without regard to whether the responding party
917 plans to use the information in the case. These requests supersede
918 the initial disclosure provisions of Rule 26(a)(1). The pilot does
919 not allow the parties to opt out. It calls for discussion at the
920 case-management conference. Answers, counterclaims, and crossclaims
921 are to be filed without regard to pending motions that otherwise
922 would defer the time for filing, although the court may suspend the
923 obligation to file for good cause when the motion goes to matters
924 of jurisdiction or immunity. There are separate provisions for
925 producing electronically stored information.

926 The task of enlisting pilot courts is under way. The hope is
927 to find five to ten districts for each; no one district would be
928 selected for both projects. Districts of different characteristics
929 should be involved, both large, medium, and small, in different
930 parts of the country. Although it will be desirable to have
931 participation by every judge on each pilot court, there is some
932 flexibility about engaging a court that cannot persuade every judge
933 to participate.

934 Several judges expressed optimism about engaging their courts
in a pilot project. Others were less optimistic.

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

REBECCA A. WOMELDORF
SECRETARY

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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Neil M. Gorsuch, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: December 7, 2016

I. Introduction

The Advisory Committee on Appellate Rules met on October 18, 2016, in Washington, D.C. At this meeting, the Advisory Committee considered one action item and six discussion items. The action item concerned a proposed amendment to Appellate Rule 3 that would eliminate a requirement of "mailing" a notice of appeal. The discussion items concerned security provided on appeal, corporate disclosures, class action settlement objectors, electronic filing by pro se litigants, circuit splits over the meaning of several Appellate Rules, and initiatives to improve the efficiency of federal appellate litigation.

The Advisory Committee now presents five information items to the Standing Committee and no action items. Although the Advisory Committee agreed with a proposed amendment to Rule 3, the Advisory Committee decided not to present the proposal to the Standing Committee at this time. Instead, the Advisory Committee plans to study all of the references to "mail" and "mailing" in the Appellate Rules and then present a more complete proposal to the Standing Committee.

Detailed information about the Advisory Committee’s activities can be found in the attached draft of the minutes of the October 18, 2016 meeting and in the attached agenda. The Advisory Committee has scheduled its next meeting for May 3, 2017, in San Diego, California.

II. Information Items

A. Items 08-AP-A, 11-AP-C, and 15-AP-D (Electronic Filing and Service of a Notice of Appeal)

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.¹ In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether Rules 3(a) and (d) should also be amended. Rule 3(a) addresses the filing of a notice of appeal. Rule 3(d) concerns the clerk's service of the notice of appeal.

The Advisory Committee concluded that subdivision (a) requires no amendment, but that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown in the discussion draft below. First, in lines 10 and 22, the words "mailing" and "mails" should be replaced with "sending" and "sends" to make electronic filing and service possible. Second, as indicated in lines 13-14, the portion of subdivision (d)(1) saying that the clerk must serve the defendant in a criminal case "either by personal service or by mail addressed to the defendant" should be deleted. These changes will eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(d) Serving the Notice of Appeal.

¹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), <http://www.uscourts.gov/file/20163/download>.

9 (1) The district clerk must serve notice of the filing of a notice of appeal by
10 mailing sending a copy to each party's counsel of record—excluding the
11 appellant's—or, if a party is proceeding pro se, to the party's last known address.
12 When a defendant in a criminal case appeals, the clerk must also serve a copy of the
13 notice of appeal on the defendant, ~~either by personal service or by mail addressed to~~
14 ~~the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the
15 docket entries—and any later docket entries—to the clerk of the court of appeals
16 named in the notice. The district clerk must note, on each copy, the date when the
17 notice of appeal was filed.

18 (2) If an inmate confined in an institution files a notice of appeal in the
19 manner provided by Rule 4(c), the district clerk must also note the date when the
20 clerk docketed the notice.

21 (3) The district clerk's failure to serve notice does not affect the validity of the
22 appeal. The clerk must note on the docket the names of the parties to whom the clerk
23 mails sends copies, with the date of mailing sending. Service is sufficient despite the
24 death of a party or the party's counsel.

The Advisory Committee discussed and tentatively approved these suggested changes to Rule 3(d), but decided to postpone sending any proposal to the Standing Committee. Instead, the Advisory Committee has decided to study all references to "mail" in the Appellate Rules and then make a comprehensive recommendation to the Standing Committee.

B. Item No. 12-AP-D (Civil Rule 62 / Appeal Bonds)

In August 2016, the Standing Committee also published proposed changes to Appellate Rule 8(b), which concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal.² The Advisory Committee subsequently learned of a problem in the published draft. The first clause of the first sentence of the proposed revision of Rule 8(b) mentions four forms of security (i.e., "a bond, other security, a stipulation, or other undertaking"), but the second clause mentions only two (i.e., "a bond or undertaking"). The Advisory Committee discussed the problem at its October 2016 meeting and tentatively decided that

² See *id.* at 21 (proposed revision of Appellate Rule 8).

it should be corrected by rephrasing the first sentence of the recently published proposed version of Rule 8(b) as indicated in the discussion draft below:

1 **Rule 8. Stay or Injunction Pending Appeal**

2 * * *

3 **(b) Proceeding Against a Surety or Other Security Provider.** If a party gives
4 security in the form of a bond, a stipulation, an undertaking, or other security, ~~a~~
5 ~~stipulation, or other undertaking~~ with one or more sureties or other security
6 providers, each provider submits to the jurisdiction of the district court and
7 irrevocably appoints the district clerk as its agent on whom any papers affecting
8 its liability on the security ~~bond or undertaking~~ may be served. On motion, a
9 security provider's liability may be enforced in the district court without the
10 necessity of an independent action. The motion and any notice that the district
11 court prescribes may be served on the district clerk, who must promptly mail a
12 copy to each security provider whose address is known.

The indicated revision lists the possible forms of security in a more logical order in the first clause and then refers to them generically as "the security" in the second clause. Although the Advisory Committee believes that these corrections will address the problem, the Committee has decided to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

C. Item No. 08-AP-R (Disclosure Statements)

In August 2016, the Standing Committee published proposed changes to Criminal Rule 12.4, which concerns disclosure statements.³ At its October 2016 meeting, the Advisory Committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1. As shown in the discussion draft below, the changes would modify subdivision (b) and add a new subdivision (d).

1 **Rule 26.1. Corporate Disclosure Statement**

2 * * *

³ See *id.* at 251 (proposed revision of Criminal Rule 12.4).

3 (b) Time for to Filing; Supplemental Later Filing. A party must file
4 the Rule 26.1(a) statement with the principal brief or upon filing a motion,
5 response, petition, or answer in the court of appeals, whichever occurs first, unless
6 a local rule requires earlier filing. Even if the statement has already been filed, the
7 party’s principal brief must include the statement before the table of contents. A
8 party must supplement file a statement at a later time promptly if the party learns
9 of any additional required information or any changes in required information
10 ~~upon its statement whenever the information that must be disclosed under Rule~~
11 ~~26.1(a) changes.~~

12 * * *

13 (d) Organizational Victim in a Criminal Case. In a criminal case, unless
14 the government shows good cause, it must file a statement identifying any
15 organizational victim of the alleged criminal activity. If the organizational victim
16 is a corporation, the statement must also disclose the information required by Rule
17 26.1(a) to the extent it can be obtained through due diligence.

In this discussion draft, the heading and third sentence of subdivision (b) match the proposed revision of Criminal Rule 12.4(b)(2). Subdivision (d) matches the proposed revision of Criminal Rule 12.4(a)(2), with only minor differences necessary for adapting the provision to the Appellate Rules. The words "in a criminal case" are added to the heading and the first sentence, and the subdivision refers to "the information required by Rule 26.1(a)" instead of Criminal Rule 12.4(a)(1). The Advisory Committee decided to wait before proposing these conforming amendments to Rule 26.1 to the Standing Committee until receipt of all public comments on the proposed revision of Criminal Rule 12.4.

In addition to these changes, the Advisory Committee previously had contemplated making changes to the basic disclosure requirement in Rule 26.1(a) and adding a new section specifically addressing disclosures in bankruptcy cases. The Advisory Committee tabled those proposals at its October 2016 meeting. The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one. The Advisory Committee further decided not to create special disclosure rules for bankruptcy cases absent a recommendation from the Advisory Committee on Bankruptcy Rules.

The Advisory Committee tentatively approved a proposal that would expressly impose a disclosure requirement on persons who want to intervene. The proposal would add the following new subdivision to Rule 26.1:

1 **(f) Intervenors. A person who wants to intervene must file a statement**
2 **that discloses the information required by Rule 26.1.**

Although intervention at the appellate level is rare, three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially. The phrase "a person who wants to intervene" comes from Rule 15.1(d). Separately, the Advisory Committee is considering proposals regarding disclosures for persons filing amicus briefs.

D. Item No. 12-AP-F (Class Action Settlement Objectors)

In August 2016, the Standing Committee published a proposed revision of Civil Rule 23 to address objections to class action settlements.⁴ At its October 2016 meeting, the Advisory Committee considered whether the proposed changes to Rule 23 would require conforming amendments to the Appellate Rules. The sense of the Committee was that no amendments are necessary. The Advisory Committee therefore has removed this item from its Agenda.

E. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (Electronic Filing by Pro Se Litigants)

As mentioned above, in August 2016, the Standing Committee published a proposed revision of Appellate Rule 25 to address electronic service and filing.⁵ Proposed subdivision (a)(2)(B)(ii) will leave in place the current requirement that unrepresented parties may file papers electronically only if allowed by court order or local rule. At its October 2016 meeting, the Advisory Committee considered whether to reopen this question for further consideration in light of several suggestions submitted by members of the public. The sense of the Advisory Committee was not to recommend any additional changes. The Committee, however, will not take any action with respect to the published revised version of Rule 25 until it receives all public comments.

III. Other Matters

⁴ See *id.* at 211 (proposed revision of Civil Rule 23).

⁵ See *id.* at 27 (proposed revision of Appellate Rule 25).

At its October 2016 meeting, the Advisory Committee studied two additional matters for possible future inclusion on its agenda. First, the Committee looked at several circuit splits under the Appellate Rules. These splits are about: (1) whether delay by prison authorities in delivering the order from which an inmate wishes to appeal can be used in computing the time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. The Committee decided to investigate the first two circuit splits further but concluded that amending Rule 39(a)(4) would not be an appropriate way to address the third circuit split. Second, the Committee discussed several law review articles proposing ways to make appellate litigation faster and less expensive. As recounted in the minutes, the Committee decided to seek additional information before taking action and will address the matter again at future meetings.

Enclosures:

1. Draft Minutes from the October 18, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee

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TAB 4B

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Advisory Committee on Appellate Rules Table of Agenda Items —December 2016

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/14
16-AP-C	Suggestion to amend Federal Rules of Appellate Procedure 32.1 and 35 to require publication of orders granting rehearing en banc, etc.	Eric Bravo, Esq.	Awaiting initial discussion
16-AP-D	Suggestion to amend Federal Rule of Appellate Procedure 28 to address how supplemental authority is to be filed, whether a response is permitted, whether a reply is permitted, etc.	John Vail, Esq.	Awaiting initial discussion

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DRAFT Minutes of the Fall 2016 Meeting of the
Advisory Committee on Appellate Rules

October 18, 2016
Washington, D.C.

Judge Neil M. Gorsuch, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, October 18, 2016, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Gorsuch, the following members of the Advisory Committee on Appellate Rules were present: Judge Michael A. Chagares, Justice Judith L. French, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, Kevin C. Newsom, Esq., Judge Brett M. Kavanaugh, and Professor Stephen E. Sachs. Acting Solicitor General Ian Heath Gershengorn was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on Appellate Rules; Scott Myers, Esq., Attorney Advisor, RCSO; Elisabeth A. Shumaker, Clerk of Court Representative, Advisory Committee on Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer. Judge Pamela Pepper, Member, Advisory Committee on Bankruptcy Rules and Liaison Member, Advisory Committee on Appellate Rules, participated by telephone.

I. Introductions

Judge Gorsuch began the meeting by welcoming Judge Campbell, Justice French, Judge Pepper, Professor Sachs, and Ms. Shumaker to their first meeting of the Advisory Committee. He thanked Ms. Cox and Ms. Womeldorf for organizing the meeting and setting up a dinner that took place the evening before.

Judge Campbell greeted the Committee Members and said it was a privilege to be involved in the process. Ms. Womeldorf then introduced the staff of the Administrative Office. Every person present at the meeting then introduced himself or herself. Judge Gorsuch then expressed his

gratitude to Judge Colloton, the former chair of the Advisory Committee, for clearing much of the Committee's agenda before his term expired. Judge Gorsuch further thanked Judge Jeffrey Sutton, the former chair of the Standing Committee, for his assistance with the Advisory Committee's work.

II. Public Comment on Proposed Amendments to Rule 29

In August 2016, the Standing Committee published a proposed amendment to Rule 29(a).¹ The change would authorize a court of appeals to "strike or prohibit the filing of an amicus brief that would result in a judge's disqualification." The Advisory Committee heard comments on this proposed change from Associate Dean Alan Morrison of the George Washington University Law School, who also filed written comments prior to the meeting.² Dean Morrison asserted that there was no need for the amendment, that the amendment would not solve the problem that it is intended to solve, that the amendment might deprive the courts of information, and that the amendment will deny amici the opportunity to be heard.

A judge member mentioned that the proposed amendment was largely a codification of existing local rules. Dean Morrison responded that he had never seen a recusal based on an amicus brief. He asserted that most attorneys file amicus briefs well before knowing who the judges are. Accordingly, a client might hire a lawyer to write a brief and then have the brief stricken. Dean Morrison asserted that there would be nothing that the attorney could do about the possibility that the amicus brief might be stricken either before or after filing it. Dean Morrison also pointed out that the Supreme Court receives more amicus briefs than the appellate courts, that all of its Justices are known at the time of filing, and that recusal based on amicus briefs has never been a problem even though the Supreme Court does not have a rule like the one proposed.

Dean Morrison acknowledged that a brief causing a recusal could possibly be a problem when a case is reheard en banc and said that his written comments address this issue. He also said that a brief might be filed at the panel stage and then stricken when the case is reheard en banc. An attorney member asked whether, at the time an amicus brief is stricken, it would be too late to file a substitute brief. Dean Morrison said that it would be too late. The attorney member also noted when there is more than one amicus or more than one lawyer on the amicus brief, it might be unclear

¹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) [hereinafter August 2016 Proposed Amendments] (proposed revision of Appellate Rule 29), <http://www.uscourts.gov/file/20163/download>.

² See Comment from Alan Morrison, <https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0003>.

who caused the recusal. An academic member asked how often judges recuse themselves. Dean Morrison did not have the statistics. The Advisory Committee took Dean Morrison's comments under advisement and will decide what action to take after the public comment period on Rule 29 ends on February 15, 2017.

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of the Standing Committee

The Committee approved the Minutes of the April 5, 2016 Meeting of the Advisory Committee, with the correction of one typographical error on page 7.³ The reporter mentioned that Judge Colloton had communicated with the chief judges of the various circuits about Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees) as the April 2016 Minutes indicated he would. Judge Gorsuch recounted items of interest from the June 2016 meeting of the Standing Committee.

IV. Action Item—Item 11-AP-C (Amendments to Rules 3(a) and (d))

Judge Gorsuch introduced this matter, which concerns amendments to Rules 3(a) and 3(d) to eliminate references to "mailing."⁴ The Advisory Committee first discussed the proposed change to Rule 3(a). The clerk representative suggested eliminating the proposed word "nonelectronic" in line 6 of the discussion draft because it might cause confusion. An attorney member suggested that "hard copy" might be a better word. A judge member then asked whether attorneys reading the rule might think that hard copies would always be needed. Judge Campbell asked whether the confusion might lead to extra paper being filed in the court. The clerk representative said that she did not think so. Judge Campbell also asked whether the second sentence of Rule 3(a) was needed at all, given that clerks can provide the necessary copies. The clerk representative said it probably would not make a difference. A judge member worried about imposing additional burdens on the clerks of court. The Advisory Committee then discussed the proposed changes to Rule 3(d). The reporter explained the purpose of the amendments. The clerk representative expressed agreement with the proposal.

Following the discussion, the Advisory Committee voted to recommend the proposed changes to Rule 3(d) but not to recommend any changes to Rule 3(a). But rather than sending the

³ See Advisory Committee on Rules of Appellate Procedure, Fall 2016 Meeting at 33 [hereinafter Fall 2016 Agenda Book] (draft minutes of the April 2016 meeting of the Advisory Committee), www.uscourts.gov/file/20243/download.

⁴ See *id.* at 51 (memorandum on Item 11-AP-C).

proposal to the Standing Committee, the Advisory Committee decided to hold the matter until the spring. In the meantime, the Advisory Committee asked the reported to study all references to "mail" in the appellate rules and to prepare a memorandum suggesting revisions. At the Spring 2017 meeting, the Advisory Committee will determine whether to change other rules along with Rule 3(d). It was also the sense of the Advisory Committee that district court judges should be consulted about whether any alternative changes to Rule 3(a) should be considered.

V. Discussion Items

A. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

The Reporter introduced Item No. 12-AP-D, which concerns the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8.⁵ As explained in the memorandum addressing this issue, there is a discrepancy between the first and second clauses of the first sentence of the version of Rule 8(d) recently published for public comment.⁶ The memorandum suggested four possible options for addressing the discrepancy.

An attorney member said that he preferred the third option because it would correct all problems addressed in the memorandum. In response to a question from a judge member about the term "security" in line 27, the attorney member said that the word "security" in line 27 refers to "security" in line 21. Another attorney member explained the history of the rule. Judge Campbell asked whether Rule 8(d) should match Civil Rule 62.1 by saying "bond, undertaking, or other security" (but not "stipulation"). An attorney member expressed concern about limiting Rule 8(d) in this way. The Committee then considered additional proposals for redrafting the first sentence of Rule 8(d) so that all forms of security were listed in the first clause and then referred to generically in the second clause as "the security."

Following further discussion, the sense of the Committee was to change the first clause of Rule 8(b) to say "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, ~~a stipulation, or other undertaking~~ with . . ." and to change the second clause to say "affecting its liability on the security bond or undertaking may be served" The Advisory Committee decided to postpone submitting the proposed changes to the Standing Committee until it receives all public comments on the recently published version of Rule 8.

⁵ See *id.* at 73 (memorandum on Item No. 12-AP-D).

⁶ See August 2016 Proposed Amendments, *supra* note 1, at 21-23 (proposed revision of Rule 8).

B. Item No. 08-AP-R (disclosure requirements)

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures.⁷ The Advisory Committee first considered the proposed changes to Rule 26.1(a).⁸ A judge member expressed the view that the current rule should not be changed. An attorney member said that the coverage of the phrase "related matter" in (a)(2)-(4) "could be immense." Another attorney member said that D.C. Circuit local rules use the term "entity" because that term appears in the financial disclosure form. A judge member said that requiring the disclosure of the names of lawyers, witnesses, and judges could be very burdensome in bankruptcy cases because there could be ten related matters in a major chapter 11 reorganization. Another judge member said that deciding what is a "related matter" would be very difficult without more guidance. He then expressed doubt that the Committee should go forward with the proposal. Another judge member explained that the guiding thought was that judges don't want to dig into a case and then find out that there was a problem; he said the term "related state matter" was drafted with habeas cases in mind. He thought more disclosure could be helpful. Judge Campbell asked why Professor Daniel Capra had written the original memorandum about this item. An attorney member explained that there were complaints by judges that they did not have enough disclosure up front. The clerk representative said that the version of Rule 26.1(a) in the Agenda Book would generate many questions to clerks of court about what is a "related matter." An attorney member said that the costs appeared to be larger than the benefits. The clerk member also said that there is already a "certificate of interested parties" that is filed and that is used for recusal purposes. Another attorney suggested that unless the judges see a strong need for additional disclosure, then the lawyers

⁷ See Fall 2016 Agenda Book, *supra* note 3, at 89 (memorandum on Item No. 08-AP-R).

⁸ The discussion draft of Rule 26.1(a) under consideration read as follows:

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File; What Must Be Disclosed. Any ~~nongovernmental~~ corporate party to a proceeding in a court of appeals must file a statement that lists:

- (1) any parent corporation, and any publicly held corporation entity, that owns 10% or more of its stock that has a 10% or greater ownership interest in the party or states that there is no such corporation or entity;
- (2) the names of all judges in the matter and in any related [state] matter;
- (3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter]; and
- (4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].

would rather not have it. A judge member said that there could be a benefit to judges and taxpayers, but recognized that it was burdensome. Following discussion, the Advisory Committee approved a motion to table further consideration of amendments to Rule 26.1(a). The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one.

The Advisory Committee next considered the proposed changes to Rule 26.1(d). The reporter explained that the language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2).⁹ The Committee discussed the matter briefly and then approved the proposed amendment.

The Advisory Committee then considered the discussion draft of Rule 26.1(b). The reporter explained that the proposed changes in this discussion draft would partially conform Rule 26.1(b) to the recently published proposed revision of Criminal Rule 12.4(b).¹⁰ A judge member spoke in favor of the proposed changes to both the title and the text of the rule. Following further discussion, the Advisory Committee voted in favor of the proposed amendment.

The Advisory Committee next considered the discussion draft of Rule 26.1(e), which concerns disclosures in bankruptcy cases. A judge member said that the Advisory Committee on Appellate Rules might not want to take the lead on this matter. An academic member suggested that the bankruptcy courts might not need a rule because they would already know the information. A judge member responded that a bankruptcy court would know the names of debtors at the time the case was filed but would not know additional information until it was developed later in the case. A judge member said that the proposal had been prompted by an ethics opinion. Judge Chagares and Judge Pepper volunteered to discuss the matter further with members of the Advisory Committee on Bankruptcy Rules. The sense of the Committee was to table consideration of Rule 26.1(e) until the Advisory Committee on Bankruptcy Rules provides a recommendation.

The Advisory Committee next considered the discussion draft of Rule 26.1(f), which would impose disclosure requirements on persons who want to intervene. The reporter explained the draft. Following a brief discussion, the Advisory Committee voted in favor of the proposed amendment.

⁹ See August 2016 Proposed Amendments, *supra* note 1, at 251-253 (proposed revision of Criminal Rule 12.4).

¹⁰ See *id.*

The Advisory Committee then considered the discussion draft of Rule 26.1(g), which would prevent local rules from increasing or decreasing the disclosure requirements of Rule 26.1(a). Following discussion, the Committee decided to remove section (g) because the section would only make sense if section (a) would be amended.

The Advisory Committee next considered the discussion draft of Rule 29(c)(1).¹¹ This provision would require persons who file amicus briefs to make the same disclosures required under the discussion draft of Rule 26.1(a). The Committee concluded that the amendment was not needed because the proposal to amend Rule 26.1(a) had been tabled. The Committee therefore also decided to table the proposal to amend Rule 29(c)(1).

Finally, the Advisory Committee considered the discussion draft of Rule 29(c)(5)(D), which would require a statement about whether a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization. Following brief discussion, the Advisory Committee rejected the change because there did not seem to be a huge need for it and because party briefs do not require this.

C. Item No. 12-AP-F (class action settlement objectors)

The Advisory Committee next considered Item No.12-AP-F, which concerns a possible problem with some objections to class action settlements.¹² Following a brief discussion, the sense of the Advisory Committee was that this item should be removed from the agenda because the Advisory Committee on the Civil Rules has fully addressed the matter in the recently published provision to Rule 23.¹³ The Advisory Committee concluded that no conforming amendment to the Appellate Rules was necessary.

D. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (electronic filing by pro se litigants)

The Advisory Committee next considered Item Nos. 15-AP-A, 15-AP-E, and 15-AP-H.¹⁴ These three items concern proposals to modify the Appellate Rules so that they generally would

¹¹ See Fall 2016 Agenda Book, *supra* note 3, at 93.

¹² See Fall 2016 Agenda Book, *supra* note 3, at 133 (memorandum on Item No. 12-AP-F).

¹³ See August 2016 Proposed Amendments, *supra* note 1, at 211 (proposed revision of Civil Rule 23).

¹⁴ See Fall 2016 Agenda Book, *supra* note 3, at 145 (memorandum on Items Nos. 15-AP-A, 15-AP-E, 15-AP-H).

allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when addressing the recent changes to Appellate Rule 25. The published proposed revision of Rule 25 retains the current rule that unrepresented parties may file papers electronically only if allowed by court order or local rule.¹⁵ One judge member thought the Committee should resume consideration of this matter, but the sense of the Committee was to remove the item from the agenda. Representatives from the Administrative Office said that they would continue to look at the subject of pro se filing and report back to the Committee.

The Committee then took a break for lunch.

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

When the meeting resumed, the Committee discussed three circuit split on the interpretation of the Appellate Rules and considered whether to add them to its Agenda.¹⁶ The Committee first considered a circuit split under Rule 4(c). Judge Gorsuch introduced the issue and explained that appellate courts disagree about whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. Mr. Byron said that the Bureau of Prisons had flagged two issues. First, it would be difficult to track and provide evidence of when an inmate actually receives notice of the district court's entry of judgment. Second, a prisoner's assertion of a delay could be burdensome to prison staff. A judge member said that the Third Circuit's decision was made before *Bowles v. Russell*, 551 U.S. 205 (2007), and the relevant arguments might not have been raised. Judge Campbell said that it would be rare for this issue to arise in a criminal case. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises in civil cases.

The Committee then discussed a circuit split under Rule 7 about whether the costs for which a bond may be required under Rule 7 can include attorney's fees. Some circuits take the position that, where there is a fee shifting statute, the bond on appeal can cover the fees. The D.C. and Third Circuits disagree, reasoning that requiring a bond to cover attorney's fees might deter non-frivolous appeals. A judge member noted that the Third Circuit opinion was not published. Judge Campbell asked how often district courts award fees before the appeal. The clerk representative said that attorney's fees cases usually come to the appellate courts independently. Mr. Byron also wondered how often these cases arise. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises.

¹⁵ See August 2016 Proposed Amendments, *supra* note 1, at 271 (proposed revision of Appellate Rule 25).

¹⁶ See Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

The Committee then considered a circuit split about whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. An academic member asked what the objection would be to giving the district court discretion to decide. Judge Campbell asked whether the word "court" refers to the appellate court or to the district court. A member suggested that the historical sections in Moore's Federal Practice and Wright & Miller might have some history on this topic. Following discussion, the Committee decided not to put this issue on the agenda.

F. Initiatives to Improve the Efficiency of Federal Appeals

The Advisory Committee next considered the subject of how amendments to the Appellate Rules might lower costs and make appeals faster and more efficient.¹⁷ Judge Gorsuch introduced the subject and referred to the law review cited in the reporter's memorandum on the subject. Mr. Letter said the Committee already had looked into the interlocutory appeals issue. A Judge Member said that some of Martin Siegel's suggestions might be ideas to send to Chief Judges of each circuit. Professor Coquillete said that the Civil Rules Committee had dropped a number of forms because they were difficult to update. But he said that forms making litigation more efficient might be beneficial. Judge Campbell said that he would inquire about whether any of the proposed steps had been taken.

A judge member suggested the rules should require an introduction and summary together in the brief and not separately. Another judge member asked whether there might be ways to address interlocutory appeals. An attorney member said local rules on contents of briefs are a problem. As examples, he mentioned that the circuits have different rules on parallel citations and ways to cite the record or trial. Professor Sachs volunteered to study interlocutory appeals and report back to the Advisory Committee. Judge Kavanaugh volunteered to work with the representatives from the Department of Justice on the issues of sections of briefs and citations.

VI. New Business

Judge Gorsuch invited members of the Advisory Committee to propose possible new business for the Committee to consider.

Mr. Katyal said that the Eighth Circuit has a trap for the unwary. If a party seeks an interlocutory appeal on one issue, the party then cannot later appeal other issues. Other circuits have a different rule. Judge Gorsuch said that the topic will be on the agenda for the spring meeting and that the spring agenda book will include a memorandum on the subject prepared by Mr. Katyal.

¹⁷ See Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

Prof. Coquillette said that it would be better for a committee to resolve this issue than to wait for the Supreme Court to resolve it through litigation.

Mr. Katyal separately discussed variations in the circuits on Appellate Rule 30 concerning joint appendices. He cited the example of whether supplemental joint appendices are allowed by motion or by right. Another issue is whether the joint appendix can be deferred until after all the briefs come in. Mr. Letter and Prof. Coquillette both supported the suggestion that the Committee should consider this issue. Ms. Shumaker agreed. Judge Chagares and Judge Kavanaugh, and others thought the Committee should consider the matter. Judge Campbell asked whether electronic filing would affect joint appendices. Ms. Shumaker said that hyperlinking between electronically filed briefs and the record will be possible in the future, and said that the Second and Ninth Circuit are already experimenting with a system. Judge Chagares said that there should not be a rule prohibiting all paper. Judge Murphy said that this is one of the most complicated things appellate lawyers have to deal with. He saw the benefit of a national rule but thought that such a rule might affect lawyers who know only the local practice. Judge Gorsuch asked Mr. Letter and Mr. Katyal to prepare a memorandum for the spring meeting.

Mr. Byron suggested another item of new business. He said that Rule 45 and Rule 40(b) provide lengths for rehearing en banc petitions but not for responses. The clerk representative said that the responding party just follows the petitioner's limit. She said that although it seems like there is a gap, the issue has not been a problem. Given that the rule was just amended and there was no confusion, the sense of the Committee was that this proposed item should not be included on the agenda.

Judge Gorsuch announced that the Committee had received a request to make a rule that courts publish orders granting en banc hearing. The worry is that a lawyer (or another court) will rely on a panel decision without knowing that rehearing en banc had been granted. A judge member believed that this is a sensible request. Mr. Byron said that a rule requiring publication might raise controversy and that "publication" is an unusual term given that most documents are available on Pacer. Judge Gorsuch asked the clerk representative for guidance. She said that Westlaw decides what order to publish, not the court. Mr. Letter said that maybe this is an issue for which a letter should be written. Mr. Byron asked whether there was a problem requiring publication. A judge member said that a 7th Circuit local rule says that it must be published in the Federal Reporter. These orders do appear on Pacer. Mr. Byron and Mr. Letter said they will work with others in investigating this issue.

Finally, the Advisory Committee considered Ms. Shumaker's memorandum in the Agenda Book.¹⁸ The memorandum explains that Rules 10, 11, 27, and 30 do not account (or do not account fully) for electronic records. She said that the current situation is difficult to address. Judge Campbell said that the Civil Rules contained too many references to paper to correct but they did not cause many problems. The clerk representative said that on appeal the problems are greater. The sense of the Committee was that this is a topic to look into; there should be an inventory of what has to be changed. The clerk representative and reporter will make a list of all places where the rules have to be changed to bring them into conformity with current practice without trying to change the practice.

VII. Adjournment

The meeting adjourned at 2:10 p.m.

¹⁸ *See id.* at 183 (memorandum on Potential Fed. R. App. P. Updates).

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TAB 5

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TAB 5A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

NEIL M. GORSUCH
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 5, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on November 14, 2016. The draft minutes of that meeting are attached.

At the meeting the Committee concluded its more than five-year consideration of an Official Form and related rules for chapter 13 plans by giving final approval to the amendment of one rule, the adoption of a new rule, and minor amendments to the proposed new Official Form. This action completed the Committee's approval process that was begun at the fall 2015 meeting, when amendments to eight additional rules and the Official Form were approved, but held in abeyance. The Committee now seeks the Standing Committee's approval of the entire package of chapter 13 plan form and rule amendments.

The Committee also approved a technical amendment to one rule and a conforming amendment to one Official Form. It seeks the Standing Committee's approval of these amendments without publication.

These action items are discussed in Part II of this report.

Part III presents two information items. The first concerns the Committee's intention at the June Standing Committee meeting to seek approval of conforming amendments to Rule 8011 without publication. The second item provides information about the Committee's consideration of noticing issues under the Bankruptcy Rules.

II. Action Items

A. Items for Final Approval Following Publication

The Committee requests that the Standing Committee approve amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113. The Committee recommends that the package of rules and the form be submitted to the Judicial Conference at its March meeting and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they may take effect on December 1, 2017. The rules and form in this group appear in *Appendix A1*.

Action Item 1. Chapter 13 plan Official Form and rules package.

The Committee began considering the possibility of creating a chapter 13 plan Official Form at the spring 2011 meeting. At that meeting the Committee discussed Suggestions 10-BK-G and 10-BK-M, which proposed the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that “[c]urrently, every district's plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district.” The States' Association of Bankruptcy Attorneys (“SABA”), which submitted the other suggestion, stressed the impact of the Supreme Court's then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted, the Court imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid, not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the Committee approved the creation of a working group to draft an Official Form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Approximately 150 comments were submitted. Because the Committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At the spring 2015 meeting, the Committee considered the approximately 120 comments that were submitted after republication, many of which—including the joint comments of 144 bankruptcy judges—were strongly opposed to the adoption of a mandatory national form for chapter 13 plans. The Committee discussed a number of options relating to the chapter 13 national form and associated rules. No member favored completely abandoning the project, and no one favored proceeding with the proposed amendments to the nine rules without also proposing a national plan form. Although there was widespread agreement regarding the benefit of having a national plan form, 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 was generally inclined to explore the possibility of a compromise along the lines suggested by a group of commenters, led by Bankruptcy Judges Marvin Isgur and Roger Efremsky (“the compromise group”).¹ After a full discussion, the Committee voted unanimously to give further consideration to pursuing a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the Official Form if certain conditions were met.

During the summer of 2015, the Forms Subcommittee, joined by former Committee chair Judge Gene Wedoff and chapter 13 trustee Jon Waage, considered how best to implement an opt-out proposal and how to respond to the substantive and stylistic comments that were submitted on the plan form and Rules 3002, 3015, and 9009 (the rules most closely associated with the opt-out proposal). The Consumer Subcommittee considered the comments submitted on Rules 2002, 3007, 3012, 4003, 5009, and 7001.

The Forms Subcommittee shared its proposed revisions of Official Form 113 and Rules 3002 and 3015 with members of the compromise group, some members of the consumer debtor bar, and some chapter 13 trustees. Prior to the fall 2015 meeting, the Committee received correspondence from the president of the National Association of Consumer Bankruptcy Attorneys (“NACBA”) and from Representative John Conyers, Jr., the Ranking Member on the House Committee on the Judiciary, and Representative Hank Johnson, Ranking Member on the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Their primary concern was procedural: they advised the Advisory Committee not to approve a version of the opt-out approach without first publishing it for public comment.

At the fall 2015 meeting, the Committee gave approval to proposed Official Form 113 and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The Committee voted to defer submitting those items to the Standing Committee in order to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication. It

¹ Members of this group are Bankruptcy Judges Isgur, Efremsky, and Rebecca Connelly; George Stevenson, Rick Yarnell, and David Peake, who are chapter 13 trustees and past or present officers of the National Association of Chapter 13 Trustees; and creditors’ attorneys Michael Bates (Wells Fargo Bank), Alane Becket (Becket & Lee, LLP), and Karen Cordry (National Association of Attorneys General).

directed the Forms Subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

The Subcommittee reached out to all relevant groups and invited them to provide feedback on the opt-out proposal, as set out in proposed Rules 3015 and 3015.1, as well as on whether they perceived a need for further publication. The following groups provided comments to the Subcommittee in response: National Bankruptcy Conference (“NBC”), National Conference of Bankruptcy Judges (“NCBJ”), National Association of Consumer Bankruptcy Attorneys (“NACBA”), the American Bankruptcy Institute’s Consumer Committee, a large number of chapter 13 trustees whose comments were collected by the National Association of Chapter 13 Trustees, and an informal mortgage servicer group. While the bulk of the comments received were directed at the plan form itself, rather than at the opt-out proposal, three groups (NBC, NCBJ, and the mortgage servicers) and seven individual trustees did express support for allowing districts to opt out of a national plan form. In addition, Bankruptcy Judge Marvin Isgur (S.D. Tex.) circulated the opt-out proposal to the 144 bankruptcy judges who had submitted a letter in 2014 opposing a national plan form, and he reported that there was general acceptance of Rules 3015 and 3015.1 among the group.

The response of NACBA to the Subcommittee’s outreach was relatively brief. The president of the organization said that he could not speak for the thousands of NACBA members, and he urged the Committee to publish the proposals that were being considered. He asserted that “adoption of the ‘compromise’ proposal without providing a new comment period would not comply with the law and [would] subject such to litigation and added controversy.” NCBJ also advised that the opt-out proposal be published for public comment.

At the spring 2016 meeting, the Committee unanimously approved the Forms Subcommittee’s recommendation that the amendments to Rule 3015 and proposed new Rule 3015.1 be published for public comment. The Committee also unanimously agreed that the Committee should seek to publish Rules 3015 and 3015.1 on a truncated schedule. According to § 440.20.40(d) of the Guide to Judiciary Policy, “The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained.” Because of the two prior publications and the narrow focus of the revised rules, the Committee believed that the usual 6-month comment period should be shortened so that an entire year could be eliminated from the period leading up to the effective date of the Committee’s proposed rules and form.

The Standing Committee accepted the Committee’s recommendation, and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at a

Committee hearing conducted telephonically on September 27; they also submitted their written testimony, which was posted along with the written comments.

A majority of the comments were supportive of the proposed rules' implementation of an Official Form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the Committee considered. The strongest opposition to the opt-out procedure came from NACBA and from three consumer debtor attorneys who testified at the hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed and plans with any nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a "form chapter 13 plan," whether national or local, exceeds rulemaking authority.

At the fall 2016 meeting, the Committee unanimously accepted the Forms Subcommittee's recommendation that Rules 3015 and 3015.1 be approved with some changes that were responsive to comments submitted and that Official Form 113 (previously approved by the Committee) be amended in some minor respects and reapproved. The Committee concluded that no changes were needed to the published rules in response to comments expressing general opposition to the Committee's approach. The Committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner but do not mandate the content of such plans was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the Committee concluded that it was prudent to give bankruptcy districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals the Committee sought in its original proposal. Finally, the Committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The comments submitted in response to the August 2014 and July 2016 publications are summarized in *Appendix B*. The text of the proposed rule amendments, new rule, and new Official Form, along with their Committee Notes and a list of changes made after publication, are included in *Appendix A1*.

B. Items for Final Approval Without Publication

The Committee requests that the Standing Committee approve amendments to Rule 7004(a)(1) and Official Form 101 without publication due to their technical and conforming nature. The Committee recommends that the amendment to Form 101 take effect on December 1, 2017.

Action Item 2. Reference to Civil Rule 4 in Rule 7004(a)(1) (Summons; Service; Proof of Service).

Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, the Committee amended Rule 7004(a) to incorporate by reference the provision of Civil Rule 4 addressing a defendant's waiver of service of a summons. At that time, the relevant provision of the civil rules was set forth in Civil Rule 4(d)(1), which read:

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the foregoing provision. Specifically, the 2007 amendments renumbered the provision as Civil Rule 4(d)(5) and modified the language to read:

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the Committee recommends an amendment to Rule 7004(a) to incorporate the correct subsection of Civil Rule 4(d), that being Civil Rule 4(d)(5). The language of the proposed amendment to Rule 7004(a) is included in *Appendix A2*. Based on its technical and conforming nature, the Committee further recommends that the proposed amendment to Rule 7004(a) be submitted to the Judicial Conference for approval without prior publication.

Action Item 3. Question 11 on Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). The Committee has identified a need to amend question 11 on Official Form 101, the voluntary petition for individual debtors, to make the wording consistent with § 362(l)(5)(A).

Section 362(b) provides exceptions to the automatic stay. Section 362(b)(22) provides that the automatic stay does not apply to the continuation of any eviction action by a lessor against the debtor with respect to the debtor's residence if the lessor obtained a judgment of

possession before the bankruptcy petition was filed. The exception in § 362(b)(22), however, is made subject to § 362(l).

Section 362(l), in turn, allows a debtor who complies with certain procedural requirements to get the benefit of the automatic stay under certain circumstances. One procedural requirement is set forth in § 362(l)(5)(A), which requires a debtor to indicate on the bankruptcy petition if “a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor.” The debtor must also provide the name and address of the lessor who holds the eviction judgment. *Id.* In addition, the debtor has to file a specified certification. *See* § 362(l)(1).

As part of the Forms Modernization Project, the bankruptcy petition form (Official Form 101) was revised and a certification form (Official Form 101A) was promulgated.

Question 11 in Form 101 has the following questions which relate to § 362(l).

11. Do you rent your residence?

No. Go to line 12.

Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?

No. Go to line 12.

Yes. Fill out Initial

Statement About an Eviction

Judgment Against You (Form 101A)

and file it with this bankruptcy petition.

After review, it appears that the Forms Modernization Project inadvertently introduced an error in Form 101. The language in Form 101 “Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?” requires only debtors who desire to remain in their residences to provide information concerning an eviction judgment against them. Yet, § 362(l)(5)(A) requires all debtors who have an eviction judgment against them for their residence to indicate that fact on the petition and to provide the name and address of the lessor. (Form 101A, the new certification form, does not contain the same error; it correctly requires all debtors subject to a prepetition eviction judgment to indicate that fact and to give the name and address of the lessor.)

The Committee recommends amending question 11 on Form 101 to correct this error. As amended, question 11 would: (i) eliminate the second part of the compound sentence following the first yes box: “Has your landlord obtained an eviction judgment against you ~~and do you want to stay in your residence?~~”; and (ii) change the language of the last sentence to read, “Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it ~~with~~ as part of

this bankruptcy petition.” The proposed revised Form 101 is included in *Appendix A2*. Based on its technical and conforming nature, the Committee further recommends that the proposed amendments to Form 101 be submitted to the Judicial Conference for approval without prior publication.

III. Information Items

A. Conforming Amendments to Rule 8011 (Filing and Service; Signature) Without Publication

The Bankruptcy, Civil, Criminal, and Appellate Rules Advisory Committees are engaged in a coordinated effort to address electronic filing, signatures, service, and proof of service in their respective rules. This project began with the Civil Committee’s proposal for amending Civil Rule 5 (Serving and Filing Pleadings and Other Papers); the other committees then proposed similar amendments to their service and filing rules. The committees’ proposed rule amendments were published for public comment in August.

In furtherance of this effort, the Bankruptcy Rules Committee published for comment an amendment to address electronic filing, Bankruptcy Rule 5005(a) (Filing). The preliminary draft follows the draft of Civil Rule 5(d) (except where deviations were required for bankruptcy-specific reasons). The Committee did not propose any amendment to address electronic service and proof of service, because the amendments to Civil Rule 5(b) and (d)(1)(B) will automatically apply in bankruptcy proceedings. That is because Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings, and Bankruptcy Rule 9014(b) provides that Civil Rule 5(b) governs service in contested matters.

Because the proposed amendments focused on changes to Civil Rule 5, the Committee considered only electronic filing, service and proof of service at the trial level. It did not consider electronic filing, service and proof of service on appeal before district courts and bankruptcy appellate panels. This oversight came to light at the June 2016 Standing Committee meeting when the Appellate Rules Committee presented its proposed amendment to FRAP 25 (Filing and Service), which closely track the proposed electronic filing, service and proof of service amendments to Civil Rule 5.

Bankruptcy Rule 8011, which addresses filing and service in bankruptcy appeals, is based on and closely tracks FRAP 25. Indeed, one of the goals of our 2014 revision of bankruptcy appellate rules (Part VIII of the Bankruptcy Rules) was to have our appellate rules mirror the Federal Rules of Appellate Procedure, except when there was a bankruptcy-specific reason to do otherwise. The Committee therefore recommends amending Rule 8011 to track the amendments to FRAP 25 and address electronic filing (FRAP 25(a)), electronic signatures (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). A draft of the proposed amendments to Rule 8011 is included in *Appendix A3*.

The Committee plans to review the proposed amendments to Rule 8011 at its April 2017 meeting, which will allow it to consider any public comments to FRAP 25, as well as any refinements to the rule proposed by the Appellate Rules Committee. After making any necessary revisions to ensure consistency with FRAP 25, the Committee will request approval of Rule 8011 without publication at the Standing Committee's June 2017 meeting.

The Committee intends to recommend that the amendments to Rule 8011 be approved without publication. There are several reasons for taking such an approach. First, the Committee has determined that the proposed amendments to Rule 8011, which will be materially identical to the proposed amendments to FRAP 25, do not raise issues unique or particular to bankruptcy cases. Therefore, the public's comments on the amendments to FRAP 25 would be adequate to identify any issues or concerns about the amendments to Rule 8011. Second, to avoid confusion, it is important for the federal rules to be consistent in their approach to electronic filing, service, and proof of service. An approval of the amendments to Rule 8011 without publication will allow them to remain on the same track as FRAP 25, Civil Rule 5, Bankruptcy Rule 5005(a), and Criminal Rule 49, with a potential effective date of December 1, 2018.

B. Noticing Project

Over the years, the Committee has been asked to review noticing issues in bankruptcy cases—both the mode of noticing and service (other than service of process) and the parties entitled to receive such notices or service. These issues are important in the federal bankruptcy system, but they are also complex. The bankruptcy rules contain approximately 145 rules addressing noticing or service issues, and many of those rules include multiple subparts with different requirements. Unlike many civil or criminal matters, a single bankruptcy case may involve hundreds of parties, and the bankruptcy rules require the clerk (or some other party as the court may direct) to notice or serve certain papers on all of these parties on numerous occasions. In addition, many courts have adopted local rules to address noticing and service issues in bankruptcy cases.

At its fall 2015 meeting, the Committee approved a work plan to study noticing issues generally in federal bankruptcy cases. At its spring 2016 meeting, the Committee determined that the ongoing electronic filing, notice, and service initiatives by the federal rules committees could mitigate many of the general concerns regarding the extent and cost of required noticing in bankruptcy cases, and therefore the Committee decided to defer undertaking an extensive overhaul of bankruptcy noticing provisions. Nevertheless, the Committee decided to review and evaluate the specific suggestions regarding noticing issues in bankruptcy cases that had been submitted to the Committee.

Based on its preliminary review, the Committee decided to focus first on a specific suggestion regarding providing electronic noticing and service to businesses, financial institutions, and other non-individual parties that hold claims or other rights against the debtor. These parties may receive numerous notices and papers in multiple bankruptcy cases; thus, permitting electronic noticing and service on such parties would generate significant cost savings and other efficiencies. The Committee is exploring an amendment to the bankruptcy rules that would allow such non-individual parties who are not registered users of CM/ECF to opt into electronic noticing and service in bankruptcy cases. The Committee will ensure that any such amendment is consistent with 11 U.S.C. § 342(e) and (f), which gives certain creditors the right to designate a particular service address. While such an amendment would address bankruptcy-specific issues, it may affect the Appellate Rules Committee, the Civil Rules Committee, and the Criminal Rules Committee because the amended bankruptcy rule would govern issues similar to those in the proposed and pending amendments to Appellate Rule 25(c), Civil Rule 5(b)(2), and Criminal Rule 49(a)(3).

The Committee will provide a further update on the noticing project at the Standing Committee's June 2017 meeting.

TAB 5B

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APPENDIX A1

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Appendix A1

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

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 (a) TWENTY-ONE-DAY NOTICES TO PARTIES
8 IN INTEREST. Except as provided in subdivisions (h), (i),
9 (l), (p), and (q) of this rule, the clerk, or some other person
10 as the court may direct, shall give the debtor, the trustee, all
11 creditors and indenture trustees at least 21 days' notice by
12 mail of:

13 * * * * *

14 (7) the time fixed for filing proofs of claims
15 pursuant to Rule 3003(c);~~and~~

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

16 (8) the time fixed for filing objections and the
17 hearing to consider confirmation of a chapter 12 plan;

18 and

19 (9) the time fixed for filing objections to
20 confirmation of a chapter 13 plan.

21 (b) TWENTY-EIGHT-DAY NOTICES TO
22 PARTIES IN INTEREST. Except as provided in
23 subdivision (l) of this rule, the clerk, or some other person
24 as the court may direct, shall give the debtor, the trustee, all
25 creditors and indenture trustees not less than 28 days'
26 notice by mail of the time fixed

27 (1) for filing objections and the hearing to
28 consider approval of a disclosure statement or, under
29 §1125(f), to make a final determination whether the
30 plan provides adequate information so that a separate
31 disclosure statement is not necessary; ~~and~~

32 (2) for filing objections and the hearing to
33 consider confirmation of a chapter 9; or chapter 11, ~~or~~
34 ~~chapter 13 plan; and~~
35 (3) for the hearing to consider confirmation of
36 a chapter 13 plan.
37 * * * * *

Committee Note

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

38

1 **Rule 3002. Filing Proof of Claim or Interest**

2 (a) NECESSITY FOR FILING. ~~An~~A secured
3 creditor, unsecured creditor, or an equity security holder
4 must file a proof of claim or interest for the claim or
5 interest to be allowed, except as provided in Rules 1019(3),
6 3003, 3004, and 3005. A lien that secures a claim against
7 the debtor is not void due only to the failure of any entity to
8 file a proof of claim.

9 (b) PLACE OF FILING. A proof of claim or
10 interest shall be filed in accordance with Rule 5005.

11 (c) TIME FOR FILING. In a voluntary chapter 7
12 ~~liquidation~~case, chapter 12 ~~family—farmer’s—debt~~
13 ~~adjustment~~case, or chapter 13 ~~individual’s—debt~~
14 ~~adjustment~~case, a proof of claim is timely filed if it is filed
15 not later than ~~90~~70 days after the order for relief under that
16 chapter or the date of the order of conversion to a case
17 under chapter 12 or chapter 13. In an involuntary chapter 7

18 case, a proof of claim is timely filed if it is filed not later
19 than 90 days after the order for relief under that chapter is
20 entered,~~the first date set for the meeting of creditors called~~
21 ~~under § 341(a) of the Code, except as follows:~~ But in all
22 these cases, the following exceptions apply:

23 * * * * *

24 (6) ~~If notice of the time to file a proof of claim~~
25 ~~has been mailed to a creditor at a foreign address, o~~On
26 ~~motion filed by the~~a creditor before or after the
27 expiration of the time to file a proof of claim, the
28 court may extend the time by not more than 60 days
29 from the date of the order granting the motion. The
30 motion may be granted if the court finds that~~the~~
31 ~~notice was insufficient under the circumstances to~~
32 ~~give the creditor a reasonable time to file a proof of~~
33 ~~claim~~

34 (A) the notice was insufficient under the
35 circumstances to give the creditor a reasonable
36 time to file a proof of claim because the debtor
37 failed to timely file the list of creditors' names
38 and addresses required by Rule 1007(a); or

39 (B) the notice was insufficient under the
40 circumstances to give the creditor a reasonable
41 time to file a proof of claim, and the notice was
42 mailed to the creditor at a foreign address.

43 (7) A proof of claim filed by the holder of a
44 claim that is secured by a security interest in the
45 debtor's principal residence is timely filed if:

46 (A) the proof of claim, together with the
47 attachments required by Rule 3001(c)(2)(C), is
48 filed not later than 70 days after the order for
49 relief is entered; and

50 (B) any attachments required by
51 Rule 3001(c)(1) and (d) are filed as a supplement
52 to the holder's claim not later than 120 days after
53 the order for relief is entered.

Committee Note

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The inclusion of language from § 506(d) is not intended to effect any change of law with respect to claims subject to setoff under § 553. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules 3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the

§ 341 meeting of creditors to 70 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 70-day time for filing runs from the order of conversion. If a case is converted to chapter 7, Rule 1019(2) provides that a new time period for filing a claim commences under Rule 3002. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to any proof of claim.

Changes Made After Publication and Comment

- The deadline in subsection (c) for filing a proof of claim in a voluntary chapter 7, 12, or 13 case was changed from 60 days to 70 days.
- The phrase “under that chapter” was added after “order for relief” in two places in subdivision (c).
- The Committee Note was changed accordingly.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

1 **Rule 3007. Objections to Claims**

2 (a) ~~OBJECTIONS TO CLAIMS~~ TIME AND
3 MANNER OF SERVICE.

4 (1) Time of Service. An objection to the allowance
5 of a claim and a notice of objection that substantially
6 conforms to the appropriate Official Form shall be ~~in~~
7 ~~writing and filed:~~ and served at least 30 days before
8 any scheduled hearing on the objection or any
9 deadline for the claimant to request a hearing. ~~A copy~~
10 ~~of the objection with notice of the hearing thereon~~
11 ~~shall be mailed or otherwise delivered to the claimant,~~
12 ~~the debtor or debtor in possession, and the trustee at~~
13 ~~least 30 days prior to the hearing.~~

14 (2) Manner of Service.

15 (A) The objection and notice shall be served
16 on a claimant by first-class mail to the person
17 most recently designated on the claimant's
18 original or amended proof of claim as the person

19 to receive notices, at the address so indicated;

20 and

21 (i) if the objection is to a
22 claim of the United States, or any of
23 its officers or agencies, in the
24 manner provided for service of a
25 summons and complaint by Rule
26 7004(b)(4) or (5); or

27 (ii) if the objection is to a
28 claim of an insured depository
29 institution, in the manner provided
30 by Rule 7004(h).

31 (B) Service of the objection and notice shall
32 also be made by first-class mail or other
33 permitted means on the debtor or debtor in
34 possession, the trustee, and, if applicable, the
35 entity filing the proof of claim under Rule 3005.

36 * * * * *

Committee Note

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail addressed to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take. However, while a local rule may require the claimant to respond to the objection to a proof of claim, the court will still need to determine if the claim is valid, even if the claimant does not file a response to a claim objection or request a hearing.

Changes Made After Publication and Comment

- Subdivision (a) was divided into two paragraphs that separately address time of service and manner of service.
- A requirement of service on an entity that files a proof of claim under Rule 3005 was added to subdivision (a)(2)(B).

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

1 **Rule 3012. ~~Valuation of Security~~Determining the**
2 **Amount of Secured and Priority Claims**

3 ~~The court may determine the value of a claim secured~~
4 ~~by a lien on property in which the estate has an interest on~~
5 ~~motion of any party in interest and after a hearing on notice~~
6 ~~to the holder of the secured claim and any other entity as~~
7 ~~the court may direct.~~

8 **(a) DETERMINATION OF AMOUNT OF CLAIM.**

9 On request by a party in interest and after notice—to the
10 holder of the claim and any other entity the court
11 designates—and a hearing, the court may determine

12 (1) the amount of a secured claim under §
13 506(a) of the Code, or

14 (2) the amount of a claim entitled to priority
15 under § 507 of the Code.

16 **(b) REQUEST FOR DETERMINATION; HOW**
17 **MADE.** Except as provided in subdivision (c), a request to

18 determine the amount of a secured claim may be made by
19 motion, in a claim objection, or in a plan filed in a
20 chapter 12 or chapter 13 case. When the request is made in
21 a chapter 12 or chapter 13 plan, the plan shall be served on
22 the holder of the claim and any other entity the court
23 designates in the manner provided for service of a
24 summons and complaint by Rule 7004. A request to
25 determine the amount of a claim entitled to priority may be
26 made only by motion after a claim is filed or in a claim
27 objection.

28 (c) CLAIMS OF GOVERNMENTAL UNITS. A
29 request to determine the amount of a secured claim of a
30 governmental unit may be made only by motion or in a
31 claim objection after the governmental unit files a proof of
32 claim or after the time for filing one under Rule 3002(c)(1)
33 has expired.

Committee Note

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. When the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made only by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer's Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

(a) FILING A CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) FILING A CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) ~~DATING.~~ Every proposed plan and any modification thereof shall be dated. FORM OF CHAPTER

13 PLAN. If there is an Official Form for a plan filed in a chapter 13 case, that form must be used unless a Local Form has been adopted in compliance with Rule 3015.1. With either the Official Form or a Local Form, a nonstandard provision is effective only if it is included in a section of the form designated for nonstandard provisions and is also identified in accordance with any other requirements of the form. As used in this rule and the Official Form or a Local Form, “nonstandard provision” means a provision not otherwise included in the Official or Local Form or deviating from it.

(d) NOTICE-AND-COPIES. If the plan ~~The plan or a summary of the plan shall be~~ is not included with the ~~each~~ notice of the hearing on confirmation mailed under ~~pursuant to~~ Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court. ~~If required by the court, the debtor shall furnish a sufficient~~

~~number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.~~

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed under ~~pursuant to~~ subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, ~~before confirmation of the plan~~ at least seven days before the date set for the hearing on confirmation, unless the court orders otherwise. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in

good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) EFFECT OF CONFIRMATION. Upon the confirmation of a chapter 12 or chapter 13 plan:

(1) any determination in the plan made under Rule 3012 about the amount of a secured claim is binding on the holder of the claim, even if the holder files a contrary proof of claim or the debtor schedules that claim, and regardless of whether an objection to the claim has been filed; and

(2) any request in the plan to terminate the stay imposed by § 362(a), § 1201(a), or § 1301(a) is granted.

~~(g)~~(h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to under § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court

may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. ~~If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice.~~ Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

Committee Note

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans unless a Local Form has been adopted consistent with Rule 3015.1. Subdivision (c) also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official or Local Form specifically designated for such provisions and must be identified in the manner required by the Official or Local Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan before confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan, unless the court orders otherwise.

Subdivision (g) is amended to set out two effects of confirmation. Subdivision (g)(1) provides that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination, unlike the amount of any current installment payments or arrearages, controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012. Subdivision (g)(2) provides for termination of

the automatic stay under §§ 362, 1201, and 1301 as requested in the plan.

Subdivision (h) was formerly subdivision (g). It is redesignated and is amended to reflect that often the party proposing a plan modification is responsible for serving the proposed modification on other parties. The option to serve a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

Changes Made After Publication and Comment

- The phrase “unlike the amount of any current installment payments or arrearages” was added to the paragraph of the Committee Note that discusses Rule 3015(g)

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

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1 **Rule 3015.1. Requirements for a Local Form for Plans**
2 **Filed in a Chapter 13 Case**

3 Notwithstanding Rule 9029(a)(1), a district may
4 require that a Local Form for a plan filed in a chapter 13
5 case be used instead of an Official Form adopted for that
6 purpose if the following conditions are satisfied:

7 (a) a single Local Form is adopted for the district
8 after public notice and an opportunity for public comment;

9 (b) each paragraph is numbered and labeled in
10 boldface type with a heading stating the general subject
11 matter of the paragraph;

12 (c) the Local Form includes an initial paragraph for
13 the debtor to indicate that the plan does or does not:

14 (1) contain any nonstandard provision;

15 (2) limit the amount of a secured claim based on
16 a valuation of the collateral for the claim; or

17 (3) avoid a security interest or lien;

18 (d) the Local Form contains separate paragraphs
19 for:
20 (1) curing any default and maintaining payments
21 on a claim secured by the debtor's principal residence;
22 (2) paying a domestic-support obligation;
23 (3) paying a claim described in the final
24 paragraph of § 1325(a) of the Bankruptcy Code; and
25 (4) surrendering property that secures a claim
26 with a request that the stay under §§ 362(a) and
27 1301(a) be terminated as to the surrendered collateral;
28 and
29 (e) the Local Form contains a final paragraph for:
30 (1) the placement of nonstandard provisions, as
31 defined in Rule 3015(c), along with a statement that
32 any nonstandard provision placed elsewhere in the
33 plan is void; and
34 (2) certification by the debtor's attorney or by
35 an unrepresented debtor that the plan contains no

- 36 [nonstandard provision other than those set out in the](#)
37 [final paragraph.](#)

Committee Note

This rule is new. It sets out features required for all Local Forms for plans in chapter 13 cases. If a Local Form does not comply with this rule, it may not be used in lieu of the Official Chapter13 Plan Form. *See* Rule 3015(c).

Under the rule only one Local Form may be adopted in a district. The rule does not specify the method of adoption, but it does require that adoption of a Local Form be preceded by a public notice and comment period.

To promote consistency among Local Forms and clarity of content of chapter 13 plans, the rule prescribes several formatting and disclosure requirements. Paragraphs in such a form must be numbered and labeled in bold type, and the form must contain separate paragraphs for the cure and maintenance of home mortgages, payment of domestic support obligations, treatment of secured claims covered by the “hanging paragraph” of § 1325(a), and surrender of property securing a claim. Whether those portions of the Local Form are used in a given chapter 13 case will depend on the debtor’s individual circumstances.

The rule requires that a Local Form begin with a paragraph for the debtor to call attention to the fact

that the plan contains a nonstandard provision; limits the amount of a secured claim based on a valuation of the collateral, as authorized by Rule 3012(b); or avoids a lien, as authorized by Rule 4003(d).

The last paragraph of a Local Form must be for the inclusion of any nonstandard provisions, as defined by Rule 3015(c), and must include a statement that nonstandard provisions placed elsewhere in the plan are void. This part gives the debtor the opportunity to propose provisions that are not otherwise in, or that deviate from, the Local Form. The form must also require a certification by the debtor's attorney or unrepresented debtor that there are no nonstandard provisions other than those placed in the final paragraph.

Changes Made After Publication and Comment

- References to Bankruptcy Code §§ 362(a) and 1301(a) were added to subsection (d)(4);
- References to Rules 3012(b) and 4003(d) were added to what is now the penultimate paragraph of the Committee Note; and
- The last paragraph of the Committee Note was subdivided and the sentence "This part gives the debtor the opportunity to propose provisions that are not otherwise in, or that deviate from, the Local Form." was added to what is now the final paragraph.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

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1 **Rule 4003. Exemptions**

2 * * * * *

3 (d) AVOIDANCE BY DEBTOR OF TRANSFERS
4 OF EXEMPT PROPERTY. A proceeding under § 522(f)
5 ~~by the debtor~~ to avoid a lien or other transfer of property
6 exempt under ~~§ 522(f) of the Code~~ shall be commenced by
7 motion in the manner provided by ~~in accordance with~~
8 Rule 9014, or by serving a chapter 12 or chapter 13 plan on
9 the affected creditors in the manner provided by Rule 7004
10 for service of a summons and complaint. Notwithstanding
11 the provisions of subdivision (b), a creditor may object to a
12 ~~motion filed~~ request under § 522(f) by challenging the
13 validity of the exemption asserted to be impaired by the
14 lien.

Committee Note

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt

property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

1 **Rule 5009. Closing Chapter 7~~Liquidation~~, Chapter 12**
2 **~~Family Farmer's Debt Adjustment,~~**
3 **~~Chapter 13 Individual's Debt Adjustment,~~**
4 **~~and Chapter 15 Ancillary and Cross-~~**
5 **~~Border Cases; Order Declaring Lien~~**
6 **Satisfied**

7 (a) CLOSING OF CASES UNDER CHAPTERS 7,
8 12, AND 13. If in a chapter 7, chapter 12, or chapter 13
9 case the trustee has filed a final report and final account
10 and has certified that the estate has been fully administered,
11 and if within 30 days no objection has been filed by the
12 United States trustee or a party in interest, there shall be a
13 presumption that the estate has been fully administered.

14 * * * * *

15 (d) ORDER DECLARING LIEN SATISFIED. In a
16 chapter 12 or chapter 13 case, if a claim that was secured
17 by property of the estate is subject to a lien under
18 applicable nonbankruptcy law, the debtor may request entry
19 of an order declaring that the secured claim has been

20 satisfied and the lien has been released under the terms of a
21 confirmed plan. The request shall be made by motion and
22 shall be served on the holder of the claim and any other
23 entity the court designates in the manner provided by
24 Rule 7004 for service of a summons and complaint.

Committee Note

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a secured claim satisfied and a lien released under the terms of a confirmed plan. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been released and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

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1 **Rule 7001. Scope of Rules of Part VII**

2 An adversary proceeding is governed by the rules of
3 this Part VII. The following are adversary proceedings:

4 * * * * *

5 (2) a proceeding to determine the validity,
6 priority, or extent of a lien or other interest in
7 property, ~~other than~~ but not a proceeding under
8 Rule 3012 or Rule 4003(d);

9 * * * * *

Committee Note

Subdivision (2) is amended to provide that the determination of the amount of a secured claim under Rule 3012, like a proceeding by the debtor to avoid a lien on or other transfer of exempt property under Rule 4003(d), does not require an adversary proceeding. The determination of the amount of a secured claim may be sought by motion or through a chapter 12 or chapter 13 plan in accordance with Rule 3012. An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

Changes Made After Publication and Comment

- The first sentence of the Committee Note was revised to describe more accurately a proceeding under Rule 4003(d).
- The example in the Committee Note of a proceeding to determine the amount of a secured claim was deleted.
- The phrase “by motion or” was added to the second sentence of the Committee Note.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

1 **Rule 9009. Forms**

2 (a) OFFICIAL FORMS. ~~Except as otherwise~~
3 ~~provided in Rule 3016(d), the~~ The Official Forms
4 prescribed by the Judicial Conference of the United States
5 shall be ~~observed and used with alterations as may be~~
6 ~~appropriate~~ without alteration, except as otherwise
7 provided in these rules, in a particular Official Form, or in
8 the national instructions for a particular Official Form.

9 ~~Forms may be combined and their contents rearranged to~~
10 ~~permit economies in their use.~~ Official Forms may be
11 modified to permit minor changes not affecting wording or
12 the order of presenting information, including changes that

13 (1) expand the prescribed areas for responses in
14 order to permit complete responses;

15 (2) delete space not needed for responses; or

16 (3) delete items requiring detail in a question or
17 category if the filer indicates—either by checking

18 “no” or “none” or by stating in words—that there is

19 nothing to report on that question or category.

20 (b) DIRECTOR’S FORMS. The Director of the

21 Administrative Office of the United States Courts may

22 issue additional forms for use under the Code.

23 (c) CONSTRUCTION. The forms shall be

24 construed to be consistent with these rules and the Code.

Committee Note

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule, the Official Form itself, or the national instructions applicable to an Official Form permit alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability to make minor modifications to an Official Form that do not affect the wording or the order in which information is presented on a form. Permissible changes include those that merely expand or delete the space for responses as appropriate or delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary

to completely answer a question on an Official Form without an attachment, the answer space may be expanded. Similarly, varying the width or orientation of columnar data on a form for clarity of presentation would be a permissible minor change. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. Any changes that contravene the directions on an Official Form would be prohibited by this rule.

The creation of subdivision (b) and subdivision (c) is stylistic.

Changes Made After Publication and Comment

None.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of these rule amendments are set forth in Appendix B.

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Official Form 113

Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check if this is an amended plan, and list below the sections of the plan that have been changed.

Official Form 113
Chapter 13 Plan

12/17

Part 1: Notices

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. Plans that do not comply with local rules and judicial rulings may not be confirmable.

In the following notice to creditors, you must check each box that applies.

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.

You should read this plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance. **Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as "Not Included" or if both boxes are checked, the provision will be ineffective if set out later in the plan.**

1.1	A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor	<input type="checkbox"/> Included	<input type="checkbox"/> Not included
1.2	Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4	<input type="checkbox"/> Included	<input type="checkbox"/> Not included
1.3	Nonstandard provisions, set out in Part 8	<input type="checkbox"/> Included	<input type="checkbox"/> Not included

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

\$ _____ per _____ for _____ months

[and \$ _____ per _____ for _____ months.] *Insert additional lines if needed.*

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in this plan.

2.2 Regular payments to the trustee will be made from future income in the following manner:

Check all that apply.

- Debtor(s) will make payments pursuant to a payroll deduction order.
- Debtor(s) will make payments directly to the trustee.
- Other (specify method of payment): _____.

2.3 Income tax refunds.

Check one.

- Debtor(s) will retain any income tax refunds received during the plan term.
- Debtor(s) will supply the trustee with a copy of each income tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all income tax refunds received during the plan term.
- Debtor(s) will treat income tax refunds as follows:

2.4 Additional payments.

Check one.

- None.** If "None" is checked, the rest of § 2.4 need not be completed or reproduced.
- Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is \$ _____.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of default, if any.

Check one.

- None.** If "None" is checked, the rest of § 3.1 need not be completed or reproduced.
- The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Collateral	Current installment payment (including escrow)	Amount of arrearage (if any)	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage	Estimated total payments by trustee
_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	_____ %	\$ _____	\$ _____
_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	_____ %	\$ _____	\$ _____

Insert additional claims as needed.

3.2 Request for valuation of security, payment of fully secured claims, and modification of undersecured claims. Check one.

None. If "None" is checked, the rest of § 3.2 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as set out in the column headed *Amount of secured claim*. For secured claims of governmental units, unless otherwise ordered by the court, the value of a secured claim listed in a proof of claim filed in accordance with the Bankruptcy Rules controls over any contrary amount listed below. For each listed claim, the value of the secured claim will be paid in full with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Name of creditor	Estimated amount of creditor's total claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	____%	\$ _____	\$ _____
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	____%	\$ _____	\$ _____

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

None. If "None" is checked, the rest of § 3.3 need not be completed or reproduced.

The claims listed below were either:

- (1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or
- (2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____	_____	\$ _____	____%	\$ _____	\$ _____
				Disbursed by:	
				<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	
_____	_____	\$ _____	____%	\$ _____	\$ _____
				Disbursed by:	
				<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	

Insert additional claims as needed.

3.4 Lien avoidance.

Check one.

None. If "None" is checked, the rest of § 3.4 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). Unless otherwise ordered by the court, a judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5 to the extent allowed. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). *If more than one lien is to be avoided, provide the information separately for each lien.*

Information regarding judicial lien or security interest	Calculation of lien avoidance		Treatment of remaining secured claim
Name of creditor _____ _____	a. Amount of lien	\$ _____	Amount of secured claim after avoidance (line a minus line f) \$ _____
	b. Amount of all other liens	\$ _____	
Collateral _____ _____	c. Value of claimed exemptions	+ \$ _____	Interest rate (if applicable) _____ %
	d. Total of adding lines a, b, and c	\$ _____	
Lien identification (such as judgment date, date of lien recording, book and page number) _____ _____	e. Value of debtor(s)' interest in property	- \$ _____	Monthly payment on secured claim \$ _____
	f. Subtract line e from line d.	\$ _____	
Extent of exemption impairment (Check applicable box): <input type="checkbox"/> Line f is equal to or greater than line a. The entire lien is avoided. (Do not complete the next column.) <input type="checkbox"/> Line f is less than line a. A portion of the lien is avoided. (Complete the next column.)			Estimated total payments on secured claim \$ _____

Insert additional claims as needed.

3.5 Surrender of collateral.

Check one.

None. If "None" is checked, the rest of § 3.5 need not be completed or reproduced.

The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) request that upon confirmation of this plan the stay under 11 U.S.C. § 362(a) be terminated as to the collateral only and that the stay under § 1301 be terminated in all respects. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
_____	_____
_____	_____

Insert additional claims as needed.

Part 4: Treatment of Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims, including domestic support obligations other than those treated in § 4.5, will be paid in full without postpetition interest.

4.2 Trustee's fees

Trustee's fees are governed by statute and may change during the course of the case but are estimated to be _____% of plan payments; and during the plan term, they are estimated to total \$_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be \$_____.

4.4 Priority claims other than attorney's fees and those treated in § 4.5.

Check one.

None. If "None" is checked, the rest of § 4.4 need not be completed or reproduced.

The debtor(s) estimate the total amount of other priority claims to be _____.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.

Check one.

None. If "None" is checked, the rest of § 4.5 need not be completed or reproduced.

The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4). *This plan provision requires that payments in § 2.1 be for a term of 60 months; see 11 U.S.C. § 1322(a)(4).*

Name of creditor	Amount of claim to be paid
_____	\$ _____
_____	\$ _____

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

The sum of \$_____.

_____% of the total amount of these claims, an estimated payment of \$_____.

The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately \$_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.2 Maintenance of payments and cure of any default on nonpriority unsecured claims. Check one.

- None.** If "None" is checked, the rest of § 5.2 need not be completed or reproduced.
- The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The claim for the arrearage amount will be paid in full as specified below and disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____
_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	\$ _____

Insert additional claims as needed.

5.3 Other separately classified nonpriority unsecured claims. Check one.

- None.** If "None" is checked, the rest of § 5.3 need not be completed or reproduced.
- The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows

Name of creditor	Basis for separate classification and treatment	Amount to be paid on the claim	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	\$ _____	_____%	\$ _____
_____	_____	\$ _____	_____%	\$ _____

Insert additional claims as needed.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. Check one.

- None.** If "None" is checked, the rest of § 6.1 need not be completed or reproduced.
- Assumed items.** Current installment payments will be disbursed either by the trustee or directly by the debtor(s), as specified below, subject to any contrary court order or rule. Arrearage payments will be disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Description of leased property or executory contract	Current installment payment	Amount of arrearage to be paid	Treatment of arrearage (Refer to other plan section if applicable)	Estimated total payments by trustee
_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	_____	\$ _____
_____	_____	\$ _____ Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)	\$ _____	_____	\$ _____

Insert additional contracts or leases as needed.

Part 7: Vesting of Property of the Estate

7.1 Property of the estate will vest in the debtor(s) upon

Check the applicable box:

- plan confirmation.
- entry of discharge.
- other: _____.

Part 8: Nonstandard Plan Provisions

8.1 Check "None" or List Nonstandard Plan Provisions

None. If "None" is checked, the rest of Part 8 need not be completed or reproduced.

Under Bankruptcy Rule 3015(c), nonstandard provisions must be set forth below. A nonstandard provision is a provision not otherwise included in the Official Form or deviating from it. Nonstandard provisions set out elsewhere in this plan are ineffective.

The following plan provisions will be effective only if there is a check in the box "Included" in § 1.3.

Part 9: Signature(s):

9.1 Signatures of Debtor(s) and Debtor(s)' Attorney

If the Debtor(s) do not have an attorney, the Debtor(s) must sign below; otherwise the Debtor(s) signatures are optional. The attorney for the Debtor(s), if any, must sign below.

Ū _____
Signature of Debtor 1

Ū _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

Executed on _____
MM / DD / YYYY

Ū _____
Signature of Attorney for Debtor(s)

Date _____
MM / DD / YYYY

By filing this document, the Debtor(s), if not represented by an attorney, or the Attorney for Debtor(s) also certify(ies) that the wording and order of the provisions in this Chapter 13 plan are identical to those contained in Official Form 113, other than any nonstandard provisions included in Part 8.

Exhibit: Total Amount of Estimated Trustee Payments

The following are the estimated payments that the plan requires the trustee to disburse. If there is any difference between the amounts set out below and the actual plan terms, the plan terms control.

- a. **Maintenance and cure payments on secured claims** *(Part 3, Section 3.1 total)* \$ _____
- b. **Modified secured claims** *(Part 3, Section 3.2 total)* \$ _____
- c. **Secured claims excluded from 11 U.S.C. § 506** *(Part 3, Section 3.3 total)* \$ _____
- d. **Judicial liens or security interests partially avoided** *(Part 3, Section 3.4 total)* \$ _____
- e. **Fees and priority claims** *(Part 4 total)* \$ _____
- f. **Nonpriority unsecured claims** *(Part 5, Section 5.1, highest stated amount)* \$ _____
- g. **Maintenance and cure payments on unsecured claims** *(Part 5, Section 5.2 total)* \$ _____
- h. **Separately classified unsecured claims** *(Part 5, Section 5.3 total)* \$ _____
- i. **Trustee payments on executory contracts and unexpired leases** *(Part 6, Section 6.1 total)* \$ _____
- j. **Nonstandard payments** *(Part 8, total)* + \$ _____

Total of lines a through j

\$ _____

Committee Note

Official Form 113 is new and is the required plan form in all chapter 13 cases, except to the extent that Rule 3015(c) permits the use of a Local Form. Except as permitted by Rule 9009, alterations to the Official Form are not permitted. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced. Portions of the form provide multiple options for provisions of a debtor's plan, but some of those options may not be appropriate in a given debtor's situation or may not be allowed in the court presiding over the case. Debtors are advised to refer to applicable local rulings. Nothing in the Official Form requires confirmation of a plan containing provisions inconsistent with applicable law.

Part 1. This part sets out warnings to both debtors and creditors. For creditors, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 8 of the plan proposes a provision not included in, or contrary to, the Official Form, that nonstandard provision will be ineffective if the appropriate check box in Part 1 is not selected.

Part 2. This part states the proposed periodic plan payments, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments from each check, that should be indicated in § 2.1. If the debtor proposes to make payments according to different "steps," the amounts and intervals of those payments should also be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make regular payments to the trustee. If the debtor selects the option of making payments pursuant to a payroll deduction order, that selection serves as a request by the debtor for entry of the order. Whether to enter a payroll deduction order is determined by the court. See Code § 1325(c). If the debtor selects the option of making payments other than by direct payments to the trustee or by a payroll deduction order, the alternative method (*e.g.*, a designated third party electronic funds transfer program) must be specified. Section 2.3 provides

for the treatment of any income tax refunds received during the plan term.

Part 3. This part provides for the treatment of secured claims.

The Official Form contains no provision for proposing preconfirmation adequate protection payments to secured creditors, leaving that subject to local rules, orders, forms, custom, and practice. A Director's Form for notice of and order on proposed adequate protection payments has been created and may be used for that purpose.

Section 3.1 provides for the treatment of claims under Code § 1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage or current installment payment amount listed on the creditor's timely filed proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a non-governmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. *See* Bankruptcy Rule 3012. Bankruptcy Rule 3002 contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. *See* Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that under the so-called "hanging paragraph" of § 1325(a)(5) may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for the proposal of an interest rate other than the contract rate to be applied to payments on such a claim. A contrary claim amount listed on the creditor's timely filed proof of claim, unless contested by

objection or motion, will control over the amount given in the plan. If appropriate, a claim may be treated under § 3.1 instead of § 3.3.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). This section includes space for the calculation of the amount of the judicial lien or security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. *See* Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and requests for termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of trustee's fees and claims entitled to priority status. Section 4.1 provides that trustee's fees and all allowed priority claims (other than those domestic support obligations treated in § 4.5) will be paid in full. In § 4.2, the plan lists an estimate of the trustee's fees. Although the estimate may indicate whether the plan will be feasible, it does not affect the trustee's entitlement to fees as determined by statute. In § 4.3, the form requests a statement of the balance of attorney's fees owed. Additional details about payments of attorney's fees, including information about their timing and approval, are left to the requirements of local practice. In § 4.4, the plan calls for an estimated amount of other priority claims. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in § 4.4. In § 4.5, the plan may propose to pay less than the full amount of a domestic support obligation that has been assigned to, or is owed to, a governmental unit, but not less than the amount that claim would have received in a chapter 7 liquidation. *See* §§ 1322(a)(4) and 1325(a)(4) of the Code. This plan provision requires that the plan payments be for a term of 60 months. *See* § 1322(a)(4).

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.1, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or it could also provide that a defined percentage of the total amount of unsecured claims will be paid. In § 5.2, the plan may propose to cure any arrearages and maintain periodic payments on long-term, nonpriority unsecured debts pursuant to § 1322(b)(5) of the Code. In § 5.3, the plan may provide for the separate classification of nonpriority unsecured claims (such as co-debtor claims) as permitted under Code § 1322(b)(1).

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part. If the plan proposes neither to assume nor reject an executory contract or unexpired lease, that treatment would have to be set forth as a nonstandard provision in Part 8.

The Official Form contains no provision on the order of distribution of payments under the plan, leaving that to local rules, orders, custom, and practice. If the debtor desires to propose a specific order of distribution, it must be contained in Part 8.

Part 7. This part defines when property of the estate will revert in the debtor or debtors. One choice must be selected—upon plan confirmation, upon entry of discharge the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 8. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or that deviate from, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. *See* Bankruptcy Rule 3015(c).

Part 9. The plan must be signed by the attorney for the debtor or debtors. If the debtor or debtors are not

represented by an attorney, they must sign the plan, but the signature of represented debtors is optional. In addition to the certifications set forth in Rule 9011(b), the signature constitutes a certification that the wording and order of Official Form 113 have not been altered, other than by including any nonstandard provision in Part 8.

Changes Made After Publication and Comment

- Part 1 (Notices). The following language was added to the Notice to Debtors: “Plans that do not comply with local rules and judicial rulings may not be confirmable.”
- Part 2. Subpart 2.3 (Income tax refunds) was expanded to include all income taxes, not just federal, and a more open-ended response option was added.
- Part 3. In subpart 3.1 (Maintenance of payments and cure of default, if any), “if any” was inserted after “cure of default” and “amount of arrearage.” Language was added to limit postpetition changes in the payment amount to those that are properly noticed pursuant to Rule 3002.1, and the provision now specifies that the trustee will make any arrearage payments. A sentence was added to cover the situation in which a secured creditor does not file a timely proof of claim.
- Changes were made in subpart 3.2 (Request for valuation of security . . .) to clarify that the lien of a secured creditor is released at discharge only as to the debtor’s or the estate’s interest in the collateral and only if the debt secured by the property is discharged.
- In subpart 3.3 (Secured claims excluded from 11 U.S.C. § 506), a sentence was added to provide that if the secured creditor does not file a timely proof of claim, the plan’s statement of the amount of the claim will control.
- Subpart 3.4 (Lien avoidance) was changed to recognize the court’s authority to provide an

effective date for a lien avoidance other than the date the confirmation order is entered. A change was also made to clarify that a claim for which a lien is avoided will be treated as an unsecured claim only to the extent that the claim is allowed.

- Subpart 3.5 (Surrender of collateral) was changed from providing for the debtor's consent to termination of the stay to providing that the debtor requests that the stay be terminated upon confirmation.
- Part 4. Subpart 4.1 (General) was changed to clarify that domestic support obligations that have not been assigned will be treated under the general provision for payment in full of the priority amount. "Postpetition" was inserted before "interest."
- In subpart 4.2 (Trustee's fees), language was added to specify that the amount of the trustee's fees is determined by statute and may vary over time.
- In subpart 4.5 (Domestic support obligations assigned or owed to a governmental unit. . .), a reminder was inserted that § 1322(a)(4) requires that the debtor's disposable income for 60 months be devoted to the plan if the plan provides for less than full payment of assigned domestic support obligations.
- Part 5. Subpart 5.1 (General) and subpart 5.3 were deleted. In the subpart that is now 5.2 (Maintenance of payments and cure of any default on nonpriority unsecured claims), clarifying explanations were added, including a statement that the trustee will make payments on any arrearages being cured.
- Part 6 (Executory contracts and unexpired leases). In subpart 6.1, the columns were rearranged to a more logical order, and the heading of the second column was changed to include executory contracts.

A statement was added that the trustee will disburse arrearage payments.

- Part 7 of the published form (Order of distribution of Trustee Payments) was deleted. Subsequent parts were renumbered.
- New Part 7 (Vesting of Property of the Estate). The option of property vesting in the debtor upon the closing of the case was changed to vesting upon the “entry of discharge.”
- New Part 8 (Nonstandard Plan Provisions). A sentence explaining the meaning of “nonstandard provision” was added, along with a statement that nonstandard provisions placed elsewhere in the plan are ineffective.
- New Part 9 (Signatures). A statement was added after the signatures certifying that the plan is identical in wording and order of provisions to Official Form 113, except for any nonstandard provisions placed in Part 8.
- Exhibit: Total Amount of Estimated Trustee Payments. The wording of the introductory explanation was revised, and a sentence was added to clarify that payment amounts specified in the plan control over the amounts listed in the Exhibit. An entry was added for payments under any Part 8 nonstandard provisions.
- Committee Note. The Committee Note was revised in accordance with the changes in the plan.
- A number of technical and formatting changes were made.

Summary of Public Comment

Summaries of the comments submitted in response to the publication of Official Forms 113 are set forth in Appendix B.

APPENDIX A2

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Appendix A2

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

1 **Rule 7004. Process; Service of Summons,**
2 **Complaint**

3
4 (a) SUMMONS; SERVICE; PROOF OF
5 SERVICE.

6 (1) Except as provided in Rule
7 7004(a)(2), Rule 4(a), (b), (c)(1), (d)~~(4)~~(5),
8 (e)–(j), (l), and (m) F.R.Civ.P. applies in
9 adversary proceedings. Personal service
10 under Rule 4(e)–(j) F.R.Civ.P. may be made
11 by any person at least 18 years of age who is
12 not a party, and the summons may be
13 delivered by the clerk to any such person.

* * * * *

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

Committee Note

In 1996, Rule 7004(a) was amended to incorporate by reference Rule 4(d)(1) of the Federal Rules of Civil Procedure. Civil Rule 4(d)(1) addresses the effect of a defendant's waiver of service. In 2007, Civil Rule 4 was amended, and the language of old Civil Rule 4(d)(1) was modified and renumbered as Civil Rule 4(d)(5). Accordingly, Rule 7004(a) is amended to update the cross-reference to Civil Rule 4.

Because this amendment is made to conform to the renumbering of Civil Rule 4, approval is sought without publication.

Official Form 101

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:
 Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/17

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver’s license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years

Include trade names and doing business as names

I have not used any business names or EINs.

I have not used any business names or EINs.

Business name

Business name

Business name

Business name

EIN

EIN

EIN

EIN

5. Where you live

If Debtor 2 lives at a different address:

Number Street

Number Street

City State ZIP Code

City State ZIP Code

County

County

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street

Number Street

P.O. Box

P.O. Box

City State ZIP Code

City State ZIP Code

6. Why you are choosing this district to file for bankruptcy

Check one:

Check one:

I have lived in this district longer than in any other district.

I have lived in this district longer than in any other district.

I have another reason. Explain. (See 28 U.S.C. § 1408.)

I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explaining the reason.

Four horizontal lines for explaining the reason.

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
- Chapter 11
- Chapter 12
- Chapter 13

8. How you will pay the fee

- I will pay the entire fee when I file my petition.** Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- I need to pay the fee in installments.** If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
- Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY
- Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY

11. Do you rent your residence?

- No. Go to line 12.
- Yes. Has your landlord obtained an eviction judgment against you?
 - No. Go to line 12.
 - Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- No. Go to Part 4.
Yes. Name and location of business

Name of business, if any
Number Street
City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
Stockbroker (as defined in 11 U.S.C. § 101(53A))
Commodity Broker (as defined in 11 U.S.C. § 101(6))
None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

For a definition of small business debtor, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- No. I am not filing under Chapter 11.
No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- No
Yes. What is the hazard?

If immediate attention is needed, why is it needed?

Where is the property? Number Street

City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling**15. Tell the court whether you have received a briefing about credit counseling.**

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have? 16a. Are your debts primarily consumer debts? 16b. Are your debts primarily business debts? 16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7? Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe? 1-49, 50-99, 100-199, 200-999, 1,000-5,000, 5,001-10,000, 10,001-25,000, 25,001-50,000, 50,001-100,000, More than 100,000

19. How much do you estimate your assets to be worth? \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

20. How much do you estimate your liabilities to be? \$0-\$50,000, \$50,001-\$100,000, \$100,001-\$500,000, \$500,001-\$1 million, \$1,000,001-\$10 million, \$10,000,001-\$50 million, \$50,000,001-\$100 million, \$100,000,001-\$500 million, \$500,000,001-\$1 billion, \$1,000,000,001-\$10 billion, \$10,000,000,001-\$50 billion, More than \$50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Signature line for Debtor 1

Signature of Debtor 1

Executed on MM / DD / YYYY

Signature line for Debtor 2

Signature of Debtor 2

Executed on MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

U _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone _____ Email address _____

Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person _____

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

Signature of Debtor 1

Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

Contact phone

Contact phone

Cell phone

Cell phone

Email address

Email address

Committee Note

Part 2, line 11, is amended to accurately reflect the requirements of § 362(l) of the Bankruptcy Code. All debtors against whom an eviction judgment has been entered with respect to their residence must fill out Official Form 101A (*Initial Statement About an Eviction Judgment Against You*), whether or not they desire to remain in their residence. Form 101A is deemed to be part of the petition.

Because this amendment is made to conform to the requirements of Bankruptcy Code § 362(l), approval is sought without publication.

APPENDIX A3

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Appendix A3

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

1 **8011. Filing and Service; Signature**

2 (a) FILING.

3 * * * * *

4 (2) *Method and Timeliness.*

5 (A) Nonelectronic Filing

6 ~~(A)(i) In General. Filing~~ For a document

7 not filed electronically, filing may be

8 accomplished by ~~transmission~~ mail

9 addressed to the clerk of the district court or

10 BAP. Except as provided in subdivision

11 ~~(a)(2)(B) and (C)~~ (a)(2)(A)(ii) and (iii),

12 filing is timely only if the clerk receives the

13 document within the time fixed for filing.

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

14 ~~(B)~~(ii) *Brief or Appendix*. A brief or
15 appendix not filed electronically is also timely
16 filed if, on or before the last day for filing, it
17 is:

18 (i)• mailed to the clerk by first-class
19 mail—or other class of mail that is at least
20 as expeditious—postage prepaid, ~~if the~~
21 ~~district court's or BAP's procedures permit~~
22 ~~or require a brief or appendix to be filed by~~
23 ~~mailing~~; or

24 (ii)• dispatched to a third-party
25 commercial carrier for delivery within 3
26 days to the clerk, ~~if the court's procedures~~
27 ~~so permit or require~~.

28 ~~(C)~~(iii) *Inmate Filing*.¹ A document not
29 filed electronically by an inmate confined

¹ An amendment to this provision was published for comment in August 2016. At the appropriate time the two sets of amendments will have to be merged if both go forward.

30 in an institution is timely if deposited in the
31 institution's internal mailing system on or
32 before the last day for filing. If the
33 institution has a system designed for legal
34 mail, the inmate must use that system to
35 receive the benefit of this rule. Timely
36 filing may be shown by a declaration in
37 compliance with 28 U.S.C. §1746 or by a
38 notarized statement, either of which must
39 set forth the date of deposit and state that
40 first-class postage has been prepaid.

41 *(B) Electronic Filing.*

42 *(i) By a Represented Person—Generally*
43 *Required; Exceptions. An entity represented*
44 *by an attorney must file electronically,*
45 *unless nonelectronic filing is allowed by the*
46 *court for good cause or is allowed or*
47 *required by local rule.*

48 (ii) By an Unrepresented Individual—
49 When Allowed or Required. An individual
50 not represented by an attorney:
51 • may file electronically only if allowed
52 by court order or by local rule; and
53 • may be required to file electronically
54 only by court order, or by a local rule that
55 incudes reasonable exceptions.
56 (iii) Same as Written Paper. A document
57 filed electronically is a written paper for
58 purposes of these rules.
59 ~~(D)~~(C) Copies. If a document is filed
60 electronically, no paper copy is required. If a
61 document is filed by mail or delivery to the
62 district court or BAP, no additional copies are
63 required. But the district court or BAP may
64 require by local rule or by order in a particular

65 case the filing or furnishing of a specified
66 number of paper copies.

67 * * * * *

68 (c) MANNER OF SERVICE.

69 (1) Nonelectronic Service. ~~Methods. Service~~
70 ~~must be made electronically, unless it is being~~
71 ~~made by or on an individual who is not~~
72 ~~represented by counsel or the court's governing~~
73 ~~rules permit or require service by mail or other~~
74 ~~means of delivery. Service~~ Nonelectronic service
75 ~~may be made by or on an unrepresented party by~~
76 any of the following methods:

77 (A) personal delivery;

78 (B) mail; or

79 (C) third-party commercial carrier for
80 delivery within 3 days.

81 (2) Electronic Service. Electronic service may
82 be made by sending a document to a registered

83 user by filing it with the court’s electronic-filing
84 system or by using other electronic means that
85 the person served consented to in writing.

86 ~~(2)~~(3) *When Service is Complete.* Service by
87 electronic means is complete on ~~transmission~~
88 filing or sending, unless the ~~party~~ person making
89 service receives notice that the document was
90 not ~~transmitted successfully~~ received by the
91 person served. Service by mail or by commercial
92 carrier is complete on mailing or delivery to the
93 carrier.

94 (d) PROOF OF SERVICE.

95 (1) *What is Required.* A document presented
96 for filing must contain either of the following if
97 it was served other than through the court’s
98 electronic-filing system:

99 (A) an acknowledgment of service by the
100 person served; or

101 (B) proof of service consisting of a
102 statement by the person who made service
103 certifying:

104 (i) the date and manner of service;

105 (ii) the names of the persons served; and

106 (iii) the mail or electronic address, the
107 fax number, or the address of the place of
108 delivery, as appropriate for the manner of
109 service, for each person served.

110 * * * * *

111 (e) SIGNATURE. Every document filed electronically
112 must include the electronic signature of the person filing it
113 or, if the person is represented, the electronic signature of
114 counsel. ~~The electronic signature must be provided by~~
115 ~~electronic means that are consistent with any technical~~
116 ~~standards that the Judicial Conference of the United States~~
117 ~~establishes.~~ The user name and password of an attorney of
118 record, together with the attorney's name on a signature

119 block, serve as the attorney's electronic² signature. Every
120 document filed in paper form must be signed by the person
121 filing the document or, if the person is represented, by
122 counsel.

² The other rules, including Rule 5005(a), do not include the word “electronic” because the provisions are located in paragraphs dealing only with electronic filing.

Committee Note

The rule is amended to conform to the amendments to Fed. R. App. P. 25 on electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served. As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.

Subdivision (e), which requires the signature of counsel or an unrepresented party on every document that is filed, is amended to make an attorney's user name and password the attorney's electronic signature.

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APPENDIX B

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Appendix B

Summary of Comments on Official Form 113 and Related Rules

These comments were submitted in response to the July 2016 publication of Rules 3015 and 3015.1 and the August 2014 publication of the remaining rules and the Official Form.

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Comments on the Plan Form

General Comments

Comment BK-2014-0001-0008—Judge Robert Grant (Bankr. N.D. Ind.): As indicated in my comments last year, the bankruptcy judges of the N.D. Indiana do not believe the Code allows us to mandate a form (whether national or local) for chapter 13 cases. One chapter 13 trustee has encouraged some debtors’ attorneys in the district to use a revised version of the proposed national plan form, but we do not require it.

Comment BK-2014-0001-0009—Judge Keith Lundin (Bankr. MD. Tenn.): I support the Official Form for chapter 13 plans and the accompanying rules. We currently have many different local forms that do approximately the same thing. The substance of chapter 13 does not require these differences.

“Local culture” is a poor model for chapter 13 practice. It leads to “hide the ball” tactics by debtor’s counsel. Clarity in the treatment of creditors in the plan is prerequisite to creditor cooperation.

There will be a transition period if a national form is adopted. But that period will be short. After an initial transition period, there will be less litigation in chapter 13 cases. The

litigation that does result will not be tied to any particular local form and will be “scalable” across the country. We have needed this for decades.

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): I oppose the national plan form. It will delay payments to all secured creditors and will delay confirmation of chapter 13 cases. It will cause more unnecessary objections to confirmation.

The check box for an amended plan does not allow designation as a first amended plan, second amended plan, etc.

The plan form does not designate whether debtor is above median income or below median income. This leaves creditors and parties in interest without sufficient information as to how projected disposable income will be determined.

The plan form has no provisions for pre-confirmation adequate protection payments, no provisions for paying the Bankruptcy Court filing fee through plan administration, and no provisions for pre-confirmation ongoing mortgage payments.

Comment BK-2014-0001-0012—Judge Jeff Bohm (Bankr. S.D. Tex.), on behalf of the judges of the United States Bankruptcy Court for the Southern District of Texas: We oppose adoption of a mandatory national plan form for three reasons: (1) the form is untested and will lead to unnecessary litigation and unwanted results; (2) when tested against real-world case files, the form is unwieldy and expensive to use; and when combined with the proposed changes to Rule 9009, the form will force interpretations of the Code that differ from the law of this court and our circuit.

The inclusion of a non-standard provisions section in Part 9 does not solve these problems. There is simply no way to incorporate our case law into the plan form without the imposition of a mandatory change in Part 9.

Comment BK-2014-0001-0015—K. Michael Fitzgerald (Chapter 13 Trustee, W.D. Wash.): I oppose the adoption of a mandatory national plan form. Uniformity is not necessary, because differences in local chapter 13 forms are not a problem.

The plan form asks for the debtor’s estimates, which are not helpful to the trustee.

The form does not make clear that the debtor must serve a plan with lien strip or cram down provisions in compliance with Bankruptcy Rule 7004. Who will be responsible for determining that the plan has been correctly served?

The form does not indicate whether the debtor is below or above median, nor does it make clear the Bankruptcy Code’s requirement that the debtor must pay allowed nonpriority unsecured claims the projected disposable income that results from a correctly completed means test form.

How will a solo practitioner or small firm be able to compete with larger national firms that will certainly use a mandatory national form as a method to expand their client base?

Comment BK-2014-0001-0016—Judge Marvin Isgur (Bankr. S.D. Tex.) et al., on behalf of the Committee of Concerned Bankruptcy Judges: (This comment was submitted as a letter signed by 144 bankruptcy judges.)

There will be no significant benefits and very significant harms from the use of a national mandatory plan form.

The proposed plan form does not have adequate means to implement conduit mortgage or car payments. It does not deal with the administration of monthly payment changes, the imposition of late charges, the timing of distributions when there are payment shortages, automatic adjustments of payments to the chapter 13 trustee, or myriad other factors.

The inclusion of Part 9 does not resolve the problem. The imposition of mandatory nonstandard provisions by local rule or general order would arguably violate proposed Rules 3015 and 9009. And if nonstandard provisions can be mandated locally, the use of those nonstandard provisions will quickly eviscerate the only real benefit of the proposed national plan form.

The form lacks a standard order of distribution. The form allows (i) the trustee to implement an undisclosed distribution scheme, or (ii) the debtor to set the distribution priority. Either option weakens the claim that a national form will better enable creditors to evaluate a plan.

The form will lead to national consumer bankruptcy practices. It will encourage regional and national debtor firms to solicit clients in distant jurisdictions, with client meetings conducted electronically. This will result in court appearances that are sub-contracted to local counsel with limited client contact or time for preparation.

A national form will not be adaptable. Changes to national forms can take upwards of two years to implement. As case law develops, or statutory changes occur, local forms can meet the exigencies of the law.

Comment BK-2014-0001-0017—George Stevenson (Chapter 13 Trustee, W.D. Tenn.), on behalf of the three trustees in the W.D. Tenn.: I oppose the national plan form. It will add costs to the chapter 13 process. We have a simple one page plan that has served us well for many years. Debtors do not need to pay the additional administrative costs for complicated plans. Debtors would struggle to understand the language and meaning of the unnecessary provisions. This would hamper self-representation.

Comment BK-2014-0001-0019—Marilyn O. Marshall (Chapter 13 Trustee, N.D. Ill., Eastern Division): I support the national plan form. Official Form 113 does not change substantive law. It is no different than using the official forms for the petition, schedules, and other related documents.

To respond to concerns about Part 9, I note that in our district, we have a local plan form with a nonstandard provision section. Generally, provisions in that section deal with late claims, attorney's fee priority, tax refund requirements, and surrender of property language. At first, some debtor's attorneys attempted to use the nonstandard provision section to re-write the substance of the plan form. We stopped that by educating the debtor bar through workshops with the aid and input of our bankruptcy judges. I anticipate that the same thing will happen nationally.

Comment BK-2014-0001-0020—Edward Maney (Chapter 13 Trustee, D. Ariz.), on behalf of two trustees in the D. Ariz.: We oppose the national plan form. We have adopted a local plan form that works well. A national plan form will not deliver the same benefits. The national plan form has many good provisions. It is better to allow individual courts to adopt the national form if they so chose or just some of its provisions that are best suited to the jurisdiction.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Add a provision to address pre-confirmation adequate protection payments.

Comment BK-2014-0001-0022—Judge Robert Grant (Bankr. N.D. Ind.), on behalf of the bankruptcy judges of the N.D. Ind.: We oppose adoption of the plan form and associated rule amendments.

The proposal exceeds the Advisory Committee’s authority and intrudes upon matters of substance reserved to Congress.

The form is too long and complicated.

If the form has sufficient merit, practitioners will use it voluntarily, without being compelled to do so.

Comment BK-2014-0001-0023—John Hooge (Attorney, Kansas): I oppose the national plan form. Here in Kansas we have a model plan that has worked well. Kansas has unique exemption laws that will not work with a national form.

Comment BK-2014-0001-0027—Judge Keith Lundin (Bankr. MD. Tenn.), on behalf of Bankruptcy Judges in Support of Official Form for Chapter 13 Plan: (This letter is signed by 34 bankruptcy judges.) We support the adoption of an Official Form for chapter 13 plans. We offer the following responses to common objections to the form:

The form will not require changes to local rules, unless they conflict with the new amendments to the Bankruptcy Rules.

The form will not cause difficulties for debtors and their lawyers. The form has been designed to accommodate nearly all of the options that are available in chapter 13, with the options clearly set out.

The use of a national form is likely to decrease costs significantly after a short-term transition.

The form (§ 3.1) provides for the maintenance of mortgage payments in conduit districts. Other parts of the Bankruptcy Rules (e.g., Rule 3002.1) would implement that choice. No further provisions in the form are required.

Regarding Part 7, if the debtor proposes a distribution order, a creditor will (1) know where to find it, and (2) be able to object. If the debtor does not propose a distribution order, the creditor will know to inquire about the order of distribution that the trustee would implement and again file an objection if appropriate.

Part 9 simply implements the Code provision (§ 1321) that only the debtor can file a plan. If a provision added by debtor’s counsel in Part 9 violates any provision of the Code or a valid local rule, the plan should be denied confirmation.

There is no empirical basis for the belief that a national chapter 13 plan form will reduce participation by local attorneys in chapter 13 debtors’ representation.

There is no reason to believe that the Advisory Committee would not be able to deal effectively with any changes in the law affecting chapter 13 plans. It has been able to deal with other forms when these situations have arisen. Indeed the Committee generated a large number of new forms to deal with the enactment of BAPCPA, and put them into effect as of the effective date of the legislation.

Comment BK-2014-0001-0028—Michael Meyer (Chapter 13 Trustee, E.D. Cal.), on behalf of chapter 13 trustees opposed to a national plan form: (This comment was signed by 83 chapter 13 trustees.) We oppose the adoption of a national plan form.

Comment BK-2014-0001-0029—Robert Drummond (Chapter 13 Trustee, D. Mont.): I oppose the adoption of Official Form 113. One size does not fit all. There is local variation in chapter 13 practice. The form attempts to fix what is not broken. Despite the Advisory Committee’s statement that an option does not mean that debtors need to select that option, the form will raise objections and increase the cost of the bankruptcy process for those who can least afford it. Make the plan form optional instead.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: We oppose the adoption of a mandatory national plan form.

Our primary concern is that the proposed form could impair our conduit mortgage payment program. The form allows debtors to choose to be their own disbursing agent instead of the trustee.

There is no demonstrated need for uniformity in chapter 13 practice. The plan form will undermine judicial discretion and stifle innovation. In any event, national uniformity is an illusory goal.

Any cost savings that national creditors experience will be the result of costs imposed on local courts, clerks, trustees, and attorneys.

Comment BK-2014-0001-0033—David Lander (Attorney, St. Louis, Mo.): I urge the Advisory Committee to adopt the proposed changes to the Bankruptcy Rules but to adopt the national plan form as a Director’s Form instead of an Official Form. The level of need for a national plan form does not justify forcing it on so many courts whose judges object to it.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: NACBA takes no position on whether the proposed national plan form should be an Official Form or Director’s Form.

Comment BK-2014-0001-0035—Judge Elizabeth Magner (Bankr. E.D. La.): There is merit to uniformity. This form provides a usable base for most debtors while allowing for modification due to local custom or specialized circumstance. The new provisions regarding lien stripping and the controlling effect of the plan over proofs of claim will save time and money in connection with the administration of a case.

Comment BK-2014-0001-0036—Suzanne Bauknight: I agree with the comment submitted by the Committee of Concerned Bankruptcy Judges.

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): The national plan form should be a Director’s Form. This will enable the Rules Committee to see how it works in live situations across the country.

Comment BK-2014-0001-0038—Warren Cuntz (Chapter 13 Trustee, S.D. Miss.): I oppose adoption of the mandatory national plan form and refer the Advisory Committee to the letter of the Committee of Concerned Bankruptcy Judges, the comments of the Kansas judges, and of Laurie Williams.

Comment BK-2014-0001-0039—Jan M. Sensenich (Chapter 13 Trustee, D. Vt.): My district is a conduit mortgage district, and I am in favor of the national plan form and the accompanying rules. Much of the controversy about the project could be resolved by making clear that none of the provisions or selections suggested by the form are intended to restrict, modify, or in any substantive way interfere with current local rules regulating chapter 13 practice in various districts.

Comment BK-2014-0001-0040—Joel D. Burns (Attorney, Georgia): I oppose adoption of the national plan form. The new form would disrupt the methods of filing lien avoidances, payment of secured claims on dwellings, and other items easily accomplished under current procedures and rules in the M.D. Ga.

Comment BK-2014-0001-0041—Raymond Bell (Pennsylvania): I am a non-attorney manager of consumer bankruptcy cases. I support the national plan form. It is not perfect, but it affords easier completion by the consumer and easier access to plan information by creditors. Uniformity helps all parties involved in the bankruptcy process.

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): The M.D. Tenn. adopted the national plan form without revisions. Since then, I have filed 73 cases using the form. I am not opposed to it, but it needs some additional clarifications. We have had to place information in Part 9 in every plan. Also, more space is needed for names of creditors, collateral values, etc. throughout the form.

Comment BK-2014-0001-0043—Nicholas Hahn (Law Clerk, Bankr. D. Haw.): I oppose the national plan form. It will hamper experimentation, lead to increased litigation, cause unintended consequences, and it is too long. It should be a model plan instead of a mandatory form.

I support adoption of the amended rules.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): I support a national plan form. It increases due process for all parties by putting necessary information in a specific order. It will not lead to the displacement of local attorneys by national firms.

Local courts should be permitted to remove parts of the form that are not applicable in their districts.

Comment BK-2014-0001-0046—Judge Terrence L Michael (Bankr. N.D. Okla.): I am a signatory of the letter submitted by the Committee of Concerned Bankruptcy Judges. I oppose the national plan form and the rule amendments that make the form mandatory. The form is a solution in search of a problem. There is no benefit to uniformity. If the plan form is the greatest thing since sliced bread, courts will use it voluntarily. I do not want to see the

development of national consumer bankruptcy practices that displace the local bar. The *Espinosa* case is a non-issue.

Comment BK-2014-0001-0047—Jeffrey M. Kellner (Chapter 13 Trustee, S.D. Ohio): I oppose the national plan form. If a national form is to be adopted, it should be mandatory as to format only, allowing the local bankruptcy courts the right to use local decisions, customs, and procedures.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): I oppose the national plan form. The changes made upon republication are cosmetic only.

There is no provision showing that the debtor satisfies the best interest of creditors test under Code § 1325(a)(4).

The plan does not provide for varying options for paying of filing fees.

There is no section addressing non-assigned domestic support obligations.

I attach a link to the Kansas plan form for reference.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): I oppose adoption of a mandatory national plan form.

Throughout the form, debtors must make estimates and calculate amounts that will be meaningless.

Comment BK-2014-0001-0050—Dan Melchi (Attorney, Georgia), on behalf of Lueder, Larkin & Hunter, LLC: We oppose the national plan form.

The mandatory plan form and rules violate creditors' Fifth Amendment rights to due process and against takings of property. When a creditor files a secured proof of claim, that creditor is presumed to be a secured creditor until proven otherwise by the debtor or another party in interest. *See* Bankruptcy Rule 3001(f). A creditor has the right to know before a confirmation hearing whether it is secured or unsecured—the arguments the creditor may wish to make in the case depend on knowing that status. The Advisory Committee's proposed changes mean that a secured creditor will not know whether it is secured or unsecured before confirmation. If a debtor wishes to strip a lien, then notice and a separate valuation hearing should be required so that a creditor receives a ruling from the court prior to confirmation.

Comment BK-2014-0001-0052—Keith A. Rodriguez (Chapter 13 Trustee, W.D. La.): I oppose adoption of a national plan form. In the W.D. La., we have no local plan. Most debtor's attorneys use a form provided by a software vendor. The proposed national plan form has too many places where debtors are given the option of making payments directly to creditors.

I have, in the past, objected to specific parts of prior iterations of the plan form. Now I think a general objection is more in order. This national plan form could very well leave trustees in limbo as to how to efficiently administer several of their cases.

Comment BK-2014-0001-0053—Chief Judge David S. Kennedy (Bankr. W.D. Tenn.): (This letter is signed by three other bankruptcy judges of the W.D. Tenn.) We oppose the national plan form. It is not right for our district. A one-size-fits-all plan should not be forced upon every district.

Comment BK-2014-0001-0054—Michael Joseph (Chapter 13 Trustee, D. Del.): I oppose a mandatory national plan form. The form as currently drafted presents potential legal challenges, contains unnecessary and confusing language (checking boxes), and may be misleading.

The Advisory Committee should consider allowing districts with local plan forms in place that provide the notice sought under the national form (with any non-standard provisions clearly highlighted) to continue use of their local plan forms.

Comment BK-2014-0001-0056—Marvin Wolf (Attorney, New Jersey): I am the New Jersey State co-chair of the National Association of Consumer Bankruptcy Attorneys. I agree with Henry Sommer’s comment but oppose adoption of the national plan form.

Bankruptcy courts have set up filing packages seeking to eliminate lawyers from the process and turn bankruptcy into a “fill out the form” type of practice. This has hurt many debtors and encourages a lack of respect from debtors towards bankruptcy attorneys—a belief that our skills are fungible and easily replaced by some paralegal form preparer who is nothing more than a glorified typist, but who charges less than we do. A national plan form will cause more talented lawyers to leave consumer practice. It would encourage judges to “stick to the form” and interfere with our creativity in finding ways to fund plans and keep debtors in their houses.

Comment BK-2014-0001-0057—Gwendolyn M. Kerney (Chapter 13 Trustee, E.D. Tenn.): I oppose a national chapter 13 plan form. I agree with the comments of Chief Judge Grant, Judge Brian Lynch, and the many judges and trustees who have submitted comments opposing the plan form.

Comment BK-2014-0001-0059—Mitchell Marczewski (Attorney, Zanesville, Ohio): I oppose the national chapter 13 plan form. Although many things are standardized in bankruptcy, chapter 13 practice, by its nature, is not conducive to standardization.

Comment BK-2014-0001-0061—Judge Marvin Isgur (Bankr. S.D. Tex.): A diverse group of bankruptcy professionals propose a compromise alternative to the national plan form. The compromise consists of the following key features:

Each district must permit use of Official Form 113 unless the district has adopted a local plan form that conforms to the requirements set forth in new language to be added to Rule 3015(c).

A conforming local form must be adopted, after public notice and comment, by a local rule or order that (i) requires use of the local form for all chapter 13 plans; (ii) prohibits alteration; (iii) mandates that all non-standard provisions be contained only in the final paragraph of the plan labeled “Non Standard Provisions”; (iv) requires that the plan contain a certification by the debtors and their lawyer that no changes have been made to the form (other than nonstandard provisions in the final paragraph) and that the debtor does not seek confirmation of any provision that has been deemed not to be effective under the Bankruptcy Rules; and (v) is posted on the court’s website under Local Rule 3015.

Our proposed amendment to Rule 3015(c) would require additional features of a conforming local plan form, including conspicuous labeling of provisions.

We propose that every chapter 13 plan—whether submitted on Official Form 113 or a local conforming plan form—must include at the beginning an informational statement. That informational statement gives notice whether the plan (i) contains nonstandard provisions; (ii) proposes to limit the amount of secured claims; (iii) avoids a security interest or lien; (iv) cures or maintains a loan secured by the debtor’s principal residence; (v) provides for the treatment of domestic support obligations; or (vi) includes a 910-day car claim or one-year purchase money security interest claim.

We also propose that the amendment to Rule 3002(c) be altered to allow for the filing of claims no later than 70 days after the order for relief.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The NCBJ takes no position on the advisability of a national plan form.

Comment BK-2014-0001-0063—Camille Hope (Chapter 13 Trustee, M.D. Ga.): I oppose the national plan form. It has major defects and is too long.

Comment BK-2014-0001-0068—Harold J. Barkley, Jr. (Chapter 13 Trustee, S.D. Miss.): I oppose a mandatory national plan form. We have had a local plan form in our district for 30 years, and it has worked well. There are features of the national form that we may incorporate in our local form, but the national form should not be mandatory. Bankruptcy law strives for uniformity, but there will always be local nuances and subtleties in local bankruptcy courts.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): We oppose the national plan form.

The range of choices left to debtors invites chaos and does not promote uniformity. The plan form leaves debtors with an inappropriately wide range of choices, which will affect the likely success of their cases. Some of the choices left to debtor discretion would cut against uniformity and expand the differences currently found among jurisdictions to differences found on a case by case basis within a jurisdiction.

The proposed plan form does not require the identification of the debtor as above or below median income or make it clear that the debtor is required to devote all disposable income to the plan.

The form does not include any information as to disposable income from B22-c or Schedules I and J. Creditors do not receive a copy of the bankruptcy schedules, so with the omission of income and expense information on the plan, they are without the necessary facts to assist them in evaluating the plan without resort to cumbersome and expensive research through PACER.

No provision is made in the proposed form for § 1305 claims [postpetition claims].

Comment BK-2014-0001-0071—Judge Marci McIvor (Bankr. E.D. Mich.): I oppose the adoption of the mandatory national plan form for the reasons stated by the Committee of Concerned Bankruptcy Judges. But I support the compromise proposal offered by a group of bankruptcy judges and other professionals.

Comment BK-2014-0001-0072—Judge Lamar W. Davis, Jr. (Bankr. S.D. Ga.): I opposed the national plan form in a comment submitted when the form was first published. I have reviewed the changes made on republication and remain opposed to adoption of the plan form. There is no consensus in favor of it.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: There is a valid concern that the benefit of diverse local practices will be lost with a proposed national plan form, notwithstanding its justifiable goals.

We endorse the compromise proposal.

Comment BK-2014-0001-0074—Judge Daniel Opperman (Bankr. E.D. Mich.): I signed the letter of the Committee of Concerned Bankruptcy Judges in opposition to the national plan form. I support the compromise proposal, so long as each district retains the right to decide for itself whether to use its own model chapter 13 plan form or adopt the national chapter 13 plan form.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): I oppose a mandatory national plan form. A local form allows a more nimble response to shifting legal landscapes.

Comment BK-2014-0001-0077—Mary B. Grossman (Chapter 13 Trustee, E.D. Wisc.): I understand that the national plan form cannot require debtors to make all of their plan payments through the trustee, but I encourage the Advisory Committee to remove the check box options for disbursement of funds by debtors. The determination of who will disburse to creditors, and therefore who will pay the trustee's fees, should be made by case law and local practice.

The checkboxes for this choice are also confusing. They are in odd locations and are missing from at least one part of the form (§ 3.2).

Comment BK-2014-0001-0078—John Bodle (Attorney, Kansas): I oppose the national plan form and agree with the objections of the Kansas bankruptcy judges. Please permit us to continue to use our local chapter 13 plan, which well serves the needs of Kansas debtors, creditors, and bankruptcy practitioners.

Comment BK-2014-0001-0079—Joseph Wittman (Attorney, Topeka, Kansas): I oppose the national plan form. Our local plan form is ten pages long and works well in our conduit district. The national form will not work because it does not deal with conduit mortgage payments and because of the limitations imposed by proposed Rule 3015.

A national form is unnecessary. Very few attorneys attempt to hide provisions in plans.

Changes to a national form will take too long

I agree with the views of the Committee of Concerned Bankruptcy Judges.

Comment BK-2014-0001-0080—Gail Robinson: The national plan form is too long and complicated.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): I strongly support the adoption of a uniform national chapter 13 plan form. My observations are based upon our adoption of the proposed form as a mandatory form in our district. We have had actual experience with the form. It has shown the bar the degree of freedom debtors have in proposing chapter 13 plans. That freedom does not mean that any and all choices by debtors will avoid creditor or trustee opposition. We are a conduit mortgage district, and a debtor's choice to make payments directly would draw an objection from the trustee and, in all likelihood, would not be approved by the court.

There are some changes that the Advisory Committee should consider:

Add a provision for dealing with postpetition claims allowable under § 1305. Every debtor has added this provision in Part 9.

Add a provision for a plan to make applicable § 524(i) (dealing with willful failure of a creditor to credit payments received under a confirmed plan). Every debtor with a mortgage cure adds this language to Part 9.

Add a provision for pre-confirmation adequate protection payments.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): I oppose the national plan form. I agree with the views expressed by the Committee of Concerned Bankruptcy Judges.

Section 1325 sets forth the requirements for confirmation of a chapter 13 plan. Use of a form cannot be mandated so long as a plan satisfies the Code.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): I oppose proposed Rule 3015(c) and Official Form 113 on the basis that the Rule and Form unduly create litigation issues, have no known enforcement mechanism, and are directly contrary to the Bankruptcy Code.

Official Form 113 does not provide the information required by Forms B22C-1 and B22C-2 regarding a debtor's disposable income. Similarly, there is no space provided to identify disposable income as listed on Schedules I and J. Creditors need this information to determine whether to file a disposable income objection.

Comment BK-2014-0001-0085—Judge Dennis Montali (Bankr. N.D. Cal.): I oppose the mandatory national plan form for the same reasons I gave in my comments upon the initial publication of the plan form in August 2013.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): I oppose the plan form in its current form. I appreciate the concerns of the Advisory Committee and the open forum in which this process is being conducted. But the plan form should not be mandatory. It does not reflect local practices and would disrupt them.

Comment BK-2014-0001-0090—William Mark Bonney (Chapter 13 Trustee, E.D. Okla.): I support the compromise proposal. Any burden experienced by local stakeholders is outweighed by the benefit to national stakeholders. Even local stakeholders will find benefit from a more uniform plan confirmation process.

National stakeholders all too often fail to file timely claims, fail to comply with Rule 3002.1, and violate the provisions of § 524(i). They should be required to dedicate the resources

necessary to fulfill their obligations to local stakeholders if they are to receive this benefit of a national plan form or compromise.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: The plan form and rule amendments (with the exception of Rule 3002) should be treated as an integrated package.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter 13 Trustees:

- The plan form does not provide options for paying of filing fees.
- There is no section addressing non-assigned domestic support obligations. Perhaps this could be added to § 4.4.
- The plan form will result in higher costs and reduce the distribution to unsecured creditors. It will cause the conduit payment processes in many districts to be turned on their head. It will certainly not provide the needed relief for debtors in specific jurisdictions.
- The plan form should be a model and not mandatory. This will enable the Rules Committee to see how it works in live situations across the country.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): I endorse the national plan form. The adoption of a local plan form in my district had a positive impact on the efficient administration of chapter 13 cases. The same will be true for a national plan form. National creditors, who now must review over 200 different local forms, will benefit. Software providers will no longer have to keep up with 200 different local forms. Debtor's and creditor's attorneys who practice in multiple districts will benefit. Chapter 13 education will become more efficient. All of these changes will lead to reduced costs for all parties.

Comment BK-2014-0001-0095—Orlando Segura, on behalf of AT&T Corp.: AT&T strongly supports the Advisory Committee's proposal for a national chapter 13 plan form. A national form would enable creditors like AT&T to implement more efficient procedures for reviewing chapter 13 plans and administering chapter 13 debtor accounts, thereby decreasing administrative costs and errors for the benefit of all parties.

There are as many as 200 local chapter 13 plan forms currently in use with a wide variety of differences in the forms. This inhibits the ability of national creditors like AT&T to develop procedures for managing claims, tracking debtors' payment obligations, and appropriately treating executory contracts in chapter 13 cases across all jurisdictions. In many cases, AT&T's administrative costs are greater than the nominal amounts owed to AT&T by chapter 13 debtors.

For example, AT&T could focus its review on Part 6 of the national plan form and determine if a contract is rejected. In the last year alone, AT&T wrote off over \$55 million in uncollectible amounts due to bankruptcy filings. A portion of this loss is attributable to continued billing to debtors who failed to specify treatment of executory contracts in their chapter 13 plans.

A data-enabled form would increase the aggregation of data. AT&T actively pursues creation of electronic review methods and procedures to introduce efficiencies into the bankruptcy process where possible. The ability to do so using a national form would result in cost savings and a streamlined experience for customers in the chapter 13 process.

Comments opposed to the plan form focus on the stifling of local innovation. The argument ignores the practical difficulties associated with complying with hundreds of local plan variations in a market where the vast majority of debt is held by national rather than local creditors. The mistakes, omissions, delays, and lawsuits (by debtors and creditors alike) fostered by the lack of a national form increase costs for all parties and delay the goal of providing consumers with a fresh start.

Comment BK-2014-0001-0096—David Baker: Unlike the Schedules and Statement of Financial Affairs, a chapter 13 plan needs flexibility to be useful, because plans are jurisdiction specific. Plans should not be designed to make things easy for creditors; they have the financial resources and motivations to peruse plans carefully. Debtors and their counsel have more limited resources and need a plan that is straightforward and flexible so that variations from the “norm” can be accommodated easily. That does not seem possible (or at least not easy) in the proposed plan form.

Comment BK-2014-0001-0097—John J. Talton (Chapter 13 Trustee, E.D. Tex.): I oppose a mandatory national plan form. It should be optional.

The national plan form will not create uniformity. It will lead to litigation to interpret its provisions, driving up costs.

There is no provision for adequate protection payments.

There is no provision for plan funding from the turnover of recoveries from lawsuits, sales of property, or other sources.

Comment BK-2014-0001-0098—Judge John Gustafson (Bankr. N.D. Ohio): I support the national plan form. Uniformity is a worthy goal, and chapter 13 is the most non-uniform area of bankruptcy practice. We have national forms, such as the schedules and proof of claim form, even though the law differs across jurisdictions. Chapter 13 plans are not fundamentally different.

There are several advantages to the use of official forms. One is simply knowing where information is going to be, and that it will be presented in a standard way. Another is that chapter 13 plans will not be able to be “data-enabled” (allowing data to be collected and processed by computers) unless there is an Official Form, instead of many local forms. Not having a form for filing chapter 13 plans prevents creditors, the trustees, and the courts from automatically extracting important data from chapter 13 plans.

The new rules would go into effect with the adoption of the official form. I find it disheartening to read arguments about the difficulties the courts and trustees would have in dealing with a form for filing chapter 13 plans given the additional costs and work that have been imposed on creditors in recent rules amendments, such as Rule 3002.1. Bankruptcy courts have enforced those difficult provisions against creditors, with few excuses accepted. Dealing with a form for presenting chapter 13 plans would not be too onerous for the courts.

Finally, a form for presenting chapter 13 plans will promote increased uniformity in the case law, as every chapter 13 plan appeal will not start with idiosyncratic language from a mandatory local form that bears little relationship to the language of other parochial forms found around the country.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.):

A mandatory national form for chapter 13 plans will be a seismic shift in chapter 13 practice. The Committee must weigh the benefits of its adoption against the serious possibility that a change will do more harm than good. Adopting the current draft national plan form as a result of hubris or impatience will only create difficulties in the future.

There is no preconfirmation adequate protection provision.

Add a form confirmation order.

Comment BK-2014-0001-0100—Michael Bruckman: I am adamantly opposed to the chapter 13 plan form. The form restricts the ability of debtor's counsel to be flexible in an unpredictable environment of default and debt.

Comment BK-2014-0001-0101—Roger Cotner: Add a place to specify an effective date for the plan.

Add language that invokes § 524(i).

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): A national plan form is a national mistake. One size does not fit all. With the exception of a few mortgage companies and a hand-full of software providers, this does not benefit anyone. The current system is more flexible, allows districts to experiment with mandatory or proposed forms, and has worked well.

Comment BK-2014-0001-0103—R. Greg Wright: I oppose the national plan form. In Kansas, the judges, chapter 13 trustees, and members of the bar worked very hard to come up with a local plan form. Our plan is wonderful. It is also comprehensive and tracks our local rules. While a national plan form may sound like a good idea, all courts not only have their respective local rules, but also have their specific ways of conducting business.

Comment BK-2014-0001-0104—Paul Post (Attorney, Kansas): I oppose the national plan form. Our Kansas form plan meets the needs of our debtors, creditors, the bankruptcy bar, and our Kansas judges. The proposed national plan form will throw all of those efforts out the window.

The driving force behind the proposed national plan form is to allow “data enabling,” which apparently benefits large national creditors. Has any study been done to determine what the additional cost will be to debtors in the form of additional attorney's fees which will undoubtedly be required to properly prepare plans?

Comment BK-2014-0001-0107—Steven R. Wiechman: A national plan form would have made more sense 8 years ago when bankruptcy filings were on the increase.

If the ultimate goal is a national form, then incremental steps requiring each jurisdiction to develop a plan form and each to include a uniform cover sheet would be of great benefit.

Comment BK-2014-0001-0108—Martin J. Peck (Attorney, Wellington, Kan.): I agree with the concerns of Kansas bankruptcy judges, particularly that the national plan form as drafted fails to address several useful and mandatory plan provisions in Kansas bankruptcies. On

the other hand, I understand the concerns of national creditors that want to be able to determine their treatment in chapter 13 without having to keep abreast of practice in 94 separate judicial districts.

I suggest that rather than a national plan form, it would be better to have a national form cover sheet or national plan summary form that calls to creditors' attention, in a standardized format, whether their rights are being impaired and where in the plan that occurs.

Comment BK-2014-0001-0109—Marie Elaina Massey (Chapter 13 Trustee, S.D. Ga.): Our district uses a two-page plan. It covers the usual cases, while including an “other provisions” section for the occasional case, and is short enough to be reviewed quickly.

If the purpose of the proposed national form is to bring consistency, having a Bankruptcy Code does not guarantee consistency. A longer, more detailed plan form will mean higher attorney's fees, less money for unsecured creditors, and a higher cost of administration for trustees.

The plan form has an obsession with math. But the numbers in chapter 13 are always estimates. There is no perfection in a chapter 13 case!

Comment BK-2014-0001-0110—W. H. Griffin (Chapter 13 Trustee, D. Kan.): I oppose the national plan form. I agree with the comments of my fellow trustees, Laurie Williams and Jan Hamilton, and with the comment submitted by Judge Karlin on behalf of the Kansas bankruptcy judges.

Comment BK-2014-0001-0111—Kelley L. Skehen (Chapter 13 Trustee, D.N.M.): I oppose the national plan form. It will bring no benefits but cause significant harms, including increased costs for parties, courts, and trustees. Nor can a national plan form address the variations in state laws that are applicable in bankruptcy.

I understand that there is a proposed draft compromise rule. I would support such a compromise (with an appropriate comment period) and encourage the Advisory Committee to consider it.

Comment BK-2014-0001-0112—Judge Terrence L. Michael (Bankr. N.D. Okla.) with Chief Judge Tom R. Cornish (Bankr. E.D. Okla.): We signed the letter submitted by the Committee of Concerned Bankruptcy Judges.

We understand that a compromise proposal has been submitted. It may be worthy of consideration, but it is not ripe for adoption. It should not be adopted without publication and the opportunity for public comment.

The compromise does not address our concerns about Rule 9009, which are independent of any chapter 13 plan form.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: We understand a suggestion has been made to allow retention of “conforming” district plans (with only a single plan per district). Although we strongly continue to believe that the goal should be to arrive at a single national plan form with adequate provision for some local options, we do agree that the new proposal is a step in the right direction.

We suggest that many of the concerns about a national plan form and local practices (such as in conduit districts) could be addressed by identifying the major points in question and providing for each district to adopt by local rule its position on those points. The plan could state in Part 1 the particular approach that the district takes.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: The form has no provisions for pre-confirmation adequate protection payments.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): I support the national chapter 13 plan form. The uniformity of a national plan form will benefit all involved in the chapter 13 process—creditors, debtors, attorneys, and trustees. The proposed Official Form 113 meticulously takes into consideration the many possible options available to chapter 13 debtor.

Comment BK-2014-0001-0118—Teresa Kidd (Attorney, Kansas): We have had a model plan in our state for years. We finally have every conceivable question or problem worked out. I fear there will be triple the number of motions, objections, etc., with a new plan. I do not understand the concept of “fixing something that isn’t broken.”

Comment BK-2014-0001-0119—Gary Hinck (Attorney, Kansas): I oppose the national plan form. I agree with the comments of the Kansas judges and trustees. Our district has a workable plan form with a conduit mortgage provision. A national plan form without a conduit mortgage provision is simply not a reasonable option.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): We do not have a local plan form in Arkansas. I oppose a mandatory national plan form. It will be burdensome to practitioners, debtors, trustees, creditors, and courts, and would likely result in more, not less, administrative expense.

The compromise proposal submitted as a comment may satisfy some opponents of a mandatory national plan form. But there is no provision to allow a district to opt out of accepting the national form without adopting a conforming local plan form. A prescribed plan form is not needed for all districts.

Include provision on Official Form 113 for adequate protection payments and for amended plans.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): I oppose the national plan form, which will lead to increased litigation.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: The Department supports the concept of a national form for chapter 13 plans, because uniformity and consistency will enhance ease of case administration and increase transparency, to the benefit of debtors and creditors.

We continue to have concerns about § 3.4 and Part 8 of Official Form 113.

Comment BK-2014-0001-0127—Lonnie D. Eck (Chapter 13 Trustee, N.D. Ga.): I oppose the mandatory plan form as presently proposed.

Comment BK-2014-0001-0128—Prof. Katherine Porter (University of California, Irvine, School of Law): I support of a uniform national form for chapter 13 plans. Uniformity is a critical element of a fair and efficient bankruptcy system. It benefits parties in all roles: debtors, creditors, trustees, judges, and others. While particular members of one of these groups may prefer the existing alternative in their jurisdictions, the collective whole is indubitably better served with a national chapter 13 plan form. At stake in this debate is the integrity of justice in bankruptcy.

I am a law professor who has spent ten years conducting empirical studies of the consumer bankruptcy system. I have particular expertise in chapter 13 processes and outcomes. I conducted the first national study of mortgage servicers' conduct in chapter 13, which is governed in part by confirmed plans. I also serve as the monitor for the State of California of the \$25 billion national mortgage settlement. I oversaw the implementation of new mortgage servicing rules, including several dozen pertaining to chapter 13.

A national plan form would increase creditor compliance with bankruptcy law. As California Monitor, I saw hundreds of bankruptcy cases in which mortgage payments were applied incorrectly according to the terms of the confirmed plans. While Rules 3001 and 3002 improve this issue, they are not sufficient. Creditors need to build and implement software for payment applications and for tracking chapter 13 cases. Software and improved practices are needed from car lenders and other secured, non-mortgage lenders, who are outside the scope of the existing Bankruptcy Rules. Hand-accounting for chapter 13 plans must end.

A uniform national plan form would improve creditor behavior, because it would allow them to more easily train, supervise, and audit their actions in bankruptcy cases. It also would drive down the costs of compliance checks by regulators of financial institutions. The variability in chapter 13 plans under the existing system inhibits national regulators from assessing compliance in any effective manner. Crucially, better creditor behavior and stronger compliance checks redound to the benefit of debtors and unsecured creditors, as well as to the integrity of the system.

I concede that chapter 13 plans in some jurisdictions may be superior in some respects to the proposed national plan form. In many other jurisdictions, however, the local forms are quite poor.

If the Advisory Committee does not favor the adoption of the proposed national plan form, I support the compromise proposal, which is better than the status quo.

Comment BK-2014-0001-0129—Shannon Garrett (Attorney, Kansas): I oppose the national plan form. It limits the ability of a lawyer to craft a plan that will address a client's needs. It is too rigid. It is hostile to our conduit mortgage program here in Kansas. It lacks provisions for domestic support orders. The Kansas plan form is better. I trust my judges and comrades of the bar to understand the community in which we serve.

Comment BK-2014-0001-0130—Rick A. Yarnall (Chapter 13 Trustee, D. Nev.): I oppose the national chapter 13 plan form. In February 2014, I submitted 51 items related to the initial publication of the form. Although the republished form addresses issues raised in my prior comment, the majority were not substantively considered.

In my 37 years of practicing bankruptcy law, I have never seen an issue more divisive than this proposed plan form.

I have joined in the compromise proposal submitted as a comment.

Comment BK-2014-0001-0132—Daniel H. Brunner (Chapter 13 Trustee, E.D. Wash.): We oppose a mandatory national chapter 13 plan form. It will increase litigation. It will encourage debtors to circumvent local rules, such as conduit mortgage requirements.

One size does not fit all.

Comment BK-2014-0001-0133—Joelyn Pirkle (Attorney, Georgia): I oppose a mandatory national plan form. My primary concern is the effect it will have on the quality of representation for debtors and creditors. A boom of “petition preparer” advertisements will inevitably follow. While I do not oppose all the rule changes, such as moving the claim deadline closer to confirmation, I strongly oppose a mandatory national plan form. Perhaps it will serve as a model.

Comment BK-2014-0001-0135—Joyce Bradley Babin, on behalf of the National Association of Chapter 13 Trustees: The board of the NACTT has voted to recommend support of the compromise proposal. The vote was not unanimous, with some members supporting only the mandatory national plan form and others supporting neither the national plan form nor the compromise proposal.

Comment BK-2014-0001-0136—William Heitkamp (Chapter 13 Trustee, S.D. Tex.): I oppose a mandatory national plan form. I support a national form that serves as a model for local districts.

Comment BK-2014-0001-0138—Judge Margaret M. Mann (Bankr. S.D. Cal.), on behalf of the bankruptcy judges of the district: The bankruptcy judges of the S.D. Cal. unanimously support the compromise proposal.

Part 1: Notice to Interested Parties

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): Debtors will conclude that if the form has an option then it must be available to be selected, regardless of contrary warnings.

Comment BK-2014-0001-0015—K. Michael Fitzgerald (Chapter 13 Trustee, W.D. Wash.): Debtors will conclude that if the form has an option then it must be available to be selected, regardless of contrary warnings.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Clarify that local rulings on procedures and statutory provisions remain in place.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: The notice about the presence of options does not address our concern about the plan form’s effect on conduit mortgage districts. Without

including specific language from our local conduit mortgage payment rule, the debtor's plan would be unconfirmable in our district. Pro se debtors and debtors represented by lawyers who are not frequent practitioners in our court would be adversely affected.

A checkbox indicating whether debtor is eligible for a discharge should be included in Part 1. It was removed from Part 3, where it did not belong, but should not be removed entirely from the form.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: NACBA questions use of the phrase “permissible in your judicial district” in Part 1. It suggests that local courts may interfere with a debtor's right to propose a plan that satisfies § 1325. Revise that language to read: “. . . the presence of an option on the form does not indicate that the option is appropriate in your circumstances, and such an option may be prohibited in your case by controlling case law applicable in your judicial district.”

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): Eligibility for a discharge should be indicated.

Comment BK-2014-0001-0038—Warren Cuntz (Chapter 13 Trustee, S.D. Miss.): Proposed Rule 3015(c), which mandates use of the national plan form, and proposed Rule 9009 are at odds with the “warning” in Part 1. If the plan form is adopted, this warning must be bolder and repeated throughout the form.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): One of the notices to creditors indicates that the creditor must file an objection to confirmation of a plan at least 7 days prior to the confirmation hearing date. Not all courts require confirmation hearings, and plans may be confirmed if no objections are filed.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): This language is not prominent enough. Debtors will conclude that if the form has the option then it must be available to be selected regardless of contrary judicial authority. We suggest using revised language in bold at various locations throughout the form.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Include a checkbox to indicate if notice is required for a plan modification.

Include a checkbox for whether debtor seeks a discharge.

Include a checkbox for whether the debtor is above or below median income.

Combine the checkboxes for valuation and lien avoidance. Add a checkbox regarding service of the plan.

Include space to explain the reason for a plan modification.

Comment BK-2014-0001-0081—Matthew T. Loughney (Clerk, Bankr. M.D.Tenn.), on behalf of the Bankruptcy Noticing Working Group: The Committee Note states that inapplicable sections of the plan form “do not need to be reproduced.” This should be changed

to say that unused sections “should not be reproduced.” A warning to that effect should be included in Part 1.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): Please eliminate the three check boxes for claim valuation, lien avoidance, and non-standard provisions. If those provisions are in a plan, that fact will be self-evident. Having a check-box in Part 1 only serves as an opportunity to create inconsistencies between Part 1 and Parts 3 and 9.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Add language certifying that a plan does not deviate from the Official Form.
- The form has no provision for paying pre-confirmation adequate protection payments, or ongoing mortgage payments through the plan.
- Part 1 includes a notice which says that this form sets out options that may be appropriate in some cases but the presence of an option on the form does not indicate that the option is appropriate in your circumstance or that it is permissible in your judicial district. However, at least half of the sitting bankruptcy judges nationwide say that the comment in itself does not give them authority to address changes in their plan.
- Add space to indicate whether an amended plan is the first amended plan, second amended plan, etc.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): The warning language about the need to comply with local rules should be made stronger.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Include a date of the plan. There are instructions to debtors buried in the notice to creditors. There should be a checkbox on each part of the plan form modified by a nonstandard provision.

Comment BK-2014-0001-0104—Paul Post (Attorney, Kansas): Paragraph 1 suggests that local rules may make some or all of the possible nonstandard language unavailable. If this is so, how is this a “national” plan form?

Where does the plan form tell creditors that the debtor is above or below median income? Where does the plan form specify that above median income debtors must pay for 60 months? Will the language allow above median income debtors to pay less than 60 months?

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: If greater local options are built into the plan form, it would be appropriate to have the most important default structures set out here under the notice to creditors.

The checkbox for the use of nonstandard provisions should also include space to note the affected parts.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: The notice of whether the plan is amended should indicate whether it is a first amended plan, a second amended plan, etc.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): The language should not state a specific time period for objections to confirmation. It should state that an objection should be filed in the time period prescribed by the court.

Comment BK-2014-0001-0121—Tracy Updike, on behalf of the M.D. Pa. Bankruptcy Bar Association:

Add space to list the plan version number.

The “important notice” language should be made more conspicuous.

We are split as to whether an objection to confirmation should be filed prior to confirmation.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): There is no consequence for failure to fill in the checkbox.

The requirement of an objection within 7 days of the date set for the confirmation hearing will cause problems, because in some cases the § 341 meeting of creditors is not concluded within 7 days of the scheduled confirmation hearing. This will lead to unnecessary objections.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: We represent secured creditors.

Include space for a brief description of changes if the plan is an amended plan.

Comment BK-2014-0001-0127—Lonnie D. Eck (Chapter 13 Trustee, N.D. Ga.): For pro se debtors, newer practitioners, and perhaps even some seasoned practitioners, the mere existence of an option on the form may entice the plan proponent to try the option.

The warning should not say that a creditor “may need to file” a timely claim. Filing a proof of claim is absolutely necessary for a claimant to be the holder of an allowed claim.

The preferred manner of making payments is through the trustee.

Part 2: Plan Payments and Length of Plan

Section 2.1 (payments to the trustee)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): The provision stating that additional monthly payments will be made to the extent necessary if fewer than 60 months of payments are specified will lead to less transparency and certainty as to the length of the plan.

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: This provision appears to permit plan modifications (extensions) without notice and hearing, or any of the other requirements of 11 U.S.C. § 1329.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: There is inadequate detail in this section for trustees to administer plans.

Comment BK-2014-0001-0035—Judge Elizabeth Magner (Bankr. E.D. La.): The default should be that all payments received after confirmation are due to the trustee, unless the court orders otherwise.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): This is an excellent provision.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): The form compels regular monthly payments, which are not required so long as the debtor has regular income that is steady and predictable. Farmers, for example, may receive income annually and still qualify for chapter 13.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Below median debtors have an applicable commitment period of only 36 months, yet the language in this section refers to 60 months.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Debtors should be able to specify how payments are made, in keeping with debtors' pay patterns.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Include a provision for adequate protection payments in Part 2.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): This section appears to allow for payments less than 60 months regardless of the applicable commitment period in the case. See Code § 1325 (b) (1) (B).

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): The vast majority of Chapter 13 trustees have cases that last longer than 65 months—over 3,000 cases nationally in FY 2013—perhaps due to plans that run from the date of confirmation. The form does not provide a checkbox for the debtor to specify whether the plan is to run 60 months from first plan payment or 60 months from the effective date of confirmation. The form appears to take the position that plan length is determined by the date of the first payment.

Although the Committee Note contemplates weekly or biweekly payments, the form as written unnecessarily guides debtors into monthly payments.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- If the debtor’s applicable commitment period is only 36 months and the plan initially calls for a longer period to complete payments, it is unfair to require debtors to pay out for the longer period if it turns out that the longer period is unnecessary to meet debtor’s obligations.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Specify the applicable commitment period and list the plan length. Add beginning and end dates and space to specify when a payment will change.

Section 2.2 (manner of payments to the trustee from future earnings)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): The lack of a place to designate the address of an employer for the payroll order will cause delay.

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): Clarify from which debtor the payroll deduction will be taken.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): I do not understand why there is an “other” check box. What other option is available besides a payroll order or no payroll order?

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): More detail is needed for the payroll deduction order.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): More detail is needed for the payroll deduction order.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): The form should not appear to give debtors the option of deciding whether to make payments by payroll deduction. This is a judicial determination.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Delete this section. The amount of the payment should be in the plan, but the manner of payment (wage order, etc.) does not need to be in the plan.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): Provide space for the debtor to insert the name and address of the employer, or, in joint cases, an indication of whose wages will be deducted.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Add space to designate the address of an employer for a payroll order, which will avoid delay.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): Add language that if the debtor agrees to pay by payroll deduction order, the debtor agrees to the immediate entry of the order.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Include employer information for the payroll deduction order.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Include employer information and information on joint debtors for the payroll deduction order.

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): This section should refer to future income, not “earnings.”

Section 2.3 (federal income tax refunds)

BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: Section 2.3 does not include an option for the debtor to pay all tax refunds during the term of the plan. If this provision is to be included at all, it should either (1) include all possible options (e.g., “all tax refunds received during the term of the plan shall be turned over to the trustee”) or (2) be a blank space for the debtor to complete.

Comment BK-2014-0001-0015—K. Michael Fitzgerald (Chapter 13 Trustee, W.D. Wash.): This section is internally inconsistent. At one point it requires a debtor to provide the trustee with copies of tax returns, and in another instance requires the submission of the tax return itself.

This section fails to require submission of redacted copies and in doing so will impose more work on the trustee.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: The original published version, which reminded debtors of the requirement to submit copies of their tax returns to the trustee, is preferable. This section should not omit state tax returns.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: This is an improvement on the previous version. But the language about providing tax returns should be removed. It conflicts with the Code § 521(f) and procedures established by the Administrative Office.

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): Trustees in our district do not want debtors to submit copies of tax returns.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): Debtors should not have the option to retain tax refunds.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): I would have to object to every chapter 13 plan if this provision were adopted. Tax refunds are property of the estate that should be administered by the chapter 13 trustee.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): This provision should include state income tax returns.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Include state income tax refunds and more detail about other tax refund scenarios.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): All debtors are required to provide copies of all tax returns to chapter 13 trustees. Check box one should be modified to clarify that the copies are not excused if refunds are retained. Check box three should be modified to clarify that the trustee should receive a copy of the return and not the original return and add a time limit of 14 days from filing. The language following all three boxes should be modified to include state tax returns, if applicable. Add language referring to the requirement that tax returns should be redacted.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): The first option should require that the entire tax refund be turned over to the trustee as well as the federal tax return during the term of the plan. Probably because of rulings in some members of the committee’s jurisdictions, the form takes the position that debtors a) can keep their whole refund, b) can keep the earned income credit, or c) can pick whatever portion they want to turn over. A refund that results from over withholding during the plan term is disposable income. The earned income credit is additional income not already accounted for on Schedules I and J and should be paid to creditors absent a court’s ruling otherwise.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): Include state and local tax returns and refunds.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): This section is unnecessary. There is nothing in our local plan form about tax refunds. The debtor should be required to submit to the trustee a copy of the tax return in all cases.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): Rather than having check boxes, the plan form should allow each district to modify the language according to the trustee’s preferences. It is unclear whether the form instructs a debtor to turn over a “copy of each federal tax return” as specified in the second check-box, or the actual return, as specified in the third check-box.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Delete this section or designate tax refunds as disposable income.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- We do not want every debtor to submit a tax return.

- Any time debtors are allowed to keep all the funds they receive from a tax refund, they are going to elect to do so.
- Add an option for dedicating the full tax refund (including earned income tax credits).
- These options do not cover all alternatives.
- This provision would require the trustee to object to each and every plan.
- Add separate options for the tax return and the tax refund, so that submission of a copy of the tax return and dedication of the tax refund do not always accompany each other.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): Clarify that payment of tax refunds is in addition to payment of the amounts listed in § 2.1.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): This section should include all tax refunds—not only federal refunds. Simplify the third checkbox.

Comment BK-2014-0001-0111—Kelley L. Skehen (Chapter 13 Trustee, D.N.M.): This provision attempts to make legal determinations. In the 10th Circuit, earned income credit constitutes disposable income and is not excluded from any tax refunds being turned over to the trustee.

Include state income tax returns and refunds.

All debtors should be required to turn tax returns to the trustee annually, not just those who are retaining their refunds.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: If there is a reference to providing the tax return within 14 days in the second option, that same time limit should apply to the third option.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Include all income tax refunds, not only federal refunds.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): This section contains unnecessary detail.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): Include state tax refunds.

Section 2.4 (additional payments)

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): This section should be combined with previous sections in Part 2, with the debtor proposing additional payments “as follows” or the like.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): The form should provide that the debtor has the obligation to disclose increases in income, inheritances, and other funds that may be property of the estate.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Include checkboxes if the debtor will fund the plan from the sale or refinancing of property.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Delete this provision. Trustees should not be bound by debtors' choice about additional funds. If additional sources of funds become available, the trustee should be able to pursue them.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): If variable plan payments are proposed a schedule of plan payments could be attached.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Combine these sections so that the debtor proposes to make additional payments into the plan “as follows,” with blank lines to list the funding source.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: Whenever real property is referenced, require that the debtor include the property tax ID number used by the local taxing authority.

Section 2.5 (total amount of estimated payments)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): Whose determination of the actual amount of the total payment will control? The Trustee may estimate the amount of the total payments differently than the debtors, the creditors, or both.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Clarify here or in another provision that, in conduit districts, ongoing mortgage payments are to be disbursed by the trustee.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): If this number is just the sum of monthly payments and additional payments, is this line necessary?

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): The plan form does not state, with finality, the amount the debtor will pay the trustee over the course of the plan. This is important because it determines the point at which a plan may no longer be modified. See § 1329(a).

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Creditors should be able to rely on this number. It should not be an estimated amount.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): This total should not include §§ 2.3 and 2.4, which may turn out not to be available (*e.g.*, if the debtor does not get a tax refund).

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Delete the “estimated” language. The trustee needs certainty in base plan funding.

Part 3: Treatment of Secured Claims

Part 3 (general)

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: Part 3 fails to give the debtor the opportunity to disclose the number of months that each creditor is expected to receive payments.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): Add stronger language so that only lienholders served with the relief from stay are removed from payment under the plan.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: We have a number of questions about the meaning of the “claimed arrearage,” the “amount of unsecured portion of claim,” and the “government claim” controls.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): Include a provision on adequate protection payments.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: Include a provision for pre-confirmation adequate protection payments.

Section 3.1 (maintenance and cure)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): There is no option for the debtor to make conduit mortgage payments through plan administration.

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: The plan is unclear as to what happens to a late-filed, secured claim for arrears. The implication is that if an arrearage claim is late-filed, it will be treated differently in the plan. There is no authority in the Code or Bankruptcy Rules for the trustee to do anything other than pay all claims as filed, whether timely or not, absent a court order disallowing or modifying the claim.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: We are concerned about this provision’s effect on our conduit mortgage payment program.

There should be language providing that after stay relief is granted, any deficiency will be treated as an unsecured claim to be discharged upon completion of the plan.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: Debtors should not be required to set forth monthly arrearage amounts, which they often will not know at confirmation. The language should be revised to require “Estimated amount of arrearage” and “Estimated monthly plan payment on arrearage,” which would conform to the next column, “Estimated total payments to trustee.”

We suggest alternative language regarding relief from the stay.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): Delete the option for debtors to make direct payments to creditors.

Debtors do not know the interest rate on arrearages.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): This section does not deal with the effect of stay relief or abandonment.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The third sentence of § 3.1 refers to proofs of claim filed before the Rule 3002(c) deadline as controlling over the plan. This is inconsistent with Code § 502(a), which provides for the allowance of proofs of claim absent an objection. Substitute the phrase “proofs of claim that have not been disallowed.”

Comment BK-2014-0001-0063—Camille Hope (Chapter 13 Trustee, M.D. Ga.): The plan form lacks a standard way to specify plan payments in conduit districts.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): I suggest changes to clarify the treatment of arrearages, ongoing payments, and late-filed proofs of claim.

Comment BK-2014-0001-0065—Rebecca Holschuh (Office of the County Attorney, Hennepin County, Minn.): Section 3.1 refers to “contractual installment payments” but this is not the only basis for payment of secured claims. In Minnesota, real property taxes are secured by perpetual liens that arise each year by operation of law. Accordingly, property tax claims are secured claims paid with interest at the rate set by Minnesota law, as is required by Bankruptcy Code § 511. Part 3 should include an explicit place for secured tax claims.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): The language in this section should be amended to state that payments as to collateral “will cease as soon as practicable.” It is possible that the court will enter an order granting relief from stay during the trustee’s monthly distribution, overlapping disbursement to the affected creditor.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): Break this section into arrearages and regular monthly payments. The arrearage payments, which should always be made by the trustee, should not have “disbursed by” check boxes.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: The arrearage amount should be “grossed up” to include the agreed or modified interest rate.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): The next to last sentence includes the phrase “will no longer be treated by the plan.” Does this mean the unsecured deficiency claim is excluded all together? Clarification is needed.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): The language of this provision is troubling. The trustee will not necessarily know when the stay is lifted, and therefore will not know that payments should cease.

Clarify that the trustee will pay the arrearage.

I am not in a conduit district, but giving debtors a choice to pay directly or through the trustee will cause problems.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): Presenting debtors with multiple options when local practice limits the available choices will increase the number of plan objections and increase the time and expense required of the debtor, the trustee, chambers, and the clerk’s office.

It is not clear what happens regarding the amount of the arrearage claim when the creditor files an untimely claim with a different arrearage amount from the plan. The claim is still an allowed claim, even if tardily filed.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): The trustee should be the disbursing agent on payments to creditors unless otherwise specified.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This section includes no options for the debtor to make conduit mortgage payments through plan administration.
- This section is the biggest problem by far. Conduit payments are a main source of funding for many of the chapter 13 trustee’s operations.
- Eliminate the checkboxes that appear to allow direct payment by the debtor to creditors. The provision lacks clarity and is inconsistent with precedent in many districts.
- Presenting a direct payment option would be extremely disruptive in my district, where it contradicts our local bankruptcy rule requiring trustee conduit payments.
- The provisions directing that the debtor specify the interest rate on the arrearage will create a problem, because debtors usually do not know the interest rate. A better approach would be to provide only that the arrearage bear interest as per the contract, as a default position.

- Clarify this section.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Rephrase language in this section. The columns are unwieldy.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): Section 3.1 is overly elaborate and depends on information the debtors often do not have at the beginning of their cases. It also seems to indicate that a specific portion of every plan payment must go to the secured creditors, in violation of the existing order of payments procedures in many districts. Finally, it does not appear to provide for adequate protection payments.

Having the proof of claim control over the plan requires additional objections and hearings.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: This section assumes that all secured claims are in the nature of contractual agreements with installment payments. Tax claims are secured but are usually fully due and owing with no installment provisions applicable, and no arrearages versus current payments.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: Section 3.1 identifies the name of creditor and the collateral, but it should also include a section for reference to the last four digits of the account number.

The stay relief language in is section will prevent a creditor from receiving payment on a claim secured by collateral upon which another creditor obtained relief from stay.

The plan form is unclear as to what happens to a late-filed, secured claim for arrears.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Clarify that the trustee will disburse payments on arrearages.

When the claim controls over the plan, what will happen if a creditor amends the claim after the bar date?

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Clarify that the trustee makes the arrearage payment.

Clarify the wording and options in this section.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: We represent secured creditors. Clarify this section.

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Clarify this section.

Section 3.2 (request for valuation of security and claim modification)

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: The valuation provision will result in *de facto* claims objections without the necessary requisites of claims objections.

The form does not require debtors to provide evidence for the proposed valuation of collateral.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: See comments under § 3.1.

There should be a provision for preconfirmation adequate protection payments.

Comment BK-2014-0001-0035—Judge Elizabeth Magner (Bankr. E.D. La.): The creditor’s proof of claim should only control if filed timely.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): This is an excellent provision, but the form should include space for the debtor to give the basis for valuation.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): This provision creates more work for the court and counsel. Simply state that the value in the plan controls unless objected to.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): This provision will not be effective. If, for example, a junior mortgage is valued at \$0.00, that valuation does not void the lien. A debtor would then have to launch an adversary proceeding under Rule 7001.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): This section does not permit the debtor to reduce the amount of the claim and propose a stream of payments beyond the date of discharge.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): I suggest clarifying language in this section.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): The valuation or avoidance process should include a separate motion filed by the debtor and served in accordance with applicable rules. Who checks to make sure that service of a plan proposing valuation was correct? It would be unduly burdensome to delegate yet another responsibility to clerks or trustees.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): It would be simpler to provide for the secured portion of a creditor’s claim and not try to deal with the ranking of a lien. The purpose should only be to let creditors know how much their collateral is going to be valued at and at what interest rate.

The columns for “estimated amount of creditors claim” and “amount of claims senior to creditor claims” will be erroneous the majority of time.

Comment BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Eliminate the column “monthly payment to creditor” and change the last column to “total payment by trustee.”

Comment BK-2014-0001-0076—Frederick Schindler (Office of the Chief Counsel, IRS): Section 3.2, as proposed, would require a creditor to release its lien after discharge, which would not occur until after satisfaction of the secured claim. Certain types of tax debts, however, are nondischargeable in chapter 13 cases. Further, certain property may be excluded from the bankruptcy estate and could not be used to calculate the value of a creditor’s secured claims. *IRS v. Snyder*, 343 F.3d 1171 (9th Cir. 2003). For instance, the debtor may have an interest in a pension plan that is excluded from the estate under § 541(c), but nevertheless be subject to the federal tax lien. The lien would survive the bankruptcy case on the excluded property. The debtor would have no right in a chapter 13 plan to force the Service to release the lien upon the excluded property, the value of which could not be paid as a secured claim under the chapter 13 plan.

We recommend that the following underlined language be added to § 3.2, “The holder of any claim listed below as having value in the column headed Amount of secured claim will retain the lien until the earlier of . . . discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor unless the underlying debt is excepted from discharge or the underlying collateral was excluded from the bankruptcy estate under 11 U.S.C. § 541.”

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Governmental creditors should not be excluded from the general chapter 13 cramdown provisions.

Some of our bankruptcy courts have held that a lien does not have to be released when there is a non-filing co-debtor. Does the plan form overrule those decisions by stating that the lien is released when the debtor is discharged?

There is no reason to list the amount of claims senior to the creditor’s claim.

Include language in this section, similar to the provision in § 3.1, for situations when the stay terminates as to collateral being treated.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): This section will require scrutiny of a large number of addresses on the BNC certificate of service regarding the notice of the confirmation hearing. The entire mail list must be compared against § 3.2 to ascertain whether service was proper under Rule 7004, and whether the debtor must independently serve the plan on a specific address in the form required by Rule 7004.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Governmental creditors should not be excluded from cramdown. Add language stating that the debtor is scheduling the value at X amount and that the creditor has Y days to object or else the value as stated by the debtor will control.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This version of the plan form no longer addresses debtors' eligibility in this section. It should be addressed at the beginning of the plan.
- The provision for valuing a secured claim through the plan conflicts with the Code, which provides that a claim is deemed allowed unless a party in interest objects.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): The request for valuation should be labeled a motion seeking an order, in keeping with Rule 9013.

Delete the reference to nongovernmental creditors.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): Section 3.2 makes the use of the plan form to avoid or strip a lien mandatory, and effectively ends the practice in many districts of doing this by motion or adversarial proceeding. This should be left up to the individual districts.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: The term "value of the secured claims" is ambiguous.

Comment BK-2014-0001-0114—Bradley C. Johnson (District Attorney's Office, Salt Lake County, Utah): Section 3.2 does not make clear whether interest will accrue on the secured claim from the date of confirmation or the date of the petition. State and local taxing authorities will have to object to every plan that does not provide in Part 9 for interest from the petition date. The plan form in our local district includes a separate provision for secured tax claims.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Clarify that the trustee will disburse payments on arrearages.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Governmental units should not be give special consideration in the valuation of secured claims. We also have language and format suggestions.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): Governmental units should not be excluded from the general valuation provision.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: Clarify this section.

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Clarify this section.

Section 3.3 (secured claims excluded from 11 U.S.C. § 506)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): This section is confusing.

Comment BK-2014-0001-0034—Henry Sommer (Attorney, Philadelphia), on behalf of the National Association of Consumer Bankruptcy Attorneys: See comments under § 3.1. There should be a provision for preconfirmation adequate protection payments.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): I do not understand how the debtor will be able to cram down a car interest rate and make payments directly. Debtors rely on the trustee's records to track the payment of principal and interest.

Add a column with the contract interest rate.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: Plan § 3.3 contains the same error regarding late-filed claims as in § 3.1.

The NCBJ urges the Advisory Committee to re-draft § 3.3 into a more general provision in which a debtor provides for any modification of a secured claim, which includes, but is not limited to, valuation and modification of the claim.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): Current language interferes with the effect of *United Student Aid Funds, Inc. v. Espinosa* and *In re Franklin*, 448 B.R. 744 (Bankr. M.D. La. 2011). The plan's controlling the secured amount (rather than the proof of claim or amended proof of claim) would be a more efficient practice and provide certainty for disbursements.

Include a column for the term of the monthly payment (*e.g.*, months 1-24 or 5-56).

Do not include a provision for direct payments by the debtor.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: This section should be used only for claims excluded from § 506(a) for which the debtor seeks modification of the interest rate, as a majority of jurisdictions permit. For secured claims that are current and unaffected, another section (either § 3.1 or a new, separate section) should be used.

Eliminate references to payment by the trustee or the debtor.

Repeat here the statement in § 3.2 about the holder of the claim's retaining the lien.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): If the debtor is behind on payments on a 910-day car claim or has altered the interest rate, then the payments should be made through the trustee.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): I offer suggestions for changing the wording and formatting.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): While the principal amount of a 910-day car claim cannot be crammed down, that is not

true of the interest rate. The plan form does not make this clear. Also, the form states that the proof of claim controls, thus requiring an objection. Therefore, this provision accomplishes little.

Comment BK-2014-0001-0111—Kelley L. Skehen (Chapter 13 Trustee, D.N.M.): Do not allow direct payment by the debtor. To provide otherwise affects the funding of the offices of the chapter 13 trustee.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: The caption might be clearer if the words "by Section 1325" were added at the end.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Clarify this section.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): This section does not address over-secured claims.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: This section permits the debtor to modify the interest rate. If the debtor is making these payments directly, they should be pursuant to the contract terms.

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Clarify this section.

Section 3.4 (lien avoidance)

Comment BK-2014-0001-0035—Judge Elizabeth Magner (Bankr. E.D. La.): The lien avoided by this section should only be removed once the plan is completed and the debtor is discharged.

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): This section will streamline the lien avoidance process.

Comment BK-2014-0001-0046—Judge Terrence L Michael (Bankr. N.D. Okla.): The lien avoidance provision is contrary to case law.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The "Lien Identification" requirement is unnecessary in a chapter 13 plan and therefore an undue burden on the debtor and the debtor's counsel. The NCBJ recommends that it be deleted.

Second, delete the sentence that reads: "The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5." Avoidance of a judicial lien is an entirely distinct process from claims allowance. A debtor may avoid a judicial lien regardless whether the creditor has filed a claim. There is no reason to provide for a distribution of a claim without the filing of a proof of claim. Therefore, the sentence should be eliminated, or at least, qualified with the phrase, "if the holder's claim is allowed."

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): See comments under § 3.1.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): The form makes the avoidance of the lien effective upon the entry of the confirmation order. This may be premature. Section 349(b)(1)(B) of the Bankruptcy Code provides that an order dismissing a bankruptcy case reinstates “any transfer avoided under § 522.” As a result, if the case is later dismissed, the lien avoidance is automatically nullified. But once a lien upon real estate has been avoided, and the order of avoidance made part of the appropriate real estate records, reversal is akin to unringing a bell. One can only imagine the problems for title examiners.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: The form states that the lien will be avoided upon confirmation. There is a split of authority as to whether lien avoidance occurs at confirmation or upon discharge. Add “unless otherwise provided by order of the court” at the end of the second sentence of that paragraph. Include the lien retention language from § 3.2.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): The form calls for judicial lien avoidance on plan confirmation and not on discharge. While case law allows lien avoidance upon entry of the § 522(f) order, that is conditional on the debtor’s completion of plan payments and entry of discharge. Under § 349, such liens are not avoided when the case is subsequently dismissed (which occurs in approximately 50% of all national chapter 13 cases). Consequently, the legal advice given in § 3.4 is a half-truth that is accurate half the time.

For purposes of recording the lien avoidance, the debtor who pursues lien avoidance by plan may have to record the proposed plan, the confirmation order, and the order of discharge. When lien avoidance is by motion, a one-page order may be recorded along with the 1-page discharge order. Section 522(f) lien avoidance is a process that is better administered separately from the plan and confirmation process.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This section is extremely confusing.
- This section will draw objections.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): This section creates timing problems by attempting to fix a binding number at an early stage of the case.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): This is a provision where due process will be raised by creditors, producing additional delay and rendering the provision useless.

Comment BK-2014-0001-0104—Paul Post (Attorney, Kansas): Why is lien avoidance included in the form when that issue will affect only one creditor? The result is that all creditors must be notified of the proposed lien avoidance.

Comment BK-2014-0001-0106—Stephanie Edmondson (Clerk of Court, Bankr. E.D.N.C.): This section should specify what type of description is requested (*i.e.*, address of property, specific description of collateral, etc.).

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: in the second sentence, it might be clearer if it read “Such a judicial lien or security interest securing a claim . . .”

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): This provision circumvents due process requirements outlined in *Espinosa*.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: This section does not require any evidence in support of the lien avoidance request.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This section is extremely confusing.

Section 3.5 (surrender of collateral)

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Add an option for surrender of collateral in full satisfaction.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: A debtor cannot waive the co-debtor stay under § 1301. The language in this section may deceive debtors into thinking that the co-debtor stay is terminated upon surrender.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.): Surrender is not abandonment. Many courts hold that surrender can be accomplished only with the creditor’s consent.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: As in its prior comment, the NCBJ believes that the last sentence (regarding deficiencies’ being allowed and then treated as Class 5 general unsecured claims) takes a substantive position on a disputed issue of law and should be deleted. *See generally In re Sneijder*, 407 B.R. 46 (Bankr. S.D.N.Y. 2009) (describing the many “practical problems” attending this question).

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): The form does not provide for a surrender value. Does this mean the plan assumes that the surrender is in full satisfaction of the claim?

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Include a column to clarify the amount deemed unsecured.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): The language in this section about surrender of collateral and the termination of the co-debtor stay is misleading.

Comment BK-2014-0001-0109—Marie Elaina Massey (Chapter 13 Trustee, S.D. Ga.): The debtor should not be able to surrender collateral to a “secured” creditor without having to file a claim or prove a perfected security interest in the collateral. Unsecured creditors would lose out on money.

Comment BK-2014-0001-0111—Kelley L. Skehen (Chapter 13 Trustee, D.N.M.): Debtors may not, by themselves, consent to the termination of the co-debtor stay under Code § 1301.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: We recommend revising this provision to read as follows: “Termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to a creditor’s exercise of its rights against the collateral shall be effective upon entry of an order confirming the plan without the necessity of a separate order granting relief from the automatic stay and/or co-debtor stay.”

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Although the provision relates to the debtor, it should be clear that the trustee is not consenting to relief from stay or abandonment. An additional provision should be included noting that surrender does not constitute abandonment of any interest of the estate in the collateral or grant relief from stay regarding the trustee.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: We represent secured creditors. This provision does not set a deadline for the debtor to surrender the collateral. Rather than providing for the debtor’s “consent,” the form should provide for termination of the stay upon surrender or upon confirmation.

Comment BK-2014-0001-0127—Lonnie D. Eck (Chapter 13 Trustee, N.D. Ga.): Clarify treatment of deficiency claims.

Part 4: Treatment of Trustee’s Fees and Administrative and Other Priority Claims

Part 4 (general)

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: Part 4 fails to give the debtor the opportunity to disclose the number of months that each creditor is expected to receive payments.

The form does not require the debtor to identify priority creditors or the amounts of their debts to be paid through the plan.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): The plan form should permit debtors to identify priority claims and how priority claims might be paid.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): This part should be renamed “Fees and Priority Claims.”
Include more detail to identify priority claims.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): This provision accomplishes nothing. It does not allow for payment of trustee’s or attorney’s fees before other claims, even though the statute requires it. The recommended plan for the E.D. Pa. accomplishes this in a better fashion with a simple provision for order of payments.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: In light of the special provisions applicable to domestic support orders, we believe it would be appropriate to set out a special section of the plan form for them.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: The form fails to identify priority creditors.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Add a provision in Part 4 for ongoing domestic support orders.

Section 4.1 (general)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): This provision does not allow for existing domestic support orders to continue.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: The plan form does not discuss how filing fees are to be paid.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): This provision does not allow for existing domestic support orders to continue. This will disrupt ongoing support payments unnecessarily.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.):
Reword this section.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: Priority claims should not receive post-petition interest. But pre-petition interest is part of an allowed priority claim. See § 502(b)(2). Clarify that “without interest” means “without post-petition interest.”

Section 4.2 (trustee’s fees)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): An estimated trustee’s fee may not allow for fluctuation in the fee in violation of 11 U.S.C. § 586(e).

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: Trustee’s fees are set by § 586(e).

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.):
Trustee’s fees fluctuate.

Comment BK-2014-0001-0049—Grant Shipley (Attorney, Fort Wayne, Ind.):
Debtors will not know the trustee’s fees.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Trustee’s fees are set by the Executive Office of United States Trustee and not subject to change by Plan provisions. If an estimate is needed, it should be at the maximum statutory fee of 10% to prevent the underfunding of cases.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.):
Due to periodic variance in the actual percent applied, it is best to disclose the maximum fee of 10% on funds disbursed by the trustee.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): This is unnecessary. Trustee’s fees are set by statute and are hard to estimate.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): The only safe way to estimate trustee fees in advance is to use the maximum rate of 10%. Only the Executive Office of the U.S. Trustee may set the chapter 13 trustee’s fee and any amount asserted by the debtor will likely be ineffectual.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.):
The trustee’s fee varies over the fiscal year. Delete this section.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- The trustee’s fee fluctuates. If the debtor’s estimate is too low, it may cause feasibility problems.

- An estimate of trustee’s fees of anything less than 10% can cause problems.
- The provision should state: “The Trustee will be paid a variable percentage fee up to 10% of plan payments pursuant to 11 U.S.C. § 586(e).”
- Take out any mention of the percentage amount. Instead, include language to the effect that the percentage fee is fixed periodically by the United States Trustee.

Comment BK-2014-0001-0097—John J. Talton (Chapter 13 Trustee, E.D. Tex.): The actual trustee’s fee may change over time. We presume 10% to calculate feasibility.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Remove the “estimated” language. A plan should state its assumptions with precision.

Section 4.3 (attorney’s fees)

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): This provision only sets forth the balance of fees owed to the attorney. It does not state the amount of attorney’s fees paid pre-petition.

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: The form does not give direction to the trustee as to how outstanding attorney’s fees are to be paid. There is diversity among jurisdictions on this issue.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): More detail should be required about attorney’s fees.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: More detail should be required about attorney’s fees.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): More detail should be required about attorney’s fees.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): More detail should be required about attorney’s fees.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): The attorney’s fee should not be estimated. An option for monthly payments should be included.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Statistical reporting requires the trustee to furnish the pre-petition as well as the postpetition attorney’s fees as part of the final report.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): Include the total fee charged as well as the amount to be paid in the plan.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): The plan form does not provide sufficient flexibility to designate monthly payments or periodic payments to the debtor’s attorney.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): There should be a sum certain for the amount of attorney’s fees. Trustees cannot pay out on an estimate.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): This section does not inform creditors about the manner or timing of the attorney’s fee payment.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): My local form simply states that the attorney has received X amount for attorney’s fees and that Y remains to be paid through the plan.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Total attorney’s fees are required to be reported by the chapter 13 trustee in the Final Report and Account.

Comment BK-2014-0001-0097—John J. Talton (Chapter 13 Trustee, E.D. Tex.): Attorney’s fees should be an exact amount. Remove the word “estimated.” The provision relating to attorney’s fees gives no flexibility to account for any automatic step up as additional work is performed by the debtor’s attorney as may be provided for in local practice.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Reword this section to cover all attorney’s fees. The use of estimates is imprecise.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Greater detail on attorney’s fees is needed.

Section 4.4 (other priority claims)

Comment BK-2013-0001-0006—Jan Hamilton (Chapter 13 Trustee, D. Kan.):

There is no section addressing non-assigned domestic support obligations. Include a specific reference to those obligations in § 4.4 (ongoing; arrearage; payment through the trustee; payment through an existing state court order).

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): Include space for the names of priority unsecured creditors and how they will be paid.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Provide more detail for domestic support orders.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. W. Va. and S.D. W. Va.): A lump sum figure is not sufficient, particularly where there is a domestic support obligation with a higher priority than other priority claims. Supplying a lump sum figure in the plan that is less than the amount shown on Schedule E gives the trustee no guidance as to which if any claims are not entitled to priority or are over stated.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): The form assumes that there can be only one priority creditor per case but fails to identify who it is. The form should allow debtors to identify the priority creditor or amount owed, or include parenthetical information.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Include space to list all priority claims (except for attorney’s fees).

Comment BK-2014-0001-0077—Mary B. Grossman (Chapter 13 Trustee, E.D. Wisc.): Leaving room for more detail at this location will allow creditors and trustees to determine if a debtor has provided for specific priority claims.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): There is no space to list other priority claims, such as IRS claims.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): All priority claim treatment should be set out in the same section.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Permit the option of making fixed monthly payments to priority creditors.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: Add space to list and itemize the priority claims so those parties can be sure that they are properly listed.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Clarify this section.

Section 4.5 (domestic support obligations assigned to a governmental unit)

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Provide more detail for domestic support orders.

Comment BK-2014-0001-0077—Mary B. Grossman (Chapter 13 Trustee, E.D. Wisc.): I recommend adding a statement in § 4.5 indicating in bold that, if the debtor elects to pay less than the full amount of a domestic support obligation assigned or owed to a

governmental unit, the debtor must pay all disposable income into the chapter 13 plan for sixty months.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- Specify which disbursements on domestic support orders are by the trustee and which are direct.
- Include space for the debtor to provide information needed by the trustee in order to comply with the requirements for mailing the domestic support order notice.
- Delete this section.
- Permit the option of making fixed monthly payments to priority creditors.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): The claim should control over the plan for this section.
Address the trustee’s payment of court filing fees by installment.

Comment BK-2014-0001-0104—Paul Post (Attorney, Kansas): Section 4.5 on assigned domestic support obligations appears to be at odds with the Code, which requires that the debtor must pay all projected disposable income for 5 years for the debt to be discharged.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: Add reference to the requirement in § 1322(b)(4) that the plan must commit all of the debtor’s disposable income for the necessary five-year period, with a certification that the plan in fact does so. That requirement is more critical than the chapter 7 liquidation test that is referenced.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Clarify that the amount stated will be paid by the trustee, regardless of any contrary proof of claim.

Part 5: Treatment of Nonpriority Unsecured Claims

Section 5.1 (general)

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Clarify if the trustee is to pay all allowed claims, whether or not they are scheduled.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Delete this section. It is superfluous.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: This section provides for paying unsecured claims to the extent “allowed,” but there is no discussion here or in the rules about how and when objections by the debtor would be resolved and how that resolution would relate to the claims filed.

Section 5.2 (nonpriority unsecured claims not separately classified)

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: The “best interest of creditors” number is helpful. But it fails to include payment to priority creditors in the liquidation value analysis. Debtors should explain how the best interest number was calculated.

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): Delete the liquidation analysis. It is not part of a plan.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): This provision is unworkable.

Comment BK-2014-0001-0050—Dan Melchi (Attorney, Georgia), on behalf of Lueder, Larkin & Hunter, LLC: The third checkbox should be removed. An unsecured creditor should be told in unambiguous terms what that creditor’s claim will receive under the plan.

Comment BK-2014-0001-0063—Camille Hope (Chapter 13 Trustee, M.D. Ga.): Unsecured creditors will not be able to tell whether they will receive a distribution if the plan is limited to 36 or 60 months. Fewer unsecured creditors will bother to file claims as a result, which will further reduce distributions to creditors.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Provide more options for payment of nonpriority unsecured claims.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Debtors are required to devote all disposable income for the applicable commitment period to the plan. Check boxes one and two appear to give debtors the option to pay a set sum or percentage to unsecured creditors without reference to what amount may be required to comply with the Code.

Check box three creates a conflict between the requirement of the Code that secured creditors be paid in equal monthly installments and with the payment in this section to unsecured creditors being paid after secured creditors. Trustees do not want to hold funds intended to be distributed to unsecured creditors to the end of the case. Change the language in this section to the following: “Funds not dedicated to payment for secured and priority claims or administration of the estate shall be distributed to the unsecured creditors.”

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): Box #3 gives no useful information regarding proposed payments to general non-priority unsecured creditors.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): The liquidation test should include general and priority unsecured claims.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): The liquidation test should include general and priority unsecured claims.

Section 5.3 (interest)

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): This section is useful but should clarify that payment of interest may be elected by solvent estates.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): Code § 1325(a)(4) does not make reference to interest.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): Rename this section “present value calculation” and change the word interest to annual discount rate.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): APR should be explained. Use “projected” instead of “estimated.”

Section 5.4 (maintenance and cure)

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): Indicate whether the trustee of the debtor will make disbursements on domestic support obligations.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): Delete this section. It will lead to mischief and improper discrimination in the treatment of unsecured claims.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Check box two is unclear as to who will act as the disbursing agent on the arrearage amount, as either the trustee or the debtor may be a disbursing agent under a plan.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): This section should be combined with § 5.5.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: It is unclear why this provision is necessary. If it is included, it should provide space to describe the type of debt.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Make clear that the trustee will pay the arrearage.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Section 5.4 will create problems in the manner and timing of plan payments to these creditors.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This section is troublesome and can lead to discrimination.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Combine §§ 5.4 and 5.5.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): This section does not explain why these obligations should be treated separately.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: This says arrearages will be paid under the plan but does not indicate how the claim for the arrearage is to be determined—whether plan or claim controls and, if claim, how it is implemented if the debtor objects to the amount as filed.

This appears to assume that all arrearages will be spread out over the entire duration of the plan? Section 1322(a)(5) says arrearages must be paid within a “reasonable time,” which does not automatically equate to a 3-5 year pay-off period.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Clarify that the trustee will disburse payments on arrearages.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Clarify the language on whether debtor or trustee will make payments.

Section 5.5 (other separately classified nonpriority unsecured claims)

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): This provision runs afoul of the antidiscrimination provisions of Code § 1322(a)(3) and (b)(1).

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Combine §§ 5.4 and 5.5.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: Why is there even a suggestion that some claims might get interest, and that unsecured claims might be paid interest while priority claims do not receive interest? Section 1322(b)(10) only allows payment of interest on nondischargeable claims—and then only if all allowed claims are paid in full.

This is again a place where the drafter appears to choose a side in a dispute over separate classification of unsecured claims. It is probably a minority position to allow separate classification.

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Clarify this section.

Part 6: Executory Contracts and Unexpired Leases

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: Consider reversing the presumption, so that a contract is assumed unless specifically rejected.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Clarify whether an executory contract or unexpired lease is assumed or rejected and how a cure or a default will be treated.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): This provision does not state how any default is to be cured, as required by § 365(b)(10)(B) and (b)(1)(B) and (C).

Comment BK-2014-0001-0063—Camille Hope (Chapter 13 Trustee, M.D. Ga.): By requiring the debtor to assume a lease, this section will force debtors to disclose that fact that they are in bankruptcy to their landlords, who will terminate leases of debtors as soon as permissible. The average consumer debtor is better off if the landlord does not know of the bankruptcy.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): Clarify that the trustee will pay arrearages, if any.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): The default of rejection instead of assumption is risky and may be contrary to case law. All executory contracts should be listed and treated to avoid inadvertent omission.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Make clear that the trustee will make payments on any arrearage.
The “treatment” column is not sufficiently descriptive.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Section 6.1 will create problems in the manner and timing of plan payments to these creditors.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This provision does not specify how any default is to be cured as required by Code § 365(b)(10)(B) and (b)(1) (B) and (C).

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Today, every debtor has executory contracts, which may be unrecognized by debtors and their lawyers. Include a reference to Schedule G, so that only those executory contracts and leases are rejected. Any others should remain in limbo until the debtor or counterparty take action.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Clarify whether the debtor or trustee will be disbursing agent on arrearages.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: Clarify this section.

Part 7: Order of Distribution of Trustee Payments

Comment—BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): Debtors could select improper priorities in distribution causing objections and delays in confirmation. Leaving the distribution sequence to the trustee is not transparent to creditors or debtors.

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: Delete Part 7.

Comment BK-2014-0001-0015—K. Michael Fitzgerald (Chapter 13 Trustee, W.D. Wash.): Part 7 will invite chaos instead of uniformity.

Comment BK-2014-0001-0019—Marilyn O. Marshall (Chapter 13 Trustee, N.D. Ill., Eastern Division): Part 7 should include a standard order of distribution.

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Sometimes secured and priority and administrative claims are paid at the same time. How would that be shown in Part 7?

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: Delete Part 7.

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): Eliminate the reference to statutory trustee's fees. Debtors should not be permitted to select the order of payments. Priority is determined under Code § 507.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): Delete Part 7.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): Part 7 will draw objections. Debtors should not be permitted to select the order of payments.

Comment BK-2014-0001-0063—Camille Hope (Chapter 13 Trustee, M.D. Ga.): This section should not allow the debtor to determine the order of distribution to creditors. Debtors counsel will immediately put their fees first, resulting in litigation of issues already settled by standing orders in most districts.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Delete Part 7.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Delete Part 7.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.):
Delete Part 7.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.):
The language is confusing. This section will not be completed with meaningful information for creditors or direction for trustees.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.):
Debtors should not set the order of distribution.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.):
The local form I operate under specifies the disbursements under the plan unless otherwise set out. Section 1326 requirements should be the minimum in this section.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- This provision would negatively affect the trustee's administration of cases and increase the overall time needed to review each plan.
- It might be better to designate minimum payments to be disbursed to each creditor. The reference to statutory trustee's fees can be eliminated. Debtors should not be permitted to select the order of payments. Priority is determined under § 507.

Comment BK-2014-0001-0097—John J. Talton (Chapter 13 Trustee, E.D. Tex.): It will cause an administrative nightmare if debtors can propose the order of distributions.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.):
Delete Part 7.

Comment BK-2014-0001-0111—Kelley L. Skehen (Chapter 13 Trustee, D.N.M.):
The Bankruptcy Code, not the debtors, should determine the order of distributions. There should be a set order of distributions.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: We continue to believe that Part 7 should have a default order of payments that controls absent a nonstandard provision.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.):
Include a mandatory order of distributions.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Do not allow debtors to propose the order of distributions.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): Delete Part 7.

Comment BK-2014-0001-0127—Lonnie D. Eck (Chapter 13 Trustee, N.D. Ga.): Delete Part 7.

Part 8: Vesting of Property of the Estate

Comment BK-2014-0001-0021—Debbie Langehennig (Chapter 13 Trustee, W.D. Tex.): Does this imply that the plan is binding with respect to non-governmental claims that are timely filed after confirmation where the plan treatment is inconsistent?

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: By placing “at confirmation” as the first option, the form will lead debtors to think this is their best option. For most debtors, it is not.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): There is no space to describe when revesting will occur if “other” is selected.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The NCBJ suggests adding a third specific option that is a common choice for revesting: “at discharge.”

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): In many jurisdictions the revesting of property has been determined by the court on a jurisdiction wide basis. Debtors should be warned that the choices on the form may not be available in their district.

BK-2014-0001-0073—Albert Russo (Chapter 13 Trustee, D.N.J.), on behalf of the standing chapter 13 trustees of the D.N.J.: Vesting should be upon entry of discharge and not closing of the case.

Comment BK-2014-0001-0076—Frederick Schindler (Office of the Chief Counsel, IRS): Part 8 appears to take the position that a debtor may retain all of the debtor’s property in the estate until the case is closed. The default is for revesting at confirmation. We acknowledge that Code § 1327(b) allows for revesting at different points in time. But there is no indication in the Code that retaining all the debtor’s property in the estate until the close of the case is permissible. We see no other reason for a debtor to elect to do so other than to insulate the debtor from the collection efforts of postpetition creditors.

That election will force the IRS either to incur the time and expense of referring the case to the Department of Justice to object to the plan or seek relief from the stay, or simply halt any collection efforts until the stay ends. If the latter, the debtor will incur substantial interest and penalties that accrue during the bankruptcy case, increasing the difficulty for the debtor to pay and the IRS to collect.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): Delete this section. The Code sets the default for revesting. If debtors want to propose revesting at some other point, that should be a nonstandard provision in Part 9.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): For districts that specify in the confirmation order that property of the estate remains property of the estate following confirmation, Part 8 presents a false choice to the debtor and should be an optional provision for a district.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Revesting should occur upon discharge and not the closing of the case.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: Either the form or rules should include a default provision for what is meant by stating that property “shall revest” in the debtor.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): The current practice in Arkansas is for the property to remain property of the estate and revest in the debtor upon discharge or dismissal. Substitute “discharge” for “closing of the case,” which is an administrative step that has nothing to do with vesting. To allow a debtor to choose a time for vesting would cause confusion and hamper trustee administration.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): The vesting provision may conflict with Georgia state law.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: See comment by the Office of the Chief Counsel, IRS.

Part 9: Nonstandard Plan Provisions

Comment BK-2014-0001-0019—Marilyn O. Marshall (Chapter 13 Trustee, N.D. Ill., Eastern Division): To respond to concerns about Part 9, I note that in our district, we have a local plan form with a nonstandard provision section. Generally, provisions in that section deal with late claims, attorney’s fee priority, tax refund requirements, and surrender of property language. At first, some debtor’s attorneys attempted to use the nonstandard provision section to re-write the substance of the plan form. We stopped that by educating the debtor bar through workshops with the aid and input of our bankruptcy judges. I anticipate that the same thing will happen nationally.

Comment BK-2014-0001-0030—Judge Janice Miller Karlin (Bankr. D. Kan.), on behalf of the bankruptcy judges of the D. Kan.: Part 9 should require debtors to indicate exactly which paragraph of the form they are modifying. We also recommend inclusion of a debtor/lawyer certification that the debtor/lawyer has made no changes other than in the nonstandard section.

Comment BK-2014-0001-0037—Margaret Burks (Chapter 13 Trustee, S.D. Ohio): The Cincinnati plan has provisions not included in the national plan form that the Advisory Committee should consider adopting.

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): We have adopted the national plan form in our district. Every case has required additional provisions in Part 9, the most common being mortgage-specific language, payroll-deduction information, and treatment of post-petition claims.

Comment BK-2014-0001-0048—Jan Hamilton (Chapter 13 Trustee, D. Kan.): There should be a nonstandard provisions box after each section. One place for a hodgepodge of nonstandard provisions seems counter to the apparent goals of a national form.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): The statement “These plan provisions will be effective only if the applicable box in Part 1 is checked” creates confusion if the plan is confirmed and the applicable box in Part 1 is not checked.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- The inclusion of only one place for nonstandard provisions is inadequate. If all nonstandard provisions are lumped into one section, the possibility of the tail wagging the dog will surely occur.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Add cross references to provisions that are being modified in Part 9.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): There is a very high risk that a plan will have unchecked boxes, and then, in essence, an entire local plan added in via Part 9. This renders the entire proposed national plan form a waste of paper.

Comment BK-2014-0001-0104—Paul Post (Attorney, Kansas): The “nonstandard” provisions will prove to be cumbersome. In our Kansas plan form, nonstandard provisions are allowed after each paragraph.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Rephrase the title—the word “plan” is not needed. Many nonstandard provisions will be needed to clarify ambiguities in the rest of the plan form.

Comment BK-2014-0001-0134—Linh Tran, Quantum3 Group, LLC: Clarify that an objection to a non-priority general unsecured proof of claim is not permitted under Part 9.

Part 10: Signatures

Comment BK-2014-0001-0011—Rod Danielson (Chapter 13 Trustee, C.D. Cal.), on behalf of the five chapter 13 trustees of the C.D. Cal.: If the plan is to have evidentiary value, the debtor’s signature is necessary.

Comment BK-2014-0001-0015—K. Michael Fitzgerald (Chapter 13 Trustee, W.D. Wash.): The debtor’s signature should be required.

Comment BK-2014-0001-0064—Richard Fink (Chapter 13 Trustee, W.D. Mo.): Include space for the attorney’s contact information.

Comment BK-2014-0001-0069—Helen M. Morris (Chapter 13 Trustee, N.D. and S.D. W. Va.): Debtors’ signatures should not be optional. The signature indicates that the debtors have read the plan, and if the plan provides for judicial lien avoidance or valuation of collateral, the signature would have an evidentiary value.

Comment BK-2014-0001-0070—Annette Crawford (Chapter 13 Trustee, M.D. La.): All debtors should have to sign chapter 13 plans. Otherwise, they can plead ignorance about the terms of plans. Requiring debtors’ signatures also protects attorneys.

Comment BK-2014-0001-0084—Ryan W. Johnson (Clerk of Court, Bankr. N.D. W.Va.): The debtor’s signature is required to give the plan evidentiary effect. Bankruptcy clerk’s offices may be required to compare the signature page with Parts 3.2 and 3.4, and delay proceedings if the debtor’s signature is required for evidentiary purposes.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): All debtors should sign the plan.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: In order to strengthen the evidentiary weight of the plan, debtors should be require to sign the plan, even when they are represented by counsel.

Comment BK-2014-0001-0117—Lydia S. Meyer (Chapter 13 Trustee, N.D. Ill.): Require all debtors to sign the plan.

Comment BK-2014-0001-0120—Joyce Bradley Babin (Chapter 13 Trustee, E.D. Ark. and W.D. Ark.): Require debtors to sign the plan. Otherwise, the plan lacks evidentiary value, and the attorney is exposed to unnecessary liability.

Comment BK-2014-0001-0125—Sheryl Ith, on behalf of Cooksey, Toolen, Gage, Duffy & Woog: If the debtor can value collateral and avoid liens through the plan, the debtor should be required to sign the plan under penalty of perjury. The debtor (or the debtor’s attorney) should also certify that the provisions of the plan do not conflict with the Bankruptcy Code.

Plan Exhibit (Estimated Amount of Trustee Payments)

Comment—BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): The trustee will have to object to confirmation to correct debtors’ math. This will delay confirmation.

Comment BK-2014-0001-0042—Mary Beth Ausbrooks (Attorney, Nashville, Tenn.): Delete the exhibit. It is not necessary.

Comment BK-2014-0001-0075—Barbara Foley (Chapter 13 Trustee, W.D. Wash.): I like this very much.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees: The exhibit will cause confusion and discrepancies. The trustee will object to it. Based on experience, the exhibit will be wrong or inconsistent with the body of the plan in a large number of cases.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): Add a line to display the total estimated payments from § 2.5 and a warning that this number must equal or exceed the total of lines a through j.

Comment BK-2014-0001-0099—Peter C. Fessenden (Chapter 13 Trustee, D. Me.): Reword and rework this exhibit.

Comment BK-2014-0001-0109—Marie Elaina Massey (Chapter 13 Trustee, S.D. Ga.): This is a huge waste of time. Numbers in chapter 13 plans are always estimates.

Comments on the Amended Rules

General

Comment—BK-2014-0001-0009—Judge Keith Lundin (Bankr. MD. Tenn.): I support the proposed rule amendments. One word of caution: The bankruptcy community has learned from the recent changes to Bankruptcy Rule 3002.1 that even good changes can generate unforeseen opportunities for creditors to increase the cost of bankruptcy by charging debtors for compliance with new rules and forms. The Advisory Committee should address that issue with respect to this next round of rules and forms changes by signaling when rules and forms are designed to facilitate compliance without the services of an attorney.

Comment BK-2014-0001-0009—Judge Keith Lundin (Bankr. MD. Tenn.): I support the Official Form for chapter 13 plans and the accompanying rules.

Comment BK-2014-0001-0033—David Lander (Attorney, St. Louis, Mo.): I urge the Advisory Committee to adopt the proposed changes to the Bankruptcy Rules but to adopt the national plan form as a Director's Form instead of an Official Form.

Comment BK-2014-0001-0043—Nicholas Hahn (Law Clerk, Bankr. D. Haw.): I support adoption of the amended rules.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The NCBJ submitted extensive comments on the rule amendments published in August 2013. To the extent that the republished rule amendments did not adopt the changes suggested by the NCBJ, we renew and restate those comments.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): I strongly support the proposed rule amendments that will facilitate the prompt and efficient administration of chapter 13 cases.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: With the exception of the amendment to Rule 3002, we endorse adoption of the rule amendments if the plan form is adopted. The plan form and rule amendments (with the exception of Rule 3002) should be considered as a package.

Comment BK-2014-0001-0094—Ellie Bertwell, on behalf of Aderant CompuLaw: We urge the Advisory Committee to add an introductory note explaining how the rule amendments affect pending cases and proceedings.

Comment BK-2014-0001-0105—Hilary Bonial (Attorney, Dallas, Tex.), on behalf of Buckley Madole, P.C.: We are in favor of amendments to Rules 3002, 2002, 3015, 3007, 3012, 4003, 7001, and 9009, even if a national plan form is not approved. We suggest further clarification for some of the rule amendments.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: The proposed amendments to the Bankruptcy Rules would benefit the system but can be improved.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN: The rule amendments should be considered only in conjunction with adoption of the national chapter 13 plan form. Many creditors and their counsel have understood that the proposed amended rules, which weaken certain existing protections and due process, are in exchange for one consistent national plan form.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: If a national chapter 13 plan form is not adopted, we oppose adoption of the associated rule amendments.

We continue to have concerns about proposed amendments to Rules 3002(a), 4003(d), 5009(d), and 7001(2).

Comment BK-2014-0001-0133—Joelyn Pirkle (Attorney, Georgia): I oppose a mandatory national plan form. I do not oppose the rule changes.

Comment BK-2014-0001-0134—Linh Tran, Quantum3 Group, LLC: If the purpose of the proposed rules is to facilitate the implementation of the national chapter 13 plan form, it does not sense for the form to be adopted unless the proposed rules are also enacted.

Rule 2002

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Rule 3002

Comment BK-2014-0001-0003—Traci Cotton: The time to file a proof of claim should not be shortened to sixty days, which is insufficient time for corporate and institutional creditors. If the bar date is shortened, 90 days would be more appropriate.

Comment BK-2014-0001-0004—Raymond Bell: The bar date should be 90 days instead of 60 days. If the debtor waits fourteen days to file schedules, a 60-day rule would leave only 45 days for creditors to file proofs of claim. Creditors would have to file extension requests.

Comment BK-2014-0001-0005 and BK-2014-0001-0006—Jeanette Gillman: Same as Raymond Bell.

Comment—BK-2014-0001-0009—Judge Keith Lundin (Bankr. MD. Tenn.): Some creditors will complain that the new timetables are too strict for the filing of claims. But this will lead to increased speed and accuracy of distributions in chapter 13 cases.

Comment BK-2014-0001-0010—Laurie Williams (Chapter 13 Trustee, D. Kan.): In some cases this gives the mortgage creditors even longer than the current requirement to meaningfully comply. Plan feasibility and distribution cannot be determined until all required documents are filed. The rule change will cause confirmation delay and will delay commencement of distributions to all creditors.

Comment BK-2014-0001-0013—Judge Joe Lee (Bankr. E.D. Ky.): Proposed subdivision (c)(6) is ambiguous. Practitioners and even some courts could reasonably misinterpret the amendment to settle the long-running dispute over whether bankruptcy courts may allow late-filed, tardily scheduled claims. The Committee Note is not clear on this point. I question the value of the amendment. The Advisory Committee could clarify the scope of (c)(6) by altering the Committee Note as follows:

Subdivision (c)(6) is amended to ~~expand~~extend to all creditors, in the following limited circumstance, the exception to the bar date for cases in which a foreign creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). This amendment is not intended to address cases in which an incomplete list is timely filed. . .

. [Alternatively: This amendment is not intended to address cases in which individual creditors are omitted from a timely filed list or schedule.]

Comment BK-2014-0001-0044—Peter Greco: I oppose the proposal to shorten the time to file a proof of claim. In the alternative, the two-stage filing deadline in 3002(c)(7) for mortgage creditors should be made available to student loan creditors.

Comment BK-2014-0001-0061—Judge Marvin Isgur (Bankr. S.D. Tex.): See general comment on plan form.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: Regarding proposed Rule 3002(c)(6), the NCBJ believes that the standard in the current rule that applies to foreign creditors only is an appropriate standard for extension of the bar date and perceives no reason why creditors with foreign addresses should receive preferential treatment.

Comment BK-2014-0001-0076—Frederick Schindler (Office of the Chief Counsel, IRS): We continue to be concerned about the amendment to Rule 3002(a). The revised Committee Note does not address the concern that the new requirement in the first sentence of Rule 3002(a), mandating that secured creditors must file proofs of claim for the claim to be allowed, could have the effect of avoiding setoff rights when the secured creditor does not file a proof of claim. The problem is not that the final sentence of rule 3002(a) will affect setoff rights notwithstanding section 553, but rather that the first sentence will.

We recommend that the following sentence be added to the end of section 3002(a): “The failure of an entity to file a proof of claim does not waive a right of setoff if the debtor asserts a claim against that entity.”

Comment BK-2014-0001-0077—Mary B. Grossman (Chapter 13 Trustee, E.D. Wisc.): While I am generally in favor of shortening the time for filing claims in Rule 3002(c), 60 days from the date of entry of the order for relief is too short, especially for small business or individual creditors. I recommend changing the deadline to the later of 60 days after the order for relief or 14 days after the § 341 meeting.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): Requiring secured creditors to participate in a process that, of necessity, operates only if all affected parties participate is a positive step. The deadline for the filing of claims in Rule 3002(c) will assist trustees in determining the feasibility of plans before they are presented to the court for confirmation. This is perhaps the most important rule you are considering and I urge its adoption, even if you elect to defer or reject the proposed plan form.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: We oppose the amendment to Rule 3002. The shorter claims bar date will deprive creditors of a meaningful opportunity to protect their interests by filing a timely proof of claim. We do not think this amendment is integral to the national plan form.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees:

- In some cases, the amendment to Rule 3002(c) would give mortgage creditors more time than they have now to file a proof of claim with all supporting documents.

Comment BK-2014-0001-0093—Glenn Stearns (Chapter 13 Trustee, N.D. Ill.): I strongly favor the amendment to Rule 3002(a).

Comment BK-2014-0001-0094—Ellie Bertwell, on behalf of Aderant CompuLaw: The rule amendment does not address the deadline for proofs of claim when an involuntary chapter 11 case has been converted to a chapter 7 case. We recommend the following language: “In an involuntary chapter 11 case converted to chapter 7, a proof of claim is timely filed if it is filed no later than [60 or 90] days after the order for conversion is entered.”

Rule 3002(c)(7)(A) should also be clarified. It could be revised to state, “[a] proof of claim filed by the holder of a claim that is secured by a security interest in the debtor’s principal residence is timely filed if . . . the proof of claim . . . is filed not later than 60 days after the order for relief is entered in a voluntary case, and 90 days after the order for relief is entered in an involuntary chapter 7 case.”

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): Because the proposed amendment to Rule 3002(a) states that failure to file a claim does not modify rights under any lien, the proposed amendment accomplishes nothing.

The proposed amendment to Rule 3002(c), changing the deadline to file a proof of claim to 60 days, may be beneficial. However, the proposal to give additional time to file attachments makes this improvement worthless, and in fact, is worse than the current practice.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: Rule 3002(a) should also say that a “lien is not void due only to the failure of any entity to file a proof of claim or to file such proof of claim in the time prescribed under these Rules.” Whether a claim is not filed at all or is disallowed because it is late has no relationship to the merits of the lien.

We remain concerned about the reduction under proposed Rule 3002(c) in the time for filing claims in chapter 7 cases. While this provision does not apply to governmental claims, we are concerned about the time periods applicable to our citizens when they seek to file claims.

The provision in proposed Rule 3002(c)(6) for extending the date to file claims by 60 days does not adequately cover the potential scenarios. It should provide that in situations where the debtor (i) fails to file the list, (ii) omits a creditor(s) from the list, or (iii) lists the creditor(s) with an incorrect address (as well as where the mailing goes to a foreign address), the court should be allowed to extend the time to file.

Comment BK-2014-0001-0116—Alberta Hultman, on behalf of Michael L. Zevitz, Esq., President, USFN:

The change to Rule 3002(a) will impose increased costs for little benefit in chapter 7 cases. Creditors will be forced to file proofs of claim in all chapter 7 cases to preserve their

ability to assert an allowed claim in the case, in order to share in any potential dividends from the bankruptcy estate, or credit bid at a § 363 sale of property secured by their lien.

In Rule 3002(c), the 60 day bar date is too short. We oppose the bifurcated bar date, because a creditor should not file a proof of claim without having the supporting documents.

Comment BK-2014-0001-0123—Raymond Obuchowski, on behalf of the National Association of Bankruptcy Trustees:

As we commented upon initial publication, we support the proposed change to Rule 3002(a) to require secured creditors to file proofs of claim.

We also continue to support a shorter time for filing proofs of claim. We are concerned, however, that proposed Rule 3002(c) will conflict with the claims filing process in chapter 7, where most cases are not noticed for filing of claims until the trustee files a notice of assets, as provided in Rule 2002(e). We suggest changing the proposed amendment to reference Rule 2002(e)

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Proposed Rule 3002(c)(6) should be more limited. Allowing a late claim is very disruptive.

Comment BK-2014-0001-0133—Joelyn Pirkle (Attorney, Georgia): I oppose a mandatory national plan form but do not oppose moving the claims deadline closer to confirmation.

Comment BK-2014-0001-0134—Linh Tran, Quantum3 Group, LLC: The time to file proofs of claim under proposed Rule 3002(c) is too short. There is still an average delay of more than 4 days from the bankruptcy petition date before the respective bankruptcy court electronically notifies the creditor of the bankruptcy filing. When paper notices are mailed by the bankruptcy court, the delay is even longer, at an average of over 19 days. Even though Proposed Rule 3002 permits a creditor to request extension of the claims bar date, the expense of filing a request for extension usually exceeds the potential chapter 13 plan payout for a general unsecured claim.

If the goal of the amendment is to reduce the amount of time from petition date to the deadline to file a claim, then a 90-day period for filing would better account for the time creditors to receive and process the petition notices.

Comment BK-2014-0001-0136—William Heitkamp (Chapter 13 Trustee, S.D. Tex.): The 60-day claims filing period in proposed Rule 3002(c) is too short.

Rule 3007

Comment BK-2014-0001-0014—Judge Austin Carter (Bankr. M.D. Ga.): I applaud the effort to clarify the rules for service of claim objections. However, the new proposed rule does not address the scenario in chapter 11 cases where a party in interest objects to a claim which is deemed allowed under Rule 3003(b)(1). In that instance, there would be no proof of claim on file, so subsection (a)(1) of the proposed Rule 3007 (requiring service on the “notice address” reflected on the proof of claim) could not be followed.

Include in the new Rule 3007 direction on how to serve an objection to a claim which is deemed allowed under Rule 3003, perhaps by serving the creditor at the address listed in the latest version of the debtor's schedules, and then also have proposed subdivisions (a)(1)(A) and (B) apply with respect to the federal government and insured depositories.

Comment BK-2014-0001-0082—Henry Hildebrand (Chapter 13 Trustee, M.D. Tenn.): I would encourage the Committee to consider the impact of proposed Rule 3007. Certified mailing to an insured depository institution imposes an unnecessary and significant cost on trustees, debtors, and their counsel when the creditor itself has identified the address to which notices can be sent on the face of the proof of claim form. Further, the rules should be modified to reflect use of electronic notice and service through the CM/ECF system.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Comment BK-2014-0001-0094—Ellie Bertwell, on behalf of Aderant CompuLaw: Proposed Rule 3007(a) requires notice of the deadline to request a hearing. However, when a local bankruptcy rule provides for notice and opportunity for hearing, the time to request a hearing generally is computed from the service or filing of the objection. Thus, it would not be useful or practical to compute the notice deadline from the “deadline for claimant to request a hearing,” as proposed. We suggest the following changes: “An objection to the allowance of a claim and a notice of objection . . . shall be filed and served at least 30 days before any scheduled hearing or any deadline for the claimant to request a hearing, unless a local rule authorizes an objecting party to provide notice and opportunity for hearing on the objection.”

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): The proposed amendment to Rule 3007 is not only unnecessary, but damaging. Each court has significant experience with claims objections and what is best for their district.

Comment BK-2014-0001-0106—Stephanie Edmondson (Clerk of Court, Bankr. E.D.N.C.): Requiring Rule 7004 service for some but not all entities may be difficult for court staff to recall when reviewing proper service of objections.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: Proposed Rule 3007(a) provides for service upon the United States in accordance with the requirements of Rule 7004(b)(4) and (5), but ignores the similar provisions for giving notice to states and municipalities set out in Rule 7004(b)(6). The same considerations that warrant more specific notice for the United States also apply to other governmental entities and are not overly difficult to comply with.

Comment BK-2014-0001-0136—William Heitkamp (Chapter 13 Trustee, S.D. Tex.): Rule 3007(a)(1) should incorporate by reference Rule 2002(g), which specifies persons deemed to be designated to receive notice.

Rule 3012

Comment BK-2014-0001-0050—Dan Melchi (Attorney, Georgia), on behalf of Lueder, Larkin & Hunter, LLC: The proposed amendments to Rules 3012 and 3015 are unconstitutional. In combination with § 3.2 of the plan form, they violate the Fifth Amendment by depriving creditors of due process and by taking their property without compensation. See general comments on plan form.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The NCBJ gives qualified support to the changes in Rule 3012. The NCBJ continues to support the change in the rule that would permit valuation of secured claims to be combined with objections to the claims themselves and continues to take no position on the proposal to permit secured claims to be valued as part of the plan confirmation process. This is a very significant rule in bankruptcy practice and the proposed changes are substantial. Consequently, the NCBJ renews all of its other prior comments that were not adopted: (1) the need for the rule to address the treatment of claims in chapter 11 cases; and (2) the ambiguity in the rule regarding priority claims and the potential overexpansion of procedural vehicles for objecting to priority claims.

The NCBJ believes that the requirement that a motion or objection seeking a determination of the amount of a secured claim of a governmental unit be made after the expiration of the governmental unit's deadline for filing a claim is misguided.

The NCBJ suggests that Rule 3012 be revised to require service of a plan that provides for a determination of the amount of an allowed secured claim on either the person entitled to receive notice of a claims objection under Rule 3007 or any person who, on behalf of the affected creditor, has requested notices under Rule 2002, and on both if both are known. If neither person exists, Rule 7004 service should be required.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): The proposed amendments to Rule 3012 are a mistake. Even though I represent debtors, I can see that this has a potential for due process problems.

Comment BK-2014-0001-0106—Stephanie Edmondson (Clerk of Court, Bankr. E.D.N.C.): Allowing determination of the amount of a secured claim through a plan instead of by motion will mean that courts will lose statistical credit for the motions that would have been filed.

Resolution of an objection would require the filing of an amended plan, increasing costs for debtors.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys:

We have several questions about the proposed language in Rule 3012(b).

In proposed Rule 3012(c), determinations of the "amount" of a secured claim may only be made after the government has filed its proof of claim or the time to do so has expired. What

is the “amount” that is being determined? Is it the amount of the overall claim or the amount that can be deemed to be “secured” under § 506(a)?

Is the government still forced to object to the plan if the debtor uses different claim amounts or asset valuations than those the government believes are accurate and that it intends to eventually include in a proof of claim?

Comment BK-2014-0001-0131—David S. Yen (Attorney, Chicago): Proposed Rule 3012(b) is an improvement over the version published previously. I adhere to the concerns stated in my comments of February 2014.

Comment BK-2014-0001-0136—William Heitkamp (Chapter 13 Trustee, S.D. Tex.): Governmental units should not be excluded in Rule 3012(c).

Rules 3015 and 3015.1

General Comments

Comment BK-2016-0001-0003 – Jeanette Hines – Sees no problem with the proposal.

Comment BK-2016-0001-0004 – Ryan W. Johnson (Clerk, Bankr. N.D.W.Va.) – By allowing various types of relief to be sought in the plan, the rules may create statistical coding problems for the clerk’s office.

Comment BK-2016-0001-0006 – Judge Marvin Isgur (Bankr. S.D. Tex.) – Strongly supports adoption of the two rules. They will enhance uniformity while also allowing flexibility in each district.

Comment BK-2016-0001-0009 – Bankruptcy Judges Roger Efremsky and Marvin Isgur (joint prepared testimony) – The rules should be adopted. The adoption of a mandatory national plan would cause problems, but the adoption of Rule 3015 and 3015.1 provides a compromise that reduces the confusion caused by multiple plans within a single district.

Comment BK-2016-0001-0011 – K. Michael Fitzgerald (chapter 13 trustee) – The proposed rules should be adopted. They represent a creative and well-conceived resolution of the debate over a national plan form. They allow districts to continue to use conforming plans that are already working well.

Comment BK-2016-0001-0012 – James “Ike” Shulman (prepared testimony) – Opposes Rule 3015.1 because it permits local plans that curtail debtors’ rights or impose unjustified burdens on debtors or debtors’ attorneys. The national plan form should be adopted and made mandatory instead. It provides a better balance between debtors and creditors.

Comment BK-2016-0001-0013 – Norma Hammes (prepared testimony) – Opposes an opt-out provision for local plan forms. A review of local plans shows that many required provisions and procedures substantially abridge debtors’ bankruptcy rights and enlarge creditors’

rights in violation of 28 U.S.C. § 2075 and Rule 9029. Although debtors have a statutory right to propose a plan, in some districts only certain provisions are allowed, and plans with any nonstandard provisions won't be confirmed. Model plans should just provide structure for the provisions, not mandate content.

Comment BK-2016-0001-0014 – Jenny L. Doling (prepared testimony) – Opposes Rule 3015.1 because even districts with a single plan may have different rules regarding its implementation. Orders confirming plans take a debtor's estimate of the percentage payout to unsecured creditors and convert it into a fixed amount over a fixed term. Nonstandard provisions are stricken by the chapter 13 trustee. There should be a remedy to enforce compliance with the requirements of Rule 3015.1.

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Supports proposed Rules 3015 and 3015.1 if certain changes are made.

Comment BK-2016-0001-0017 – Bankruptcy Judge Robert F. Grant (on behalf of N.D. Ind. Bankruptcy Judges) – Unanimously oppose Rules 3015(c) and (e) and Rule 3015.1. Mandating the use of a form chapter 13 plan, whether national or local, exceeds rulemaking authority.

Comment BK-2016-0001-0019 – Marlene Martel (Ford Motor Credit Company) – Opt-out proposal is a reasonable compromise.

Comment BK-2016-0001-0020 – Norma Hammes (on behalf of National Association of Consumer Bankruptcy Attorneys) – The rules would give an official imprimatur to local plans, which in some cases do not allow debtors to include provisions that are consistent with the Bankruptcy Code. The right of the debtor to propose his or her plan as desired must be preserved. The opt-out proposal should be rejected.

Rule 3015(c)

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule 3015(c) (incorrectly placed nonstandard provisions are void) should be deleted because it exceeds rulemaking authority and is inconsistent with the Supreme Court's *Espinosa* decision.

Comment BK-2016-0001-0017 – Bankruptcy Judge Robert F. Grant (on behalf of N.D. Ind. Bankruptcy Judges) – Unanimously oppose Rule 3015(c). Mandating the use of a form chapter 13 plan, whether national or local, exceeds rulemaking authority. These rules attempt to override § 1325 by imposing additional confirmation requirements.

Rule 3015(d)

Comment BK-2016-0001-0004 – Ryan W. Johnson (Clerk, Bankr. N.D.W.Va.) – Plans are mailed to creditors, not served. Rule 3015(d) should therefore direct the debtor to mail the plan if the clerk's office does not.

Comment BK-2016-0001-0007 – Shmuel Klein – Rule 3015(d) should allow notice by ECF if creditor has so elected.

Comment BK-2016-0001-0008 – Eva Roeber (chair, Bankruptcy Noticing Working Group) – Rule 3015(d) should impose the cost of sending the plan to parties on the debtor, not the court. Debtors should be allowed to send a plan summary rather than the entire plan, so long as any nonstandard provisions are pointed out. Substitute “give notice of” for “serve” because formal service is not generally required.

Rule 3015(f)

Comment BK-2016-0001-0005 – Thomas Dickenson – Rule 3015(f) is problematic. The requirement that an objection to confirmation be made at least 7 days before the 341 meeting will be difficult for many creditors to satisfy. Because the 341 meeting can be held as early as 21 days after the order for relief, this rule could require a creditor to object within 14 days after the case commences. That time frame is unreasonable.

Comment BK-2016-0001-0007 – Shmuel Klein – The time allowed under Rule 3015(f) for filing an objection is too short. It should extend until 14 days after the plan is filed.

Comment BK-2016-0001-0010 – Ellie Bertwell (Aderant CompuLaw) – Supports Rule 3015(f) now that it is qualified by “unless the court orders otherwise.” With that change from an earlier version, the rule is clear that local bankruptcy courts may set a different deadline.

Rule 3015(g)(1)

Comment BK-2016-0001-0007 – Shmuel Klein – Rule 3015(g)(1) should be reworded as follows: “The secured claim amount stated in the confirmed plan is binding on the holder of the claim, even if the holder files a contrary proof of claim or the debtor schedules that claim, and regardless of whether an objection to the claim has been filed; and”.

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule 3015(g)(1) should be deleted because it is not a procedural rule.

Comment BK-2016-0001-0016 – Michael Zevitz (USFN) – Rule 3015(g)(1) may result in a flood of objections by creditors based solely on minor discrepancies in arrearage amounts. The rule should state that the proof of claim controls as to arrearage amounts.

Rule 3015(g)(2)

Comment BK-2016-0001-0004 – Ryan W. Johnson (Clerk, Bankr. N.D.W.Va.) – It is unclear whether a request for relief from the stay in a plan regarding surrendered collateral requires a motion and the payment of a filing fee. Also the proposed rules may create procedures regarding relief from the stay that are inconsistent with the statutory requirements of § 362(d) and (e).

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule (g)(2) should be deleted because it is unnecessary. Plan provisions do not request relief. No rule is necessary to give effect to the plan provision if the plan is confirmed.

Rule 3015(h)

Comment BK-2016-0001-0008 – Eva Roeber (chair, Bankruptcy Noticing Working Group) – Rule 3015(h) should impose the cost of sending the proposed modification or summary to parties on the debtor, not the court.

Rule 3015.1 – General Comments

Comment BK-2016-0001-0020 – Norma Hammes (on behalf of National Association of Consumer Bankruptcy Attorneys) – Districts should have until June 1, 2018 to adopt a local plan form if they opt out. The Committee Notes to the rules should include various reminders: local plan forms should be short and easy to read; they should not include statements of the law or excessive notices to creditors; they should not include worksheets that impose a formula for calculating disposable income and the best interest of creditors test; they must be reviewed for compliance with §§ 1321, 1322, and 1325(a) and (b).

Rule 3015.1(a)

Comment BK-2016-0001-0020 – Norma Hammes (on behalf of National Association of Consumer Bankruptcy Attorneys) – Rule 3015.1(a) should specify requirements for the notice and comment procedure for adopting a local plan form and should require notice and comment for making a decision to opt out. Rule 9029 should apply. The Committee Note should provide that there is an expectation that members of the consumer bankruptcy bar will be solicited to participate in the local form development process.

Rule 3015.1(c)

Comment BK-2016-0001-0019 – Marlene Martel (Ford Motor Credit Company) – Rule 3015.1(c) should require a local form to have a checkbox to indicate an amended plan and which sections have been changed.

Rule 3015.1(c)(2)

Comment BK-2016-0001-0018 – Steven Thomas (Kay Casto & Chaney PLLC) – Rules should specify that plans with a provision limiting the amount of a secured claim must be served on the affected creditor in the manner provided by Rule 7004.

Rule 3015.1(c)(3)

Comment BK-2016-0001-0007 – Shmuel Klein – Rule 3015.1(c)(3) should be stricken because plans frequently reclassify secured claims as unsecured.

Rule 3015.1(d)

Comment BK-2016-0001-0007 – Shmuel Klein – Rule 3015.1(d) should have additional paragraphs to allow for the separate treatment of student loans and to state that creditors are subject to Code § 524(i).

Comment BK-2016-0001-0019 – Marlene Martel (Ford Motor Credit Company) – Rule 3015.1(d) should require a separate paragraph for the treatment of claims secured by personal property, for the treatment of nonpriority unsecured claims, and for the treatment of executory contracts and unexpired leases.

Comment BK-2016-0001-0020 – Norma Hammes (on behalf of National Association of Consumer Bankruptcy Attorneys) – Rule 3015.1(d) should include as a mandatory plan provision the debtor's right to seek a determination of the amount of a secured claim and to avoid a lien under § 522(f) in the plan. It should also provide the debtor options for specifying the dividend on general unsecured claims and all of the revesting options permitted by § 1322(b)(9).

Rule 3015.1(d)(2)

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule 3015.1(d)(2) should be removed because there is no reason for this issue to be provided for separately.

Rule 3015.1(d)(3)

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule 3015.1(d)(3) should be removed because there is no reason for this issue to be provided for separately.

Rule 3015.1(d)(4)

Comment BK-2016-0001-0004 – Ryan W. Johnson (Clerk, Bankr. N.D.W.Va.) – It is unclear whether a request for relief from the stay in a plan regarding surrendered collateral requires a motion and the payment of a filing fee. Also the proposed rules may create procedures regarding relief from the stay that are inconsistent with the statutory requirements of § 362(d) and (e).

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – The requirement that a local plan have a provision for requesting relief from the stay for surrendered collateral should be deleted; it exceeds rulemaking authority.

Comment BK-2016-0001-0019 – Marlene Martel (Ford Motor Credit Company) – Rule 3015.1(d)(4) should specify the statutory sections under which the stay may be terminated.

Comment BK-2016-0001-0020 – Norma Hammes (on behalf of National Association of Consumer Bankruptcy Attorneys) – Rule 3015.1(d)(5) [sic] should not require that a debtor request that the stay be terminated if collateral is surrendered. This requirement is not imposed by the Code. Section 362(e) and Rule 7004 will be triggered.

Rule 3015.1(e)

Comment BK-2016-0001-0012 – James “Ike” Shulman (prepared testimony) – If Rule 3015.1 is adopted, it should contain language providing that the inclusion of certain nonstandard provisions should not cause undue delay of confirmation.

Rule 3015.1(e)(1)

Comment BK-2016-0001-0015 – National Conference of Bankruptcy Judges – Rule 3015.1(e)(1) should be deleted because it exceeds rulemaking authority.

Comment BK-2016-0001-0017 – Bankruptcy Judge Robert F. Grant (on behalf of N.D. Ind. Bankruptcy Judges) – Rule 3015(e)(1) is contrary to § 1327 and *United Student Aid Funds, Inc. v. Espinosa* because it declares certain plan provisions ineffective.

Rule 4003

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: Regarding Rule 4003, the NCBJ expresses the same concern regarding Rule 7004 service as in its comment to Rule 3012.

Comment BK-2014-0001-0106—Stephanie Edmondson (Clerk of Court, Bankr. E.D.N.C.): Allowing avoidance of liens impairing exemptions through a plan under Rule 4003(d) instead of by motion will mean that courts will lose statistical credit for the motions that would have been filed.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: The Department’s concerns about the proposed amendment to Rule 4003(d) are similar to our concerns about amended Rule 5009(d). The proposed amendment does not provide adequate notice.

Clarify that lien avoidance is limited to judicial liens and non-purchase money security interests in limited kinds of property, as set forth in Code § 522(f).

We recommend eliminating the language allowing a plan to extinguish a lien encumbering exempt property. In the alternative, include a government exception.

Rule 5009

Comment BK-2014-0001-0076—Frederick Schindler (Office of the Chief Counsel, IRS): As explained above, § 3.2 of proposed Official Form 113 provides: “The holder of any claim listed below as having value in the column headed Amount of secured claim will retain the lien until the earlier of . . . discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.” Proposed Rule 5009(d), in combination with proposed § 3.2, therefore requires that the lien be released by the creditor, and that the court can enter an order to that effect. Assuming that debtors and courts follow the rule and the plan form, there may be no problem with the rule. But we note that debtors and courts may not understand the interaction between the plan and the rule, resulting in orders determining that tax liens were released when in fact they were not released by the IRS, as when the underlying tax was nondischargeable. Even assuming the rule works as intended, we question the usefulness of a court order that merely finds that a creditor had already released its lien.

We recommend that the amendment be dropped altogether, or that the Committee Notes be clarified to make clear the relation to the provision of the plan form.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): The idea of allowing a lien to be avoided or “stripped” in a plan is fine, but this would effectively require an additional motion with very bad timing. The motion to confirm that a lien is “satisfied” could become effectively mandatory. However, it runs up against the practice in some districts (including the Eastern District of Pennsylvania) of issuing most chapter 13 discharges simultaneously with the case closing orders. Because a wholly unsecured second mortgage is not deemed to be “stripped” until the discharge issues, this would effectively mandate yet another motion, at least one month prior to closing, to hold open the case to allow the motion to confirm satisfaction.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States’ Association of Bankruptcy Attorneys: We do not oppose the concept of this provision, but we believe it would be more appropriately brought as an adversary proceeding to ensure better notice.

Comment BK-2014-0001-0126—Diana L. Erbsen, on behalf of the U.S. Department of Justice: A “release” of a lien extinguishes a statutory lien from all property, including property that is not part of the estate. It does not simply discharge the lien from certain property. Before a declaration that a secured claim has been satisfied and a lien released, we believe that debtors should not be entitled to make such a request by motion. An adversary proceeding is essential to protect creditor rights.

This proposal potentially conflicts with non-bankruptcy law, and it may be invalid for federal tax liens and other liens of the United States. In addition, the tax exception to the Declaratory Judgement Act prohibits declaratory judgments regarding federal taxes.

Rule 7001

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Rule 9009

Comment BK-2014-0001-0022—Judge Robert Grant (Bankr. N.D. Ind.), on behalf of the bankruptcy judges of the N.D. Ind.: See comments under Rule 3015.

Comment BK-2014-0001-0045—Keith Rucinski (Chapter 13 Trustee, N.D. Ohio): Proposed Rule 9009 should be altered to allow local courts to remove parts of the plan form that do not apply in their districts.

Comment BK-2014-0001-0046—Judge Terrence L Michael (Bankr. N.D. Okla.): I oppose amended Rule 9009.

Comment BK-2014-0001-0062—Judge Robert E. Nugent (Bankr. D. Kan.), on behalf of the National Conference of Bankruptcy Judges: The NCBJ continues to oppose the amendment to Rule 9009. If the requirement of a rigid adherence to the Official Forms is driven by the expectation that the national chapter 13 plan form will be adopted, the restrictions should be stated in Rule 3015 and limited to modifications of the national chapter 13 plan form.

Comment BK-2014-0001-0083—Pam Bassel (Chapter 13 Trustee, N.D. Tex.): I oppose the amendment to Rule 9009. Leave current Rule 9009 as it is.

Comment BK-2014-0001-0088—Scott Ford (Clerk of Court, N.D. Ala.), on behalf of the Bankruptcy Clerks Advisory Group: This rule amendment would have an impact on districts where forms are modified to add language at the request of the U.S. Trustee, or language referring to local rules or to deadlines that affect parties' rights.

There is a concern that clerks' offices will be tasked with quality control to check for compliance with this rule.

Comment BK-2014-0001-0089—Ray Hendren (Chapter 13 Trustee, W.D. Tex.): Do not revise Rule 9009.

Comment BK-2014-0001-0091—Pennsylvania Bar Association: If the plan form is adopted, we endorse the amendment to this rule.

Comment BK-2014-0001-0092—Jon Waage, on behalf of the National Association of Chapter Thirteen Trustees: Amend Rule 9009 to allow local bankruptcy courts and districts to maintain the order of presenting information but to allow deletion from a form of options that are not available in a jurisdiction.

Comment BK-2014-0001-0102—Michael W. Gallagher (Attorney, East Norriton, Pa.): The current forms system, which mandates substantial compliance, has been effective and should be retained.

Comment BK-2014-0001-0113—James C. Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys: We understand a suggestion has been made to allow retention of “conforming” district plans (with only a single plan per district). Although we continue to believe strongly that the goal should be to arrive at a single national plan form with adequate provision for some local options, we do agree that the new compromise proposal is a step in the right direction.

Comment BK-2014-0001-0123—Raymond Obuchowski, on behalf of the National Association of Bankruptcy Trustees: NABT supports the concept of consistency in Official Forms and their use without modification. We support the NCBJ's comments regarding the proposed changes to Rule 9009, except to the extent directed to the issue of a national form for chapter 13 plans, on which NABT takes no position.

Comment BK-2014-0001-0124—O. Byron Meredith III (Chapter 13 Trustee, S.D. Ga.): Because I oppose the mandatory plan form, I oppose the amendment to Rule 9009.

Comment BK-2014-0001-0127—Lonnie D. Eck (Chapter 13 Trustee, N.D. Ga.): I oppose the proposed national plan form and changes to Rule 9009.

TAB 5C

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**Meeting of the Advisory Committee on Bankruptcy Rules
November 14, 2016, Washington D.C. - DRAFT**

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Thomas L. Ambro
District Judge Pamela Pepper
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Thomas Moers Mayer, Esquire
Jill Michaux, Esquire
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Circuit Judge Susan P. Graber, liaison from the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Erithe Smith
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge David Sims Crawford
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees

I. Introductions

Judge Sandra Ikuta welcomed the new members to the Advisory Committee on Bankruptcy Rules (the Committee). She also introduced Judge David Campbell, the new chair of the Standing Committee, and Judge Susan Graber, the new liaison from the Standing Committee.

II. Minutes from April 2016 Meeting

The minutes from the minutes of the April 2016 meeting of the Bankruptcy Rules Committee were approved.

III. Report from the June 2016 meeting of the Standing Committee

Professor Michelle Harner reported that all of the Committee's action items were approved. In addition, there were two information items reported, including several technical changes to the bankruptcy forms.

IV. Report on the November 2016 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar reported on the items discussed at the Civil Rules Committee meeting that were of interest to the Committee. First, the Civil Rules Committee is studying the method of serving subpoenas (service by mail versus in person). Second, the Civil Rules Committee is considering possible changes to Rule 30(b)(6) for depositions of corporate representatives. Third, the Civil Rules Committee decided not to go forward at this time with possible amendments to Rule 5.2, although the amendments may be reconsidered. The Civil Rules Committee did not find the same issues with personal identifiers in civil cases as may occur in bankruptcy cases. The other rules committees have also considered similar amendments, and each committee decided not to proceed. Judge Goldgar will monitor developments on proposed amendments to Civil Rules 45(b)(1) and 30(b)(5).

V. Report on the October 2016 Meeting of the Advisory Committee on Appellate Rules

Judge Pamela Pepper advised that the majority of the discussion at the Appellate Rules Committee meeting was unrelated to bankruptcy. Many of the potential amendments under consideration relate to electronic filing and service. The Appellate Rules Committee is continuing to discuss the proper language for bonds and security instruments in several rules. Also, they discussed potential changes to the civil class action rules and whether any Appellate Rule amendments were needed as a result. The Appellate Rules Committee discussed a suggestion to require additional disclosures in bankruptcy appeals, and asked that the Committee work with the Appellate Rules Committee on the issue. The Committee agreed to work with the Appellate Rules Committee, and the matter was assigned to the Privacy, Public Access, and Appeals Subcommittee.

VI. Report on the June 2016 Meeting of the Committee on the Administration of the Bankruptcy System

Judge Erithe Smith reported that the Bankruptcy Administration Committee considered several issues related to fees at the meeting, concurring with fee proposals submitted by the Committee on Court Administration and Case Management (CACM). Also, the judgeship vacancy pilot project is moving forward. Under the project, one judge has been sworn in to the District of South Dakota and will sit in the Middle District of Florida for five years, and another judge has been sworn in to the Northern District of Iowa and will sit in the Eastern District of Michigan. In addition, the horizontal coordination pilot project was approved by the Judicial Conference earlier this year, and the Bankruptcy Administration Committee is working on finding districts to participate in the project. Judge Stuart Bernstein added that there is concern regarding temporary judgeships, as most temporary judgeship positions will expire in May 2017 without action from Congress.

Judge Ikuta advised of the letter from the Committee to the Bankruptcy Administration Committee regarding the suggestion for a Notice of Change of Address form, and Judge

Smith advised that it will be considered at the Bankruptcy Administration Committee's December 2016 meeting.

VII. Business Subcommittee Report

Professor Harner provided the report of the subcommittee's review of noticing issues. She explained that the review focuses on formal noticing suggestions submitted to the Committee over the years, with several concerning the mode of noticing and ways to better utilize technology, electronic filing, and service. Although research is ongoing, Professor Harner noted that the many of the materials reviewed by the subcommittee suggest inefficiencies in the system and the high burden and cost associated with noticing under the Bankruptcy Rules. With the proposed amendments to Rule 5005 there is a movement toward default electronic filing, but this does not include noticing. The subcommittee generally agreed that permitting broader use of electronic noticing and service may be warranted, but that it needed to analyze further certain issues relating to non-individual parties who are not represented in bankruptcy cases.

The Committee discussed various issues relating to the suggestions regarding electronic noticing and service. One member advised that some creditors would prefer to receive notices by mail because they lack the ability to process everything electronically, or they have systems set up to accept bankruptcy notices that are not electronic. The Committee discussed the potential value to phasing in any changes to the mode of noticing and service through an opt-in mechanism. The Committee also noted the need to consider the potential impact of Civil Rule 5(b).

Professor Harner then explained two other issues identified in the noticing project. First, a few suggestions raise issues with the special service of process requirements for certain entities under Rules 7004(b)(3) and (h). The Committee discussed the need for, and challenges to, any amendments to the service of process rules. It also recognized the need to coordinate with other rules committees and other groups within the bankruptcy community before proposing any changes. Second, the noticing project considered certain issues involving claims objections. The proposed amendment to Rule 3007(a) clarifies that service of an objection may be made upon the creditor by first-class mail at the address set forth in the proof of claim. There is a question as to whether this procedure should be extended to claims for which no proof of claim is required.

Although the noticing project is ongoing, the Committee decided to focus on one issue at this time. Specifically, the Committee is exploring an amendment to the bankruptcy rules that would allow businesses, financial institutions, and other non-individual parties that hold claims against the debtor, but that are not registered users of CM/ECF, to opt into electronic noticing and service in bankruptcy cases. The Committee would ensure that any such amendment is consistent with 11 U.S.C. § 342(e) and (f), which gives certain creditors the right to designate a particular service address.

VIII. Subcommittee on Privacy, Public Access, and Appeals

A. Conforming technical amendments to Rule 8011

Professor Elizabeth Gibson reported that the amendments to Rule 8011 conform to the proposed amendments to Federal Rule of Appellate Procedure 25 (currently out for publication). The proposed amendments would also be consistent with the proposed

amendments to Rule 5005, Civil Rule 5, and Criminal Rule 49 (currently out for publication). Rule 8011 currently does not specifically address electronic filing, but the recent amendments to the Part VIII rules generally favored electronic transmission by and to represented parties. Professor Gibson noted that minor changes to the proposed amendments (to Rule 8011) may be required depending on the comments received on the published proposed amendments to Appellate Rule 25. Any changes will be presented at the spring 2017 meeting. The Committee discussed service requirements. Local rules often require additional service, although this practice could continue, even with a rule amendment. In addition, the Committee agreed that, because the proposed amendments mirror the pending amendments to the appellate rules on electronic service and proof of service, publication of the proposed amendments to Rule 8011 would serve no additional purpose. It also noted the value to having the amendments to Rule 8011 approved on the same timetable as those being made to Appellate Rule 25, Rule 5005, Civil Rule 5, and Criminal Rule 49. A motion was made and approved to move forward with the proposed amendments, subject to any minor amendments or corrections based on comments received during the publication period, and to request that the Standing Committee approve the proposed amendments without prior publication.

B. Suggestion 16-BK-E (Mandate Procedure in Bankruptcy Appeals)

Professor Gibson provided the report, explaining that the suggestion is to require a mandate in bankruptcy appeals to clarify when authority reverts with the bankruptcy court. The subcommittee previously chose not to pursue the issue, but now recommended that it be considered for further study. Current Rule 8024(b) does not require a mandate, unlike Federal Rule of Appellate Procedure 41(c). The subcommittee intends to survey bankruptcy judges and practitioners to determine if the lack of a mandate causes problems.

Professor Gibson advised the group that a number of bankruptcy appellate panels have local rules regarding mandates from bankruptcy appeals. Also, the mandate under Appellate Rule 41(c) can be withdrawn under certain circumstances and district courts can take actions without the mandate. Some members questioned whether a rule is necessary, suggesting that a better solution may be to encourage communication between the courts to prevent potential issues. The subcommittee will consider whether to propose a rule that when the Court of Appeals remands an action to the district court, the court would have a certain amount of time (30 or 60 days) to hold a status conference to determine whether the district court or bankruptcy court should move forward with the case. The Committee discussed that such a rule would likely not be necessary when a district court enters a judgment.

IX. Information Items

Professor Harner explained that there are four items under consideration. The Business Subcommittee initially considered all of the items. The first suggestion relates to noticing of plans under Rule 2002(f)(7), and whether chapter 13 plans should be added to that rule. The suggestion was considered and rejected in the past, but the grounds for rejection are unclear. The Consumer Subcommittee will look at this issue. The second suggestion relates to the parties entitled to receive notices in chapter 13 cases under Rule 2002. The Business Subcommittee referred this suggestion to the Consumer Subcommittee. The third issue is a suggestion regarding disclosures under Rule 4001(c). The Business Subcommittee also referred this suggestion to the Consumer Subcommittee. The final issue concerns service of a motion to compel abandonment under Rule 6007(b) and whether such requirements should mirror the service required for a trustee's notice of abandonment under Rule 6007(a). The

Business Subcommittee will present additional information on this suggestion at the spring meeting.

X. Coordination Issues

Scott Myers provided some background regarding the need for coordination between the rules committees. There are often conforming amendments needed to retain uniformity within the federal rules. He noted that most of the issues included in his memo (in the agenda materials) were already discussed, but highlighted that certain amendments will be needed if the Appellate Rules Committee decides to amend its rules regarding supersedes bonds. Also, the Criminal Rules Committee proposed an amendment to its disclosure rule (Rule 12.4) and the Appellate Rules Committee is considering similar amendments. The Privacy, Public Access, and Appeals Subcommittee will consider whether any changes are needed to the bankruptcy disclosure rules and report at the spring 2017 meeting.

XI. Forms Subcommittee

Judge Dennis Dow provided an overview of the subcommittee's work on amended Rule 3015 and new Rule 3015.1. The rules were published for comment in August 2015. Several comments were submitted and a hearing was held in September 2016. There was general support for the approach in the proposed rules, although there was some opposition. There were specific suggestions for edits to the proposed amendments. The subcommittee considered all of the comments.

He advised that the subcommittee determined that proposed Rules 3015 and 3015.1 permit the Committee to achieve the goals of uniformity while still permitting local variations where necessary. Districts will have only one plan form; even if it is not the national form, it will be a local form with more national uniformity. The proposed form plan and related rules are procedural rather than substantive.

Judge Dow detailed the comments and testimony. Some of the opposition focused on specific disputes regarding substantive chapter 13 issues rather than those that could be resolved by a form or procedural rule. Noticing was an issue raised in some of the comments, and these issues are being considered as part of the noticing project. Several commenters voiced concerns about the automatic stay provisions, but the subcommittee determined not to make any changes to the rule, although some explanatory language will be added to the Committee Note in response to one of these comments. Several other changes to the Committee Notes were made in response to comments, and there was one minor edit to proposed Rule 3015.1(d)(4) to add relevant statutory references.

The subcommittee also made stylistic edits to Form 113, including conforming the header and signature lines to the remainder of the modernized forms and standardizing references throughout the form. In addition, a few minor edits were made to the Committee Note for the form. The Committee approved a motion to approve Rule 3015, Rule 3015.1, the revised version of Form 113, and the Committee Note for Form 113. Professor Gibson reminded the group that the Director's Form for adequate protection needs to be issued by December 2017.

XII. Referral to Other Committees

Professor Gibson reported on an item referred to CACM regarding redaction of personally identifiable information. For redaction, the issue is with third party services that provide

court dockets to paid users and the potential for protected information to appear on those dockets. CACM thanked the Bankruptcy Rules Committee for the information. Professor Gibson also reported that the suggestion regarding a Notice of Change of Address form was forwarded to the Bankruptcy Administration Committee. Letters regarding both issues were included in the agenda materials.

XIII. Five-Year Review Questionnaire

Judge Ikuta explained that the Committee is asked to respond to the questionnaire, and that the responses from 2007 and 2012 are included in the agenda materials. She advised that she would like to include a few sentences regarding the Committee's coordination efforts, and made the suggestion that current liaison positions be entitled to vote. Finally, she added her support for the idea that Committee members have some bankruptcy experience prior to being part of the Committee. Committee members voiced support for these suggestions. Judge Campbell will coordinate responses from all Advisory Committees.

XIV. Consent Agenda

The consent agenda, reproduced below, was approved by motion by the Committee. The consent agenda materials, as well as other supporting agenda materials, are also available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-bankruptcy-procedure-november-2016>.

1. Not assigned to a subcommittee

(A) Recommendation of no action regarding Suggestion 13-BK-J to require that the Rule 2016(b) statement (Disclosure of Compensation Paid or Promised to Attorney for Debtor) be filed with the petition instead of within 14 days after the petition is filed.

(B) Recommendation to approve Suggestion 14-BK-F for technical amendment to Rule 7004(a)(1).

2. Subcommittee on Consumer Issues

(A) Recommendation of no action regarding Suggestion 15-BK-I concerning various suggestions in dealing with pro se filers and redaction of social security numbers.

(B) Recommendation to approve Suggestion 16-BK-B to amend question number 11 on Official Form 101 (Individual Debtor Petition) with proposed December 1, 2017 effective date.

3. Subcommittee on Business Issues.

(A) Recommendation of no action regarding Suggestion 16-BK-G that Rule 7004(e) to provide at least 14 days for service of summons and complaint.

4. Subcommittee on Privacy, Public Access, and Appeals

(A) Recommendation of no action regarding Suggestion 16-BK-F to eliminate the requirement of a request for permission to take a direct appeal when the court certifies the appeal.

XVII. Conclusion

The spring 2017 meeting will be held in Nashville, Tennessee on April 7, 2017. The meeting was adjourned at 1:40 PM.

Respectfully submitted,

Michelle Harner, associate reporter

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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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Evidence Rules

DATE: November 7, 2016

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the Committee held a Conference of experts to review case law developments on Rule 404(b), as well to consider two of the Committee’s current projects. The Committee at the meeting discussed the comments made at the Conference, especially those that might bear on possible changes to Rule 404(b). It also discussed ongoing projects involving matters such as possible amendments to Rules 801(d)(1)(A) and 807. Finally, it discussed briefly suggestions from members of the public to amend Rule 702, as well as recent challenges to forensic evidence that might warrant consideration of an amendment to that Rule. A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Conference on Rule 404(b), Rule 807, and Rule 801(d)(1)(A)

The Conference on the morning of the Committee meeting explored three matters: 1. New developments in regulating admissibility of bad act evidence under Rule 404(b); 2. The Committee's working draft of a proposal to amend Rule 807, the residual exception to the hearsay rule; and 3. The Committee's working draft of a proposal to amend Rule 801(d)(1)(A) to provide for somewhat broader substantive use of prior inconsistent statements.

The first topic, Rule 404(b), was chosen because the Committee has an obligation to monitor new developments in the law of evidence, and several circuits have recently made major efforts to clarify how Rule 404(b) should work. These cases have emphasized that courts must be careful to assure that the probative value of a bad act for a proper purpose proceeds through non-propensity inferences. Moreover the Committee has already agreed, unanimously, to propose an amendment to the notice provision of Rule 404(b) that would eliminate the requirement that the defendant demand discovery of Rule 404(b) material. Because the Committee will be proposing that change to the notice provision, there is an opportunity, and a responsibility, to examine whether the rule (and especially the notice provision) should be amended in any other respect.

The second and third topics were chosen so that the Committee could get advance comment from experts on whether the proposed rule changes were workable.

Prominent judges, lawyers and professors participated in the Conference and provided the Committee with extremely helpful insight, background, and suggestions for change. The Conference proceedings --- as well as accompanying articles by a number of the participants --- will be published in the Fordham Law Review.

After the Conference, Committee discussion indicated that a number of proposals for amending Rule 404(b) were worthy of further consideration, including the following:

- Adding a provision requiring the court to find that the probative value of evidence of uncharged misconduct must be independent of any propensity inference.
- Requiring notice to be provided earlier in the proceedings so that the court can focus on the purpose for which the evidence is offered and whether the path of inferences leading toward that purpose is independent from the defendant's propensity for misconduct.
- Requiring the government's description of the evidence to be more specific than the current requirement of disclosing the "general nature" of the evidence.

- Requiring the government to state in the notice the non-character purpose for which the bad act evidence is offered, and also to state how the evidence is probative of that purpose without relying on a propensity inference.

The Committee will consider these specific proposals for amending Rule 404(b) at its next meeting.

The Committee also obtained guidance at the Conference on its working drafts of amendments to Rule 807 and Rule 801(d)(1)(A). These matters are discussed below.

The Evidence Rules Committee is grateful for the Standing Committee's support for the Conference.

B. Possible Amendment to Rule 807

Over the past year, the Committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. Part of the motivation for an amendment would be to expand its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. Another reason for an amendment would be that the rule could be improved to make the court's task of assessing trustworthiness easier and more uniform, and to eliminate confusion and unnecessary effort by deleting superfluous language.

The Committee has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the Conference held on the morning of the Fall 2016 Committee meeting. Participants at the Conference generally approved of the working draft, though there was some comment that any change to the residual exception needed to proceed with caution, in order to avoid unintended effects on the standard hearsay exceptions.

The working draft incorporates the following principles, on which there is general agreement within the Committee (assuming that any amendment at all is to be proposed):

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy under the totality of the circumstances. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

- Trustworthiness can best be defined in the rule as requiring a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any good purpose. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102.

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

The Committee will continue to review and discuss the working draft of an amendment to Rule 807. It is cognizant of the risk that expanding the residual exception unduly would raise concerns about judicial discretion, and might undermine the predictability that currently exists in the application of the hearsay exceptions. The Committee continues to focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice. At the next meeting, the Committee will consider whether these changes can be supported as part of a good rulemaking effort, even if they do not result in expanding the residual exception.

C. Possible Amendment to Rule 801(d)(1)(A)

The Committee has been giving careful and lengthy consideration to the possibility of amending Rule 801(d)(1)(A), which provides for substantive admissibility for a very limited set of prior inconsistent statements of a testifying witness (those made under oath at a formal proceeding). The goal of an amendment would be to expand the rule to allow for more substantive admissibility of prior consistent statements. The Committee has, however, decided against implementing the “California rule,” under which all prior inconsistent statements are substantively admissible. The Committee’s concern is that there will be cases in which there is a dispute about whether the statement was ever made. In that situation, it is difficult to cross-

examine the witness, because the witness denies even making the statement; and the dispute over whether the statement was made could be costly and distracting.

The Committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. If the statement is videotaped there can be no dispute about whether the witness actually made it. This limited proposal was reviewed at the Conference before the Committee meeting, where it received a favorable reception. Some Committee members and others, however, remain skeptical about even this limited proposal; they are concerned about the risk of abuse and about the incentive that it might create to prepare videotaped statements for purposes of litigation.

The Committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

D. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that courts and litigants can use assistance in negotiating the difficulties of authenticating electronic evidence --- and that such assistance can be provided by publishing and distributing a best practices manual. The Reporter worked with Greg Joseph and Judge Paul Grimm to complete a manual entitled “Best Practices for Authenticating Digital Evidence.” The manual is not a work of the Advisory Committee. It is a work of the three authors.

The best practices manual was submitted to the Federal Judicial Center, but the FJC declined to publish it in the form submitted, as it did not accord with the FJC template. The authors on their own arranged for its publication by WestAcademic, and Greg Joseph provided his own funds to have the pamphlet distributed to every federal judge. WestAcademic has agreed to include the best practices manual as an appendix to the yearly Federal Rules of Evidence book that it publishes. For that purpose, the best practices manual will be updated every year.

E. Suggested Amendment to Rule 702; Challenges to Forensic Evidence; Possible Symposium on Expert Evidence

Two members of the public wrote an article asserting that courts are not following certain provisions of the 2000 amendment to Rule 702. That amendment provides that the trial court must find that an expert’s opinion is based on sufficient facts or data (subdivision (b)); that the expert is using reliable methods (subdivision (c)); and that the methods are reliably applied (subdivision (d)). The article concludes that many courts are treating the questions of sufficient facts or data and reliable application as questions of weight and not admissibility.

The Committee agrees with the assessment that many courts are treating sufficiency of facts or data and reliable application as questions of weight. Those holdings are contrary to Rules 702(b) and 702(d), which treat these questions as ones that the judge must decide under

Rule 104(a). The Committee will be considering what to do, if anything, about the reluctance of some courts to follow the rule as it is written. The problem is that if courts have not followed the rule after the 2000 amendment, there is no guarantee that they would follow it after another amendment.

There is another reason to revisit Rule 702. In the last 10 years, there have been a number of challenges to the reliability of certain kinds of expert forensic evidence --- including reports by the National Academy of Science and the President’s Council of Advisors on Science and Technology. At the next meeting, the Committee will begin to consider whether Rule 702 should be amended to provide more guidance on how courts should approach expert testimony on forensic investigations such as ballistics and handwriting identification. Moreover, the Committee will be considering whether a Symposium on the subject would be useful. If the Committee decides to go forward, the Symposium would take place on the morning of the Fall, 2017 Committee meeting. The Symposium could cover not only the challenges to forensic expert testimony, but also whether changes should be made more generally to assure that courts are undertaking the gatekeeping function established by *Daubert* and the 2000 amendment to Rule 702. The Committee resolved to revisit the question of possible amendments to Rule 702, and the possibility of a Symposium on expert testimony, at its next meeting.

F. Possible eHearsay (Recent Perceptions) Exception

The Committee has decided not to approve a proposal that would add a hearsay exception 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 a new exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the 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.

For each Committee meeting the Reporter submits, for the Committee’s information, an outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying 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. At most there are only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The Reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

G. *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 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 --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall 2016 Meeting

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

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 21, 2016

Los Angeles, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 21, 2016 at Pepperdine University School of Law in Los Angeles, California.

The following members of the Committee were present:

Hon. William K. Sessions, III, Chair
Hon. James P. Bassett
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Traci Lovitt, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelly Cox, Rules Committee Support Office
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring 2016 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June, 2016 meeting of the Standing Committee. The Evidence Rules Committee had two action items at the meeting: 1) a proposal to limit the hearsay exception for ancient documents (Rule 803(16)) to documents prepared before January 1, 1998; and 2) a proposal to add two subdivisions to Rule 902 that would allow for

authentication of certain electronic evidence by way of a certificate of a qualified person. Both those proposals were unanimously approved by the Standing Committee. Judge Sessions also reported to the Standing Committee about ongoing Committee projects, including proposals to expand substantive admissibility of prior inconsistent statements (Rule 801(d)(1)(A)); to amend the residual exception (Rule 807) to provide for more uniformity and to streamline the trustworthiness requirement; and to amend the notice provisions for Rules 404(b) and Rule 807 to provide for more uniformity.

Introduction of New Committee Members

Judge Sessions welcomed and introduced the two new Committee members: Justice James Bassett, who sits on the New Hampshire Supreme Court; and Traci Lovitt, a partner at Jones Day in Boston.

II. Conference on Rule 404(b), Rule 807 and Rule 801(d)(1)(B)

The morning of the meeting was devoted to a Conference (“the Conference”) on the following topics: 1. New developments in regulating admissibility of bad act evidence under Rule 404(b); 2. The Committee’s working draft of a proposal to amend Rule 807, the residual exception to the hearsay rule; and 3. The Committee’s working draft of a proposal to amend Rule 801(d)(1)(A) to provide for somewhat broader substantive use of prior inconsistent statements.

The first topic, Rule 404(b), was chosen because the Committee has an obligation to monitor new developments in the law of evidence. Several circuits have recently made major efforts to clarify how Rule 404(b) should work, emphasizing that courts must be careful to assure that the probative value of a bad act for a proper purpose proceeds through non-propensity inferences. Moreover, review of Rule 404(b) is warranted because the Committee has already agreed, unanimously, to propose an amendment to the notice provision of Rule 404(b), that would eliminate the requirement that the defendant demand discovery of Rule 404(b) material. Because the Committee will be proposing that change to the notice provision, there is an opportunity, and a responsibility, to examine whether the rule (and especially the notice provision) should be amended in any other respect. And the Conference can provide important assistance from experts in reviewing the operation of Rule 404(b) and in determining whether amendments are necessary.

The second and third topics were chosen so that the Committee could get advance comment from experts on whether the proposed rule changes to Rules 807 and 801(d)(1)(A) were workable.

The Committee invited a stellar group to participate in the Conference. Panelists included judges (Hamilton, Phillips, and Manella), and outstanding professors and practitioners from the Los Angeles area. The discussion was robust and incisive, and many helpful suggestions were made and debated. The transcript of the Conference will be published in the Fordham Law Review, along with accompanying articles by several of the participants.

At the Committee meeting, held after the Conference, Committee members discussed the many ideas and arguments raised by the participants. The Committee generally concluded that the Conference was excellent, and that it gave the Committee plenty to think about regarding Rule 404(b) and the proposed amendments to Rules 807 and 801(d)(1)(A).

Among the specific points raised by Committee members regarding Rule 404(b) were the following:¹

- There is a new trend in certain courts to require the government to explain precisely how a bad act is probative for a not-for-character purpose, and requiring that the showing of probative value for such a purpose proceeds through a non-propensity chain of inferences. A careful analysis is particularly important in cases where the asserted proper purpose is intent. The distinction between intent and propensity is very thin, if it even exists at all. And the instruction that is given to the jury about the distinction between intent and propensity is difficult if not impossible to follow.

- There is a huge difference among the circuits in the treatment of Rule 404(b) evidence. While some circuits are beginning to require an articulation of non-propensity inferences, other circuits are not --- in these latter circuits it is usually enough for the government to say that the evidence is offered for intent and knowledge, and the court finds that these issues are in dispute simply because the defendant has pleaded not guilty.

- Committee members agreed that it is important that bad acts be excluded if they are probative for a “proper” purpose only by proceeding through a propensity inference. Committee members also agreed that at some point the prosecution should have to articulate, and the court should have to find, that the stated proper purpose is shown through non-propensity inferences. But Committee members were not in agreement about whether Rule 404(b) should be amended to implement a more careful procedure than is being employed currently in some courts. One member stated that the solution would be to allow courts to be influenced by the cases decided by the Seventh and Third Circuits --- the two circuits in the forefront of requiring a more careful analysis under Rule 404(b). But another member stated that there was no assurance at all that other circuits would follow suit, and that any such process even were it to occur might take decades.

- Some members thought that a change should be made to the notice provision of Rule 404(b). That change would require the government to articulate specifically the purpose for which the bad act evidence is offered. That kind of notice might get trial judges to focus on evaluating the evidence for a proper purpose at the outset of the case. Judge Campbell responded that an expanded notice provision might not be effective in attuning the court to the issue, because the prosecution might articulate every possible purpose in order to avoid being precluded from some proper purpose at a later point. Thus the expanded notice provision might simply result in front-loaded makework. Another member noted that the real problem is not that the government fails to articulate a specific proper purpose, but rather that the purpose proffered is often dependent on an assumption that the defendant has a propensity. The Reporter stated

¹ Conference discussions regarding Rule 807 and 801(d)(1)(B) are set forth under separate headings below.

that if the rule is to be amended to require a showing of non-propensity inferences, that might be accomplished by adding language as follows:

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The evidence may not be admitted for such purpose, however, if the probative value of the evidence for that purpose depends on a propensity inference.

- One member argued that there is a tension between the two provisions in Rule 404(b). Subdivision (1) prohibits bad acts if offered to prove that a person acted in accordance with character, while Subdivision (2) states that evidence is admissible if offered for another purpose, even if it could also be used for propensity. The Reporter responded that this apparent tension is handled in two steps: the bad act is admissible for the proper purpose so long as the probative value of the bad act in proving that purpose (1) proceeds through a non-propensity inference (the Rule 404(b) question) and (2) is not substantially outweighed by the risk that the jury will use the evidence for propensity (the Rule 403 question).

- One member suggested a more comprehensive amendment that would delete the provision in Rule 404(b) that sets forth the proper purposes, and that would add the following to the notice provision:

If a prosecutor intends to use such evidence at trial, the prosecutor must:

(A) provide reasonable notice of the evidence that the prosecutor intends to offer at trial;

(B) do so at least two weeks before trial, unless the court, for good cause, excuses this requirement;

(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Judge Campbell noted that an effort to move up the timing of the notice (as provided in the above proposal) could be useful because it would make the court aware of the necessity to focus on whether the asserted purpose for the evidence proceeds through a non-propensity inference. He suggested that such a change could be accompanied by a Committee Note explaining that the timing of the notice is moved up because it is important to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings.

- A member of the Committee suggested that if the government were required to state the purpose for the evidence in the notice, there should be a good cause exception for situations in which a proper purpose comes to light at some later point.

- Another member stated that the current notice provision is problematic because it allows the government to give only a vague indication of the evidence it intends to offer. The rule currently states that the government must inform the defendant of the “general nature” of the

Rule 404(b) evidence. This member argued that in many cases the disclosure is so vague that it is impossible for the defendant to prepare arguments about the proper purpose of the evidence, if any. He suggested that the notice provision be amended to delete the term “general nature”--- so that the government would be required to “provide reasonable notice of any such evidence.” The Reporter noted that the Committee had already agreed on a description of what needed to be disclosed under a proposed amendment to Rule 807 --- the “substance” of the evidence. Perhaps using the term “substance” in Rule 404(b) would require more specificity than the current “general nature,” and would also provide uniformity with the notice provision in Rule 807.

After this extensive discussion, the Reporter was directed to prepare a memo for the next meeting that would present several drafting alternatives for a possible amendment to Rule 404(b), in light of the issues raised at the Conference. These alternatives include:

- deleting the reference in the notice provision to the “general nature” of the evidence (and perhaps substituting the word “substance”);
- accelerating the timing of notice;
- requiring the government to provide in the notice a statement of the proper purpose for the evidence and how the evidence is probative for that purpose by proceeding through non-propensity inferences.
- adding a clause to Rule 404(b)(2) that would specify that the probative value for the articulated proper purpose must proceed through a non-propensity inference.

III. Proposal to Amend the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be amended. Part of the motivation for an amendment would be to expand its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. Also, expanding the residual exception somewhat may make it easier to propose limits on some of the more dubious hearsay exceptions. And another reason for an amendment would be that the rule could be improved to make the court’s task of assessing trustworthiness easier and more uniform, and to eliminate confusion and unnecessary effort by deleting superfluous language.

At previous meetings, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted --- without regard to expansion of the residual exception. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is

common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy. This is especially so because a review of the case law indicates that the “equivalence” standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

- Trustworthiness can best be defined in the rule as requiring an evaluation of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional. And at any rate it is good rulemaking to delete superfluous and confusing language.

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

The Committee developed a working draft of an amendment to Rule 807 that was the subject of review at the Conference on the day of the meeting. The working draft is as follows (including amendments to the notice provision that have been previously approved by the Committee, but are being held back until any amendments to the other provisions of the rule are either proposed or rejected).

Rule 807. Residual Exception

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

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

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

(3) ~~2~~ it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

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

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address, -- including its substance and the declarant's name --~~ so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

At the Conference, some concern was expressed about expanding the residual exceptions, and about the unintended consequences that might occur in the application of the categorical exceptions if the residual exception is expanded. Most of the participants approved of the proposed changes, however, and most of the comments were that the changes were salutary without respect to expansion or contraction of the residual exception. For example, rejecting the “equivalence” standard in favor of a more straightforward reliability inquiry was useful simply because it made the rule easier to apply. And deleting the standards of “material fact” and “interest of justice” was useful because they fulfilled no independent purpose.

At the Committee meeting, members discussed the commentary on the working draft of Rule 807 at the Conference. Members also discussed a proposal by the Reporter to delete the “more probative than any other evidence” language and substitute the milder requirement that the statement be more probative than any other statement that could be obtained *by the declarant*. The Reporter’s rationale for such a change was that courts had used the existing “more

probative” requirement to tell a party how to try its case, i.e., that the party should not use residual hearsay when there was some other evidence, from any source, that it could use to prove the point. The Reporter argued that it should be up to the party to determine which evidence is most persuasive, and so long as the hearsay is reliable, there is no good reason to exclude it simply because there is some other evidence that might be out there to prove the point. Moreover, the party should have the option to offer *both* the reliable hearsay and the other available evidence, because the whole of that presentation might well be greater than the sum of its parts --- the existing “more probative” requirement mandates that the party must use the other evidence even if the residual hearsay could add to that evidence for a stronger presentation.

The Committee’s discussion about the residual exception raised the following points:

- Committee members were generally opposed to any change to the more probative requirement. Changing the mandated comparison from other available evidence to other statements of the declarant would generally mean that reliable hearsay would be admissible whenever the declarant was unavailable. That was the position taken by the original Advisory Committee, but Committee members determined that at this point it was not prudent to expand the residual exception to the Advisory Committee’s original conception. Rather, the residual exception should be crafted to prohibit unjust and unnecessary exclusion of reliable hearsay, while also prohibiting overuse and unbridled judicial discretion. While that balance might be obtained by tweaking the trustworthiness language, it would not be obtained by the overuse that would be invited in changing the “more probative” requirement.

- At the Conference, one speaker suggested that it would be helpful to include a reference in the trustworthiness clause to “the totality of circumstances.” This is a well-known standard and would emphasize that the trial court’s review of trustworthiness should not be limited. Committee members agreed that the working draft of a proposed amendment to Rule 807 should be changed to incorporate the “totality of circumstances” standard.

- Judge Campbell expressed concern that there would be substantial negative public comment to any change to the residual exception, because any such change would increase judicial discretion in admitting hearsay. He suggested that changing the language that Congress added to the Advisory Committee proposal in 1972 might upset Congress. And he stated that the public might not be convinced that the case for expanding the residual exception had been made, even though the Committee has reviewed every reported case from the last ten years in which the residual exception was discussed.

- One Committee member suggested that the proposed changes could be justified simply as improvements to the rule, without regard to whether the residual exception should be expanded or not. For example, the changes to the trustworthiness clause make it easier to apply --- alleviating the difficult-to-apply requirement that the court find guarantees equivalent to the exceptions in Rules 803 and 804. Moreover, specifying that the court must consider corroborating evidence is an improvement because it resolves a conflict among the circuits, and helps to assure that the court will consider all relevant information to determine whether the hearsay is trustworthy. Finally, deleting the superfluous clauses (material fact and interest of just) will eliminate confusion, as well as the need for the court to say, in every case, that the

standards are either met or not met when that decision is predetermined by other factors that the court has already considered.

Ultimately the Committee resolved to continue to consider the proposal to amend Rule 807 at the next meeting, focusing on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice. At the next meeting, the Committee will consider whether these changes can be supported as part of a good rulemaking effort, even if they do not result in expanding the residual exception.

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

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

Since beginning its review of Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

- Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent

statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about whether it was ever made. In such circumstances, it would be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

- If the concern is whether the statement was ever made, a majority of Committee members have concluded that the concern could be answered by a requirement that the statement be videotaped. It was also noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences. And it was further noted by some members that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee developed a working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements. A straw vote was taken at the Spring 2016 meeting, with five members in favor and three opposed. The working draft provides as follows:

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

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial;

or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

- (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
 - (C) identifies a person as someone the declarant perceived earlier.
-

At the Conference before the Committee meeting, participants generally were in favor of expanding the substantive admissibility of prior inconsistent statements. One participant --- who served as a state prosecutor in California, a state where all prior inconsistent statements are substantively admissible --- stated that without that rule many prosecutions (especially gang prosecutions) could not be brought.

After the Conference, the Committee discussed the working draft. The Committee's discussion raised the following points:

- One Committee member argued that expanding the exception could lead to abuse. The stated scenario was that a criminal defendant could coerce a witness to make a video statement that would exculpate him. Then, when the witness testified to the defendant's guilt at the trial, the defendant could admit the prior videotape as substantive evidence. There does not appear to be any reported indication that this abuse is occurring in the states where prior inconsistent statements are substantively admissible, but the Reporter stated that he would check the practice in those states for signs of abuse.
- Judge Campbell stated that it was a good idea to provide incentives for videotaping witness statements. But he feared that expanding substantive admissibility would also provide incentives to create video. He also expressed concern that with the increasing use and distribution of video, e.g., on YouTube and Facebook Live, an expanded rule would lead to broad use of such video, and this might be a problem.
- Another Committee member observed that given all the statements that are now being recorded, many might not be reliable --- though arguably that concern about reliability would be handled by the fact that the witness who made the statement would be subject to cross-examination about it. The member wondered whether there would be a category of cases that would be particularly affected by the change.
- Committee members generally agreed that if the amendment is to go forward, the language "recorded on video" should be changed because it is subject to becoming outmoded by technological change. Committee members suggested the term "audiovisual" --- which is the same term used in Civil Rule 30.

The Committee resolved to further consider the possible amendment to Rule 801(d)(1)(A) at the next meeting.

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that courts and litigants can use assistance in negotiating the difficulties of authenticating electronic evidence --- and that such assistance can be provided by publishing and distributing a best practices manual. The Reporter worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was reviewed and well-received by the Committee at a prior meeting, and also favorably reviewed at a Standing Committee meeting. The pamphlet is not a work of the Advisory Committee. It is a work of the three authors.

The Reporter informed the Committee that the best practices manual was submitted to the Federal Judicial Center, but the FJC declined to publish it in the form submitted, stating that it did not accord with the FJC template. The Reporter then negotiated to have the manual published by WestAcademic. West Academic published the pamphlet, and Greg Joseph provided his own funds to have the pamphlet distributed to every federal judge. The Reporter also obtained an agreement from WestAcademic to publish the best practices manual as an appendix to the yearly Federal Rules of Evidence book that WestAcademic publishes. Accordingly, the best practices manual will be updated every year.

The Committee congratulated the Reporter and his co-authors for arranging for maximum exposure of the best practices manual.

V. Consideration of a Proposed Amendment to Rule 702; Possible Symposium on Expert Evidence.

A law professor and another member of the public wrote an article asserting that courts are not following certain provisions of the 2000 amendment to Rule 702. That amendment provides that the trial court must find that an expert's opinion is based on sufficient facts or data (subdivision (b)); that the expert is using reliable methods (subdivision (c)); and that the methods are reliably applied (subdivision (d)). The article concludes that many courts are treating the questions of sufficient facts or data and reliable application as questions of weight and not admissibility.

The Reporter's memorandum to the Committee concluded that the article was essentially correct --- many courts are treating sufficiency of facts or data and reliable application as questions of weight. And this is directly contrary to Rules 702(b) and 702(d), which treat these questions as ones that the judge must decide under Rule 104(a). The question is, what to do about the reluctance of some courts to follow the rule as it is written. The Reporter suggested that any addition of words to the rule would be in the nature of "we really mean it" --- and if courts did not follow the rule before, there is no guarantee that they would follow it after such an amendment.

One member suggested that the rule might be amended to state specifically that the factual disputes over sufficiency of facts or data and reliable application were to be resolved under Rule 104(a). But another responded that this point was already evident in the Rule,

because those factors are set forth as admissibility requirements. Moreover, to add specific language about Rule 104(a) to Rule 702 would raise questions about why such references are not included for admissibility requirements set forth in other rules.

A Committee member observed that while an amendment to solve the problem highlighted was unlikely to be successful, this did not mean that consideration of amendments to Rule 702 should be off the table. Committee members briefly considered the possibility of a project that would evaluate whether Rule 702 should be amended to take account of all of the questions that have recently been raised about the reliability of certain forensic evidence, such as ballistics and handwriting identification. These challenges can be found in the case law, as well as in important reports issued by the National Academy of Science and, most recently, the President's Council of Advisors on Science and Technology.

The Committee then discussed the possibility of sponsoring a Symposium on the subject of forensic evidence and the challenges of admitting that evidence under Rule 702. That Symposium could be held on the morning of the Fall, 2017 Committee meeting. The Chair suggested that the Symposium could cover not only the challenges to forensic expert testimony, but also whether changes should be made more generally to assure that courts are undertaking the gatekeeping function established by *Daubert* and the 2000 amendment to Rule 702. The Committee resolved to revisit the question of possible amendments to Rule 702, and the possibility of a Symposium on expert testimony, at its next meeting.

VI. Recent Perceptions (eHearsay)

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

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person's presence --- for example, by a tweet or Facebook post.

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the

existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VII. *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 continues to remain in flux. And the fact that a new appointment to the Court (if any) might affect the development of the law of confrontation is a strong reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VIII. Next Meeting

The Spring, 2017 meeting of the Evidence Rules Committee will be held in Washington, D.C., on Friday, April 21.

Respectfully submitted,

Daniel J. Capra

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TAB 7A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

NEIL M. GORSUCH
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: November 27, 2016

I. Introduction

The Advisory Committee on Criminal Rules met on September 19, 2016, in Missoula, Montana. This report presents three information items.

- (1) Procedural protections for cooperating defendants (CACM recommendations);
- (2) Rule 5(d) of the Rules Governing 2255 Actions (right to file a reply); and
- (3) Rule 16 (discovery in complex cases).

II. Cooperators

The Criminal Rules Committee has under study proposals from the Committee on Court Administration and Case Management (CACM) for new procedures to respond to harassment, threats, and violence against cooperators. A Criminal Rules Subcommittee, chaired by Judge Lewis Kaplan, was appointed, and it has held several teleconferences.

A new Task Force, with balanced representation from CACM and the Subcommittee of the Criminal Rules Advisory Committee has also been appointed. Judge Sutton charged the Task Force with considering non-rules solutions—which would obviously involve a major buy-in from the DOJ and from the BOP—and seeking new ideas from the Criminal Rules Advisory Committee, CACM, and DOJ. Judge Kaplan chairs the Task Force, on which Judge Martinez (representing CACM) and Judge St. Eve (representing the Standing Committee) also play leadership roles. Judge Sutton also asked the Criminal Rules Advisory Committee, at a minimum, to draft a proposed rule and provide an analysis or an exposition of views as to the extent with which the Committee agreed or disagreed with the draft and why. From that point forward, the Task Force will try to see if common ground can be found on a proposal. The Task Force has had initial teleconferences, and it is developing working groups and a schedule.

III. Rule 5(d) of the Rules Governing 2255 Actions

At the April meeting, a Subcommittee, chaired by Judge Terry Kemp, was appointed to consider a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings that was drawn to the Committee’s attention by Judge Richard Wesley. The Rule states that “The moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

The Subcommittee presented its report at the September meeting, and discussion focused first on the reason for the conflict in decisions interpreting the rule and whether an amendment was an appropriate response. There was considerable support for the view that the text is, at least in part, creating the problem. The ambiguity stems from the reference to filing “within a time fixed by the judge.” This can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing. Indeed, some members acknowledged that they had previously been uncertain whether the rule granted a right to reply. One member said he had previously thought the rule to be clear, but now understood he had interpreted it incorrectly. Discussion then turned to whether an amendment was warranted in this situation. Some of the decisions denying the right to file a reply are more than a decade old, and the Committee saw little prospect that appellate review will correct the interpretation. There are a variety of barriers to correction by appellate review. Many of the prisoners involved in these cases are not represented by counsel. When appeals are filed, they are not likely to focus on this issue and brief it extensively.

Members also discussed the question whether an amendment might cause new problems. Noting that the style consultants had expressed concern that the amendment should not cast doubt on the meaning of “may”—a term used throughout the rules—the reporters presented examples of language which would clarify the intent of the rule without raising concerns of that nature. For example, the current single sentence might be divided:

The moving party may submit a reply to the respondent's answer or other pleading. The reply must be submitted within a time fixed by the judge.

The reporters noted that this language (and several other alternatives) had not yet been reviewed by the Subcommittee or the style consultants.

Members also discussed briefly the question whether any amendment should include a time for filing. The Administrative Office surveyed local rules and orders on the time for filing, finding very wide variation in the times for filing which may reflect differences among districts. There was no consensus on whether it would be desirable for the rule to set a presumptive time limit or specify that some time period for filing must be fixed by judge or local rule. This issue will be discussed further by the Subcommittee.

Discussion concluded with a request that the Subcommittee move forward with drafting an amendment, consulting closely with the style consultants. It is anticipated that the Subcommittee will bring a proposed amendment to the Committee for consideration in April.

IV. Rule 16

At the April meeting, a subcommittee, chaired by Judge Kethledge, was appointed to study a proposal that Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. In support of a proposed amendment, The National Association of Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) stated that prosecutorial discovery is a significant problem in complex cases that involve "millions of pages of documentation," "thousands of emails," and "more gigabytes of information." Their proposal provides a standard for defining a "complex case" and steps to create reciprocal discovery.

At the September meeting, Judge Kethledge reported the Subcommittee's conclusion that the NYCDL/NACDL proposal was far too broad, but there might be a case for a narrower more targeted amendment. Discussion turned first to the question whether there is a problem. There was considerable agreement that the most experienced judges have handled the issues of concern to NYCDL and NACDL within the existing rules. Moreover, the Department of Justice and members of the defense have developed a protocol for dealing with the discovery of electronically stored information. But members of the defense bar report that they continue to experience problems. Not all judges have experience with these issues, and some simply rely on Rule 16. The protocol is not well known, and they have not had a significant effect on practice.

Members discussed alternatives other than an amendment, including judicial education and the preparation of manuals or other materials that might be of assistance. Although there

was agreement that such measures would be useful, they could supplement, rather than replace, an amendment.

After discussion, the Committee agreed with Judge Campbell's suggestion that it would be desirable to use the mini-conference procedure to get additional feedback on both the threshold question whether an amendment is warranted and on specific language. The Subcommittee is now planning the mini-conference, which is tentatively scheduled to be held in Washington on February 7, 2017.

TAB 7B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
September 19, 2016, Missoula, Montana

I. Attendance

The Criminal Rules Advisory Committee (“Committee”) met at the University of Montana in Missoula, Montana, on September 19, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge David G. Campbell, Incoming Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Shelly Cox, Rules Support Office

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Molloy welcomed the Committee, made introductions, and invited Standing Committee Chair Judge Jeffrey Sutton to speak. Judge Sutton thanked Judge Molloy for hosting the Committee in Missoula. He congratulated Judge Molloy on his long service and for the honor of having a courtroom named after him there in Missoula.

B. Review and Approval of Minutes of April 2016 Meeting

Judge Molloy directed the Committee's attention to the draft minutes of the April 2016 meeting. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the April 2016 meeting minutes by voice vote.

C. Status of Pending Amendments.

At the invitation of Judge Molloy, Professor Beale asked if any members had comments or questions about the draft minutes of the last Standing Committee meeting. Hearing none, Judge Molloy asked Ms. Womeldorf to report on the status of pending Rules amendments.

The proposed amendments to Rules 4, 41, and 45 were approved by the Supreme Court and transmitted to Congress; if Congress takes no action before December 1 the proposed amendments will become law. She reported that legislation has been introduced to block the amendment to Rule 41, but a hearing before the Judiciary Committee has not been announced. Members confirmed this understanding. Judge Molloy noted there was an identical bill in the House. A member added his belief that nothing would happen this fall, but there may be some activity in the next session. Professor Beale noted that if there is a hearing it might be helpful to respond directly to claims that the Rules process was not transparent. Responding to a question about whether more outreach to legislators is needed, Judge Sutton noted that many contacts have been made to attempt to counter the misleading claims about the process, and additional efforts are probably not needed right away. Another member indicated his impression that critics of the amendment are opposed to the substantive and policy issues, not what the Committee has done concerning venue.

The proposed amendments to Rules 12.4, 45, and 49 have been approved by the Standing Committee for publication. Professor Beale noted these proposed amendments were published August 1, and so far no comments have been filed. But that most comments tend to come in at the last minute before the deadline, February 15. It is helpful to get comments earlier, particularly from groups that are likely to comment. Ms. Womeldorf noted that dates for two public hearings have been scheduled, but hearings go forward only if there is sufficient demand. Ms. Womeldorf also noted that in addition to being published in the Federal Register, proposed amendments are sent to every federal judge, as well as a listserv of thousands of people. She added that the rules process worked well with Rule 41, as some of the current critics chose to testify, the Committee held hearings and considered those comments. Professor Beale said that because Rule 49 is linked to similar changes in the other rules, there will likely be issues raised that will require coordination with other committees. The Rule 49 Subcommittee will provide its recommendations on any changes to the Committee at the April meeting.

III. Criminal Rules Actions

A. Rule 5 of the Rules Governing Section 2255 Proceedings (15-CR-F)

Judge Molloy asked Judge Kemp, Chair of the Rule 5 Subcommittee, to report on the Subcommittee's work on Rule 5 of the Rules Governing Section 2255 Proceedings. Judge Kemp agreed with Judge Molloy that this issue turned out to be more nuanced than it first appeared. He praised the Reporters' memorandum, and presented a summary. He began with the history of the 2004 amendment that added the provisions regarding the reply: "A moving party may submit a reply to the respondent's answer or other pleading, within a time fixed by the judge." The intent of that amendment was to make it clear that this was a matter of entitlement, and the judge does not have the discretion, through an order or a local rule of court, to deny the right to file a reply. But this has not been the consistent interpretation of the rule, and some judges have denied the opportunity to file a reply. Judge Wesley of the Second Circuit Court of Appeal raised this with the Committee, noting there are a number of district court decisions stating the rule continues to give judges the discretion to deny a reply.

Judge Kemp reported that the Rule 5 Subcommittee met by telephone in August to discuss whether there is a problem with the language of the rule requiring clarification by amendment, or just a misinterpretation by some judges of an unambiguous rule. Discussion also included whether there is any alternative, other than amending the rule, that would address the problem. The Subcommittee at that point was not enthusiastic about amending the rule, and asked the Reporters to investigate further potential alternatives. Judge Kemp noted that the Reporters' memo in the agenda book goes through why these various alternatives are not appropriate ways to address this. He agreed none of these alternatives are viable.

Judge Kemp asked for a sense of the Committee on the core issue. Is this a situation where the rule is clear, and it would be best just to wait for judges to correct their interpretations? Or is the language of the rule contributing to this problem, and accordingly the rule should be amended? He stated that he was in favor of an amendment. There was no consensus at the Subcommittee level about the need to amend the rule or the language and it had not yet had a chance to consider the most recent Reporter's memorandum in the agenda book. He noted that research had revealed that the rationale of some decisions did point to the language in the current rule, which is not as clear as it would be if it simply said the moving party may submit a reply, period. He noted that a number of potential alternative phrasings for an amendment are in the memo.

Judge Kemp added that the Subcommittee also looked at a secondary issue: whether there should be a presumptive time limit for filing a reply added to the rule. Helpful research from the Rules office revealed that the time limit for filing replies is not consistent from district to district or judge to judge, and that time limits initially set are often extended. He noted there was no strong feeling by the Subcommittee that there ought to be a time limit added to the rule.

Finally, Judge Kemp explained his own view that an amendment to clarify the entitlement to file a reply is warranted. Often the petition is relatively bare bones. The government's response goes into more detail, and frequently includes issues the petition does not address. The arguments of the petitioner or movant on these new issues and substantive arguments come first in the reply. So not only is denying the opportunity to file a reply inconsistent with Rule 5, Judge Kemp explained, it also has the potential to have a substantive impact on these proceedings.

Judge Molloy asked if one of the problems with this particular interpretation of the rule is that it is almost impervious to appellate review. Judge Kemp agreed, and explained that no appellate decision addressing this division could be found, even though the problem has been around for twelve years. He noted that appellate decisions reviewing these cases tend to focus on aspects of the cases other than this procedural issue.

Subcommittee members then commented. One member reported her initial view that a rule amendment was not necessary because judges rarely denied the right to reply. It felt like using a sledge hammer to hit a flea. There was also a concern that an amendment that made the filing period more specific would cause problems since districts manage this so differently. But she had changed her mind based on others' comments, the explanation in the Reporters' memo that alternatives to a rule amendment to address this would not work, and the examples of potential amendments that would not require adding more rigid or specific language to the rule about timing. Compared to the clarity of Rule 11, which is also on the agenda and needs no clarification, the lack of clarity in Rule 5 suggests an amendment may be warranted.

Another member agreed, stating he favored options in the memo for amending the rule that would break out the two parts of the provision. He agreed that indicating a time period would be inappropriate given the variation in local practice and mostly pro se litigants filing these cases. He was persuaded that some of these decisions denying the opportunity to reply are relying on the current language of the rule.

Professor Beale pointed out that the suggested alternatives to avoid triggering the concerns of the style consultants are just illustrative and that the style consultants have not reviewed them.

One member thought it would be better if we could change the Note without amending the rule because the rule is clear. Unfortunately, that is not possible. Another member indicated that restricting the opportunity to reply was not a problem in his district.

Ms. Morales stated that the Department believes Rule 5 is clear. This problem is arising in just a handful of the thousands of Section 2255 cases filed every year, she said, and it is not enough of a problem to warrant a rule change. DOJ's appellate chiefs are comfortable that you won't see this again, and she didn't think a brief similar to the one discussed in the memo would be filed again. But Morales conceded she does not know what might happen years from now,

and she observed that Section 2255 cases typically do not go to the most experienced attorneys. She added that because the rule is clear, it doesn't seem viable for the Department to instruct all of its attorneys on this specific issue, and she agreed with Professor Beale that it would be somewhat odd for the DOJ to be responsible for something the judge is supposed to do.

Professor Beale said she'd come around to thinking that the harm in clarifying the rule and running it through the amendment process was negligible, and that the amendment may have a significant benefit to the courts and moving parties and petitioners who have a point to make and deserve to be heard.

Professor King explained that the count of decisions found on Westlaw discussed in the memorandum is not a reliable measure of how often courts deny the right to reply. Most of these decisions and orders do not necessarily end up on Westlaw. Denial of the opportunity to file a reply has occurred in at least this many cases, but we cannot know the actual proportion of cases in which an opportunity to file a reply is being denied. Judge Kemp added that if replies are being denied consistently by all the judges in the districts that include a decision denying a reply, it is affecting about ten percent of cases. Others noted that it is not known if the practice is consistently applied in those districts currently or whether it is the practice of every judge in those districts.

One member indicated he supported an amendment and that it is unacceptable to deny the opportunity to file a reply. First, the reply is the first time to get into the nitty gritty of the substantive issues. Second, the reply is the first time to respond to the various procedural issues raised in the answer, including the issue of procedural default. Rule 5 is being misinterpreted in a non-trivial number of instances, and although it seems clear, some fault may lie with the language of the rule. The language could be improved to make it perfectly clear that the petitioner or movant gets to file a reply; this member favored the first proposal on p. 138 of the agenda book.

Another member agreed the Subcommittee had hoped to find some other way to cure the problem, but the Reporters' memo has shown these alternatives will not work. There is no harm in amending, this member agreed. The word "may" is what caused the problem, so this member stated a preference for getting rid of the word "may" and substituting "entitled." On the time for filing, this member preferred that the Rule include a default period for filing in case the time period for filing is not specified by local rule or by the judge.

Other members agreed there should be an amendment to clarify the Rule. One noted he always had thought the Rule was clear, but thought it meant exactly the opposite of what it actually does. An amendment would be helpful. Another member suggested that the Rule is there to make sure that litigants are properly treated. Because it appears that they are not being protected by this Rule, the Committee ought to clarify it. And a third member said he'd always been confused by the word "may," and that a change that would clarify the meaning of the Rule would be helpful.

Judge Sutton pointed out that one of the things the Rules Committees do is address circuit splits and here, for the reasons in the memo, it appears this issue does not reach the appellate courts. Attempting to address the non-trivial number of district court cases that have misinterpreted the Rule makes some sense. On the “may” point, he stated, it is important to be disciplined about using the same, consistent language across all of the Rules. The Committee should avoid creating negative implications for other rules by getting rid of the word “may” here; this supports an amendment that doesn’t change the meaning of the word “may.”

Judge Campbell stated this was a real problem with a simple fix, and that in his view the language is not clear now. He recommended simply splitting the current sentence in two by adding a period, and stating in the Committee Note that the movant gets a reply in every case.

Another member agreed and said that the style consultants’ concern about negative implication from any amendment was misplaced here because of the second clause. It was the style consultants’ suggested rephrasing that creates problems because it adds new concepts with its new clause “although the judge.” This member recommended simply separating the two concepts so that the entitlement is not blended with judge’s control of timing.

Another member agreed this should be an easy fix and wondered if the second sentence is even needed. Another member responded that the Rule needs to refer to “fixed by local rule or by the judge,” because otherwise it may create an unnecessary burden for district judge to set a scheduling order in every case.

Judge Kemp interpreted the comments of Committee members as suggesting that the Subcommittee should go forward with drafting an amendment, and that it should talk further about whether there needs to be some presumptive time limit. Professor Beale noted again that the style consultants will have to address the language of any proposal carefully. Professor King stated that the Committee members’ comments suggest that, even if the Subcommittee decides that no specific time period for filing a reply should be added to the Rule, it should consider the separate issue of whether the Rule should specify that some time period for filing must be fixed by judge or local rule. Some members might not want the Rule to require that, but in reading these cases the failure to fix a time sometimes raised problems. Requiring a time to be fixed by a judge or local rule may eliminate those problems. She hoped that members with any additional feedback on these issues will provide it to the Subcommittee.

Judge Molloy indicated that the sense of the Committee was that the Subcommittee would work on proposed language for an amendment, a simple fix preferably, with a recommendation about the time period for filing, and bring it to the Committee for consideration in April.

B. Rule 16.1 (15-CR-B)

Judge Kethledge, Chair of the Rule 16 Subcommittee, stated that at the last meeting the Committee considered a proposal by NYCDL and NACDL to amend Rule 16 to govern judicial management of discovery in complex cases. The proposal was extremely prescriptive, and there was widespread opposition to it at the meeting. The Committee set the specific proposal aside and discussed cases that involve extremely complex financial transactions or massive quantities of data, including a case with hundreds of thousands of audio tapes. The Committee recognized that if the judge fails to recognize and address the difficulties that this overwhelming discovery can pose for defense counsel, counsel's ability to prepare for trial can be impaired; cases that perhaps should be litigated and go to trial may be settled for reasons unrelated to the merits. Judge Molloy appointed a subcommittee and asked it to look at the issue.

At the Subcommittee's first call, Judge Kethledge reported, members decided that the bar proposal was a non-starter, because you can't prescribe wisdom. But the Subcommittee thought it was worth considering a more modest proposal, and the consensus was that it would be useful to create a process that would allow counsel to direct the court's attention to the problems that the defense faces in these kinds of cases. Judge Kethledge stated that this problem is not going to arise in the courtroom of an experienced judge, highly engaged, who will craft case management orders to accommodate these situations. The concern is that if the judge is inexperienced or not as engaged as he should be, Rule 16 procedures become the default and as a result counsel will have great difficulty preparing for trial. The Subcommittee tried to come up with a mechanism to allow defense counsel to engage the court with the problems these cases pose and discussed a number of factors the court could use to consider whether a case is "complex" (a term that is probably too broad).

Several alternatives were drafted after the call, he stated. One was longer, intended to assist judges dealing with this sort of thing for the first time. The first section listed a number of factors to get the court thinking about the difficulties counsel is facing dealing with the volume of data. The second section provided measures that the court could consider if the court determines that a case is complex. The third section provided actions the court could take if the court it has implemented measures and one of the parties does not comply. A second version was much shorter and did not lay out all the factors and measures, leaving these to the accompanying Committee Note. Subcommittee members' feedback before the second telephone conference suggested that something in between would be better. A third alternative was drafted that simply says the party can move to have the court determine if a case is complex; if it is complex the court can consider measures that would facilitate preparation for trial; and finally non-compliance could be met with any measure that would advance the interest of justice.

During the Subcommittee's second call, Judge Kethledge said, DOJ expressed the concern that the term "complex" is broader than the problem at hand. If the problem is overwhelming discovery, the term complex captures more than that, such as cases in which expert testimony is particularly difficult. Judge Kethledge reported that the Subcommittee has

asked the Department to suggest more narrowly tailored language that would not raise these concerns. He suggested that the Committee's process might parallel its development of the amendments to Rule 41: the Department came to the Committee with some general language, and the Committee revised the proposal to be more narrowly tailored to address the particular problem the Department had raised.

Ms. Morales agreed that the Department believes using the term "complex" will invite a host of problems. DOJ could support an amendment that would be narrowly targeted to specific sorts of cases, that invites the court to stop and consider whether these cases require some adjustments. But the language of the Subcommittee drafts opened Pandora's box and raised a lot of issues. The Department has drafted two versions which have yet to be approved for submission to the Committee, but she was optimistic that a compromise can be reached.

Another member suggested that the proposed amendment might use "may" instead of "must," and he spoke against narrowing the potential rule. He said that some members had suggested that the rule would make sense in electronic discovery cases, but he is not sure what "an electronic discovery case" is. For example, he described a case in the SDNY, with 18 defendants and 24,000 calls with wiretap materials, and another case with 500,000 audio tapes. "Complexity" does cover more than digital issues, he asserted. He recognized that there may be a need to triage and deal with electronic issues specifically, but the Criminal Rules should be able to accommodate another avenue. This is needed to ensure that judges cannot force trials without allowing proper discovery and without the defense having the opportunity to understand what the charges are and the proof will be. He said he was not sure what the Pandora's box would be other than fairness to the defense.

One member noted there is a lot of scar tissue in this area, as generations of proposals to amend Rule 16 have come and gone, making it more difficult to address. He hoped that compromise language can be reached, and that it will result in a small positive step forward. But the reality, he said, is that you have to trust the common sense, pragmatism, and practicality and of district judges, and you can't legislate through Rule or otherwise how to handle pretrial proceedings or access. For every litigant operating in good faith, he commented, there is another trying to figure out reasons to delay a trial or put 400 associates on a case to generate a gajillion gigabytes of data. Sometimes judges get frustrated. Sometimes the tribunal doesn't give as much access as it should. But that would be hard to deal with by rule or otherwise. Appellate courts, knowing how successful trial judges have been in the past, are not going to be keen about trying to manage, outside the bounds of abuse of discretion, how trial judges handle this.

Another member said it may be more helpful to have something in the rules about electronically stored information than it would be to attempt to regulate the discretion of district judges in designating particular complex cases. He said it may be helpful to have hearings or engage in fact-finding efforts to find out exactly what the problem is and what would solve it, to obtain a better understanding of the facts from the defense bar and the government regarding which cases need the most attention.

One member said he was pleased the NYCDL/NACDL proposal was a non-starter with the Subcommittee. He also saw real downsides to the drafts. One draft was so general it didn't say anything at all. Another would transform whatever litigation now takes place concerning claims that the trial judge in a big criminal case has not adequately accommodated the interests of the defendant in a fair trial, whether by aggressive scheduling or insufficient discovery. He said the draft would turn the current claim--that the judge's abuse of discretion resulted in a fundamentally unfair trial that didn't conform to due process—into an argument that nitpicks every term in the Rule. He warned that litigation would question whether the judge adequately considered the complexity of the charged conduct, what quantity of documents is too many, what is the meaning of “likely to be disclosed,” etc. Any rule carries unforeseen complications beyond the due process we have now. The problem of inexperienced judges encountering one of these cases also occurs on the civil side, and the solution is very different than what is being proposed here. There is a manual for complex litigation and conferences to educate judges with multi-district litigation. That has worked well without any rule amendments. This approach should be pursued instead of a Rule, if the problem is inexperienced judges.

Another member agreed that these training opportunities could be a supplement to a Rule, but also noted that the Civil Rules—unlike the Criminal Rules—provide for discovery, requiring that the defense be provided with the evidence and witnesses. Normally you can figure out the charge, he said, but when you have hundreds of thousands of tapes and gigabytes of data with no index, and you do not know what evidence the government is going to use to prove its case, it is impossible for the defendant to figure out the defense. It is essential for the defense to know where to find the evidence that is relevant is and what the government is relying on. Unless judges are required to consider how to give the defense access to that information, there cannot be a fair trial. This member also disagreed that the defense would ever want to pour through hundreds of thousands of tapes; the defense wants to know which tapes are relevant and might rebut the government's interpretation of the evidence. He noted that even sophisticated judges sometimes do not feel the need to allow access needed for a fair trial. If the defense were given the index and the government were forced to identify what its exhibits were, the likelihood is that there would be more dispositions sooner. Professor Beale asked if these issues are heightened in the criminal context because of the bare-bones pleading requirements. The member replied that it was both the pleadings and the discovery rules. He added that in criminal cases—unlike civil cases—there are no special masters, magistrate judges closely handling discovery, or interrogatories for the witnesses that will be called.

Another member stated that if the defense could get the civil discovery rules and the time to conduct discovery, she would give up this proposed rule in a minute. The differences between civil and criminal discovery are overwhelming. In 85- 90% of cases defenders in federal cases represent poor people, and in those cases they must go to the judge if they want an expert. That complicates the situation enormously because the judges rightfully have discretion as to how much to spend, who you can hire, at what point you can hire them. Most defense counsel who get huge electronic discovery cases and huge multi defendant cases need someone to give their time and expertise to work on those cases. Although the protocol for sharing electronically

stored information exists, and many people worked really hard on it, it isn't followed, though not because the Department of Justice is deliberately failing to follow it. But the Department of Justice is huge. And its lawyers change. They got the protocol, and they understood it, and then they left. So Federal Defenders are constantly trying to work to get just a table of contents for these huge cases, and they don't always get even that. This is a real problem, she concluded, it impacts all criminal defendants, and it would be worth this Committee's time to do something to make the situation better, even a small first step.

Ms. Morales responded that this may be more of a resource and training issue, rather than a rules issue. She expressed concern that the language of the drafts under consideration by the Subcommittee would invite litigation and confuse Rule 16 further, and hope that the Departments' proposed language will address the issues raised. The ESI protocol includes a pocket guide for judges, which is the result of years of work of collaboration between the Department and Federal Defenders. She said the Department's drafts will reference it. Technology moves quickly, raises many different issues, and requires very careful consideration. The protocol and pocket guide address these issues, and the draft could point directly to the pocket guide or summarize some of those measures.

A judge member stated this is an issue that needs to be addressed, noting he has had several cases in which just before trial defense counsel said "We just had dumped on us this many audio tapes and this many documents." The member's initial reaction was wishing this had been brought to his attention earlier so he could have done something about it, or that the parties could have worked this out. A judge has the authority to regulate these matters and facilitate discovery in this way if the parties cannot work it out themselves. As to how best to bring these issues to the attention of the bench and bar, although the non-rules mechanism are great ideas, this member said but the best way would be by a rule. If there is a rule, everybody knows about it. Any rule, he said, should put the onus on defense counsel to bring this issue to the court's attention. It is the defendant who is being burdened, and judges should not have to guess when a problem might arise or raise something that might be a can of worms that otherwise wouldn't have been opened. The member favored brevity in a rule as opposed to some sort of detailed code, and thought that electronic discovery is an acceptable way to define the types of cases, but only if that term encompasses voluminous audio tapes.

A member noted that managing criminal discovery is different than civil discovery where lawyers have to do more work. This judge said she took the lead from the defense counsel in criminal cases as to what they need and that in her experience at least one of the defense counsel will take the lead and ask for what they need. Any rule should tell judges what kinds of things make a case complex. Sometimes a case is not complex case in a general sense, but there are thousands of wiretapped conversations, and it is the quantity of discovery and how time consuming they are that causes problems. A new judge would want to know what are the things that make the case complex, so if it is the volume of discovery, the rule should say that so that a judge new to criminal cases will know. The judge may not see this until somewhere later down

the road, and if the judge needs the reins a little bit early on, it would be good to have a laundry list of factors.

Another member agreed with the comments of the last two speakers and added that like Rule 17.1 (which states the court may hold pretrial conferences) a new rule could highlight the judge's options. The note could probably explain hypothetical cases that might need attention. Just like 17.1, a short rule could let judges know you can do this on your own, without a defense motion (though it will be the defense lawyer making the motion in the vast majority of cases). And an amendment could help with the case budgeting process, knowing the defense will be going over the CJA limit because they anticipate this sort of discovery, which will be more involved than the ordinary case. A rule would bring it to everyone's attention. Manuals and conferences are also avenues, but this member favored something brief like Rule 17.1 that leaves the discretion to that judge.

One member observed that the proposal was asking for more active judicial management in handling discovery in criminal cases, and also strongly supported the idea of having the Federal Judicial center provide complex criminal case training.

A member responded to an earlier comment about the impact of a rule on appellate litigation, saying he didn't know what would be so bad about the courts of appeals having to articulate guidelines for what constitutes a fair trial. He asked why is it a problem to tell trial judges that defense lawyers need to know what the evidence will be, and that they need an index so that they can find it.

Judge Campbell observed that what is proposed in this rule is something judges already have the authority to do. Judges already can hold status conferences, set schedules, and at least in one circuit, require witness lists from the government and exhibit lists in advance of trial. The question is what do you do with the weakest of judges in order to get them to focus on it and think about it. He noted that the Civil Rules Committee has wrestled with this on the civil side. You write rules for the worst case managers recognizing that the good judges don't need the rules at all, he said.

He said he was surprised that there are complex cases in other districts that are not already coming to the attention of the judges early in the case. Complex cases come to his attention regularly by motions, filed primarily by defense attorneys, asking him to designate a case as complex for purposes of the Speedy Trial Act. The motion is invariably accompanied by a request for a case management conference. He orders the parties to work this out, they provide their agreement, and he tweaks it a bit. If a complex case does not come to his attention under the Speedy Trial Act, he said, they come in under the Criminal Justice Act because the defense lawyers want to get that budget early on, anticipating that it is going to exceed the prescriptive amount.

On fact finding, Judge Campbell reported that the Civil Rules Committee found it useful to hold a focus group meeting, called a mini-conference, with about 25 lawyers, judges and some academics representing a broad spectrum of views, who meet for a day with the subcommittee that is addressing an issue. He said that a month or two ahead of the meeting attendees were sent a list of things being considered, including proposed language changes. They were asked to come prepared to address those issues. The Committee tried to invite people who were involved in bar groups, who would canvas the position of those groups. The day-long session with these very well informed people helped the Civil Rules Committee get a much better sense of what is happening on the ground and how the rules may make a difference.

Judge Sutton expressed support for the criminal equivalent of the manual for complex civil litigation. He agreed with the suggestion that the Committee should study how the ubiquity of email and new technology has changed discovery in criminal cases, whether that leads to rulemaking or not. He expressed some skepticism about a rule. He reported that about 10 years ago the Appellate Rules Committee met at Emory to ask Professor Freer to critique the Rules process. Freer's basic thesis was that the Rules Committees do way too much "small ball," enacting one technical amendment after the other to correct whatever silly problem, on the assumption that such amendments do no harm. But 10% of the time there is harm from amendments because of unintended consequences. And the broader harm is that the Rules have become too complex, increasingly inaccessible to someone who just graduated from law school. Judge Sutton recommended being more careful with the small-ball amendments and not assuming they are cost-free. Professor Freer was very frustrated that we rarely took on big bold projects or stepped back and asked what we are doing here. What concerns me about the proposals before the Committee, Judge Sutton said, is that they seem to be the epitome of small ball. What is added by the language in the shortest version of the rule, which seems so obviously true? On the other hand, he was very skeptical that we could get bolder version of the amendments done. They would be similar to the Rule 16 Brady amendments. Rule 16 has a big graveyard of proposals, he noted, and DOJ will oppose any bold proposal. So it looks like the options are an amendment that accomplishes very little or facing difficulties in getting approval for a bolder proposal. He suggested further study, including a conference to bring in experts and people who know what is going on. Finally, he said, he was skeptical of importing anything from the civil rules on discovery into the criminal rules.

A member followed up, stating that a substantial body of precedent with the Jencks Act and bills of particulars will make it hard to do anything really bold. He also observed that this discussion about post-indictment discovery is primarily about prosecutions of individuals, because corporations tend not to get to this point.

Judge Kethledge stated that he heard that more clarity about the problem we are addressing is needed, and that the suggestion of more fact finding at a mini conference is a good one. Judge Molloy stated the Subcommittee with its current chair should consult with Judge Campbell about past conferences. He said the proposal makes a legitimate point, but we can use the conference to explore whether this is a judge problem or a rule problem.

C. Cooperators

Judge Molloy asked Judge Kaplan, Chair of the Cooperators Subcommittee, to give a report of the Subcommittee. Judge Kaplan reported that up until June the Subcommittee had been gathering information and looking into questions it had about the survey that underlies the CACM report. It had received a memo from the reporters on First Amendment issues and made other efforts summarized in the agenda book. The Subcommittee had two lengthy conference calls. At about that time, CACM published to all of the district courts what it called “interim guidance.”

After talking to Judges Molloy and Hodges, Judge Sutton proposed a different way of attacking this problem: the creation of a task force with balanced representation from CACM and the Subcommittee of the Criminal Rules Advisory Committee. Judge Kaplan would chair the task force, and Judge Martinez and Judge St. Eve would also play leadership roles. The rest of the membership had not been determined, he said. He suggested that the task force broaden the focus to include non-rules solutions—which would obviously involve a major buy-in from the DOJ and from the BOP—to seek new ideas from the Criminal Rules Advisory Committee, from CACM, and from DOJ. Judge Kaplan said that Judge Sutton had indicated that he personally intended to make it a priority to get constructive participation in the task force from the Bureau of Prisons and from the Justice Department. Judge Sutton, Judge Kaplan continued, asked that the Criminal Rules Advisory Committee, at a minimum, draft a proposed rule and provide an analysis or an exposition of views as to the extent with which the Committee agreed or disagreed with the draft and why. From that point forward, the task force would try to see if common ground can be found on a proposal.

Procedurally, Judge Kaplan continued, the Cooperators Subcommittee will draft a rule and develop a position for consideration by the full Committee in April; the full Committee will come to some conclusion, which will then be brought back to the task force. In the meantime, the task force may focus on the DOJ and BOP side of things.

Beyond that the plan was not yet fully developed. Judges St. Eve and Martinez would be meeting with Judge Kaplan in New York on September 27. Once the Rules Committee and CACM finish their work, the task force will attempt to bring order to the situation. Judge Kaplan said he understood from Judge Molloy that Judge Hodges is thinking about a somewhat altered proposal from CACM, and we look forward to seeing what develops and working cooperatively with CACM in an effort to produce a consensus on what is a very, very difficult problem.

Judge Sutton expressed concern that the issue of protecting cooperators has been around since about 2007. CACM said they thought it was a problem and gave it to Criminal Rules, Criminal Rules said we’re not sure there is a problem, was concerned about the First Amendment and not sure there was a rules solution. CACM agreed to do a study, and the FJC study found 571 assaults or threatened assaults, and 31 murders. CACM concluded there is a serious problem. CACM and the Rules Committee have two very different approaches to this problem

and two very different senses of how severe it is. He was afraid that we were about to repeat history and end up in the same place, so it made sense to have a task force—which has no power—to bring together the stake holders, including the clerks' offices whose representatives are likely to know what will or will not work. He said he'd been working to identify two or three public defenders with different positions on this issue and see if the three of them could come up with something they could agree on. We have about eight months for each of these stake holders to come forward with ideas that they think might work. In the case of Criminal Rules, he said, he thought it would be helpful to have some proposed language on the table, and it wouldn't necessarily have to be a single rule. There is more than one way to do this. He added that it is likely that to have a national solution you'll need a rule amendment, but a much narrower one than what's been contemplated. Probably we will also have something from CACM saying these are the ways we'll process these cases. The idea is to get open-minded thinking and try to achieve a consensus. This is a priority of the judiciary. The Executive Committee of the Judicial Conference recently met with the Attorney General, and this is the first thing they raised with her. At the recent Judicial Conference meeting, a discussion of the CACM guidance became a discussion about the task force and potential solutions. There was no criticism of this approach, and there were comments that this was a cross committee issue. CACM is doing more research on the constitutional issues, Judge Sutton reported. He said he was not inclined to think the First Amendment issues stand in the way of any rule amendment. This is a complicated issue, which is entirely technology driven. Twenty or thirty years ago an enterprising gang leader could go to the court files to identify the cooperators, but they were lazy and didn't do it. Now PACER, CM/ECF, and technology have made it very easy to identify cooperators. It's hard to say it is just a BOP/DOJ problem because the courts' files are part of this. Judge Sutton stated that there is no doubt that the main problem is with the DOJ and BOP. But it is hard to take the position that it is for them to fix, and we can just do what we do in each district court across the country.

Judge Molloy said that Judge Hodges had a strong feeling that unless there was a uniform national policy, it was all for naught. Judge Molloy asked Ms. Hooper if there was any correlation between the most recent data provided by the BOP and the FJC study. She responded she would be happy to look into that if the BOP data were forwarded to her.

Ms. Morales stated the Department does view this as a priority and looks forward to working on the task force. DOJ doesn't work in a vacuum, and can't solve the problems alone. DOJ has heard from AUSAs seeking to protect cooperators that judges had sometimes denied requests for sealing. We do have to work together, she said, and DOJ thinks the task force will be very productive.

At Judge Sutton's request Ms. Morales agreed the Department would come forward with three or four recommendations for the Task Force regarding how this problem should be addressed as a team. She said that the BOP has already adopted the recommendations of CACM, and the AUSAs office are already adopting some as well. She repeated that the Department is not sure that the Rules are the place to go for this. It is a serious problem, she said, but there are 10,000 people who get credit for cooperation every year. So it is really a small subset of cases,

and of those, we don't know how many got that information from court documents. We are very willing to work on it and a task force with different stake holders where we can brainstorm about measure we can take that may or may not be in the form of rules could be very productive.

Judge Sutton responded that the premise is not just to brainstorm, but that each set of stake holders will come forward with three or four concrete ideas about how we can improve things. Everyone agrees we can't eliminate all murders, all threats, and all assaults. But we can do a better job, he said, particularly if each stakeholder comes forward with something concrete.

Judge St. Eve stated that the task force will be guided in part by CACM's tracking of what jurisdictions are doing with the guidance, and if there is any success to the extent they can measure that. Also the general counsel to the BOP stressed that they are looking for a national rule or national guidance, because it won't help or work to do it district by district.

Judge Molloy asked Judge Kaplan if the Subcommittee composition should stay the same. Judge Kaplan said that it should, but that not all of the members of the subcommittee can be on the task force, which would become too large. Judge Sutton suggested that two or three members of the Subcommittee should be selected to serve on the task force and that CACM would also have two or three members.

A member reported the view of a former experienced prosecutor from the SDNY that threats and harm to cooperators result from the way the Marshals implement the witness protection program, not affording protection until after a cooperating witness has been sentenced. But cooperation becomes obvious much earlier from the movements of cooperators when they are in jail, not through court records. Further, cooperators are not separated from the general population until they are sentenced, and sentencing does not occur until after cooperation is complete. Ms. Morales noted that some districts do have measures to address this in place, and that she anticipated bringing in the Marshals Service. Judge Sutton agreed that would be beneficial.

D. Rule 11(a)(2) (16-CR-C)

Judge Molloy asked the Reporters to present the proposal to consider an amendment to Rule 11(a), which governs conditional pleas. He observed that the question seems to be the same as Rule 5. Do we need to change the rule? Or is the language already clear?

Professor Beale reported that Judge Graber, a member of the Standing Committee, invited the Committee to look at Rule 11(a). If a defendant is successful on appeal and the case is remanded, judges appear to disagree about what the Rule means in particular circumstances. She noted that the reporters had not researched district court opinions, but there is some disagreement among appellate opinions. Unlike Rule 5, the question of the proper interpretation of the rule is being debated in accessible court of appeals opinions. The question at this point is

whether the Committee wishes to pursue this suggestion of an amendment, with the appointment of a subcommittee and additional research by the reporters.

Judge Molloy said he'd had a number of conditional pleas, and could not envision defense counsel advising a client that if you win on appeal you can withdraw your appeal unless a court says it was harmless error. He thought the language was clear. He invited comments from the other members.

One member stated that unlike Rule 5 which is not clear, the language of Rule 11 is not susceptible of being misinterpreted. For example, the only reason to recommend a conditional plea to a client who has lost a suppression motion is the defense lawyer thinks if that evidence were not admissible the defendant could go to trial. Otherwise no client would plead guilty conditionally. And, this member added, she would have no idea what she would say to a client. "It is pretty likely we might be able to go to trial if we win on appeal"? The member reiterated that she was opposed to trying to change a rule she thought was already clear.

Other members agreed that the Rule is clear and need not be amended, and that no subcommittee was needed to examine it further. A member also expressed the view that the disputes about the effect of Rule 11(a) were unlikely to affect the disposition of cases because of the deferential application of the harmless error standard.

Judge Molloy suggested, with no opposition, that the Committee should place the issue on its study agenda and monitor it.

V. Next meeting; departing members.

Judge Molloy noted that the Committee's spring meeting will be in DC, and that the location places for the fall 2017 meeting is not final. Ms. Womeldorf stated that the tentative plan is to hold the 2017 meeting in Chicago and the 2018 meeting in New York.

Judge Molloy invited Justice Gilbertson and Judge Sutton to make comments. Justice Gilbertson said it had been a great six years, he'd met wonderful people, and will take away good memories. Judge Sutton, completing his term as Standing Committee Chair, thanked everyone on the Committee for all the hard work they'd done, and praised the Reporters Professors Beal and King in particular. He commended Judge Molloy for his leadership. Judge Sutton mentioned that in particular he appreciated the effort members had made to find common ground, particularly with Rule 12, and that we all benefited from the consistent consensus-seeking attitude of the Committee.

After brief logistic instructions about the Committee Dinner, the meeting was adjourned.