COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

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October 23, 2019

MEMORANDUM

TO: Scott S. Harris
Clerk, Supreme Court of the United States

FROM: Honorable David G. Campbell

RE: SUMMARY OF PROPOSED AMENDMENTS TO THE FEDERAL RULES

This memorandum summarizes proposed amendments to the Rules of Appellate, Bankruptcy, and Civil Procedure, and the Rules of Evidence, submitted for the Supreme Court's review. Each proposed amendment was unanimously approved by the relevant advisory committee as well as the Committee on Rules of Practice and Procedure. The Judicial Conference of the United States approved these amendments on September 17, 2019. If adopted by the Court and transmitted to Congress by May 1, 2020, these amendments will take effect on December 1, 2020 absent congressional action.

I. Federal Rules of Appellate Procedure 35 and 40

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) establish length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments also change the term "answer" in Rule 40(a)(3) to "response," paralleling the terms used in Rule 35.

II. Federal Rules of Bankruptcy Procedure 2002, 2004, 8012, 8013, 8015, and 8021

The proposed amendments to Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee): (1) require notice when an order confirming a chapter 13 plan is entered; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination) provides for the examination of debtors and other entities. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment adds explicit authorization to compel production of electronically stored information, and further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending.

Rule 8012 (Corporate Disclosure Statement) requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (amendments to which were adopted by the Supreme Court and transmitted to Congress on April 25, 2019). The proposed amendments to Rule 8012: (1) add a disclosure requirement for nongovernmental corporate intervenors; (2) require disclosure of all debtors' names not already listed in the caption of the appeal; and (3) require disclosures by nongovernmental corporate debtors.

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service." Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of the corresponding Appellate Rules counterparts, proposed conforming technical changes are made to Bankruptcy Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs).

III. Federal Rule of Civil Procedure 30(b)(6)

The proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, imposes a duty on the parties to confer about the matters for examination.

Rule 30(b)(6) is a perennial subject of study for the Advisory Committee, with both the plaintiffs' and defense bars reporting problematic practices of opposing counsel. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the stated problems. The Advisory Committee has now determined that an

amendment could address certain of the problems identified by practitioners. The proposed amendment is the product of three years of exhaustive study and reflects feedback received from practitioners during several drafting stages, including the formal public comment period.

The proposed amendment as published for public comment was broader than the proposal ultimately approved by the Advisory Committee in that it required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. In addition, the conferral process was to "continu[e] as necessary." The robust public comments revealed strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as the directive that the parties confer about the "number and description of" the matters for examination. While divisions among practitioners existed on various aspects of the published proposal, many commenters supported a requirement that the parties confer about the matters for examination. After carefully reviewing the comments and testimony, the Advisory Committee approved a modest amendment that requires the parties to confer about the matters for examination. The amendment codifies a best practice and practitioners across the bar support it.

IV. Federal Rule of Evidence 404

The proposed amendments to Rule 404 (Character Evidence; Crimes or Other Acts) expand the prosecutor's notice obligations under the rule. The proposed amendments delete the current requirement that the prosecutor must disclose only the "general nature" of the bad act evidence and instead require the prosecutor to provide notice of the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose. The existing requirement that the defendant request notice is deleted. Finally, to clarify that Rule 404(b) applies to other acts and not the acts charged, the phrase "crimes, wrongs, or other acts" is restored to its original form prior to the restyling of the Rules of Evidence: "other crimes, wrongs, or acts."

Thank you for considering these proposed changes. Please let me know if any additional information would assist the Court's review.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 23, 2019

MEMORANDUM

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

From: James C. Duff

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 35 and 40 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying committee notes; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2019 Report of the Advisory Committee on Appellate Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Response; Action by the Court if Granted.

* * * * *

(3) **Response.** Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

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(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

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(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a

[1] New material is underlined; matter to be omitted is lined through.

response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; ~~Answer~~ Response; Action by the Court if Granted.

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(3) **~~Answer~~ Response.** Unless the court requests, no ~~answer~~ response to a petition for panel rehearing is permitted. ~~But o~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

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(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term "answer" in Rule 40(a)(3) to the term "response," making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology." The Advisory Committee sought final approval for the proposed amendments as published.

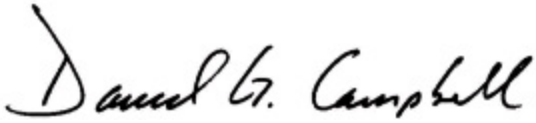
The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee.

* * * * *

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 * * * and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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

MEMORANDUM

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

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 31, 2019

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio, Texas.

* * * * *

It approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to length limits for responses to petitions for rehearing (Rules 35 and 40).

* * * * *

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 35 and 40. These amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 and 40 would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none for responses to those petitions. In addition, the proposed amendment would change the term "answer" in Rule 40 (which deals with petitions for panel rehearing) to the term "response," making it consistent with Rule 35 (which deals with petitions for rehearing en banc).

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology."

The Committee seeks final approval for the proposed amendments as published.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. <u>The length limits in Rule 35(b)(2) apply to a response.</u>

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Rule 40. Petition for Panel Rehearing

* * * * *

(a) Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted.

* * * * *

(3) **~~Answer~~Response.** Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But o~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 23, 2019

MEMORANDUM

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

From: James C. Duff

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying committee notes; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2019 Report of the Advisory Committee on Bankruptcy Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(7) entry of an order confirming a chapter 9, 11, 12, or 13 plan;

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED.

(1) *Voluntary Case.* In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days

following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) *Involuntary Case.* In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(3) *Insufficient Assets.* In a case where notice of insufficient assets to pay a dividend has been given to creditors under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEE.

Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

* * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court where the case is pending if the attorney is admitted to practice in that court.

* * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R.Civ.P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Rule 8012. Disclosure Statement

(a) NONGOVERNMENTAL CORPORATIONS. Any nongovernmental corporation that is a party to a proceeding in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) DISCLOSURE ABOUT THE DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 8012(a).

(c) TIME TO FILE; SUPPLEMENTAL FILING. A

Rule 8012 statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing;

(2) be included before the table of contents in the principal brief; and

(3) be supplemented whenever the information required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to F.R.App.P. 26.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

Rule 8013. Motions; Intervention

(a) CONTENTS OF A MOTION; RESPONSE; REPLY.

(1) *Request for Relief.* A request for an order or other relief is made by filing a motion with the district or BAP clerk.

* * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

* * * * *

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- cover page;
- disclosure statement under Rule 8012;
- table of contents;
- table of citations;
- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificates of counsel;
- signature block;
- proof of service; and

- any item specifically excluded by these rules

  or by local rule.

* * * * *

Committee Note

The amendment to subdivision (g) is made to reflect recent amendments to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system. Because each item listed in Rule 8015(g) will not always be required, the initial article is deleted. The word "corporate" is deleted before "disclosure statement" to reflect a concurrent change in the title of Rule 8012.

Rule 8021. Costs

* * * * *

(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk and serve an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

Committee Note

Subdivision (d) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief ~~Is~~ Is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(7) entry of an order confirming a chapter 9, 11, ~~or~~ 12, or 13 plan;

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. ~~In a chapter 7 case, after 90 days following~~

[1] New material is underlined; matter to be omitted is lined through.

~~the first date set for the meeting of creditors under § 341 of the Code,~~

(1) *Voluntary Case.* In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) *Involuntary Case.* In an involuntary chapter

7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor~~,~~;
- the trustee~~,~~;
- all indenture trustees~~,~~;
- creditors that hold claims for which proofs of claim have been filed~~,~~; and
- creditors, if any, that are still permitted to file claims ~~by reason of~~ because an extension was granted ~~pursuant to~~ under Rule 3002(c)(1) or (c)(2).

(3) *Insufficient Assets.* In a case where notice of insufficient assets to pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of a notice of the

time for filing claims ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

* * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court ~~for the district in which the examination is to be held~~ where the case is pending if the attorney is admitted to practice in that court ~~or in the court in which the case is pending~~.

* * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R.Civ.P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Rule 8012. ~~Corporate~~ Disclosure Statement

(a) ~~WHO MUST FILE~~ NONGOVERNMENTAL CORPORATIONS. Any nongovernmental ~~corporate party~~ corporation that is a party to a proceeding ~~appearing~~ in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) DISCLOSURE ABOUT THE DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 8012(a).

~~(b)~~(c) TIME TO FILE; SUPPLEMENTAL

FILING. ~~A party must file the~~ A Rule 8012 statement must:

(1) be filed with ~~its~~ the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must~~ be included ~~include a statement~~ before the table of contents in the principal brief~~.~~; and

(3) ~~A party must supplement its statement~~ be supplemented whenever the ~~required~~ information required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to F.R.App.P. 26.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of

appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

Rule 8013. Motions; Intervention

(a) CONTENTS OF A MOTION; RESPONSE; REPLY.

(1) *Request for Relief.* A request for an order or other relief is made by filing a motion with the district or BAP clerk~~, with proof of service on the other parties to the appeal~~.

* * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

* * * * *

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- ~~the~~ cover page;
- ~~a corporate~~ disclosure statement under Rule 8012;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ signature block;

- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The amendment to subdivision (g) is made to reflect recent amendments to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system. Because each item listed in Rule 8015(g) will not always be required, the initial article is deleted. The word "corporate" is deleted before "disclosure statement" to reflect a concurrent change in the title of Rule 8012.

Rule 8021. Costs

* * * * *

(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

Committee Note

Subdivision (d) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021 * * * with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules * * * are technical or conforming in nature and are recommended for final approval without publication.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still

file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request

for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

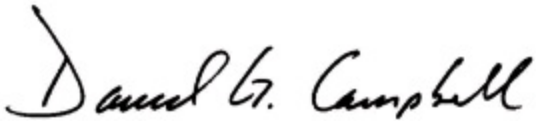
* * * * *

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 * * * and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 30, 2019

I. Introduction

The Advisory Committee on Bankruptcy Rules met in San Antonio, Texas, on April 4, 2019.

* * * * *

At the meeting the Advisory Committee gave its final approval to the amendments to three rules that were published for comment last August. The amendments are to Rules 2002 (Notices), 2004 (Examination), and 8012 (Corporate Disclosure Statement). The Advisory Committee also approved without publication technical amendments to * * * Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income).

* * * * *

Part II of this report presents those action items along with two others that the Advisory Committee voted on at its fall 2018 meeting. At that earlier meeting, the Advisory Committee voted to seek final approval without publication of conforming, technical amendments to Rules 8012, 8013, and 8015 to remove or qualify references to "proof of service" * * *.

The action items are organized as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2018—
- Rule 2002;
- Rule 2004; and
- Rule 8012.

(A2) Approval without publication—
- * * * * *;
- Rules 8013, 8015, and 8021; and
- * * * * *.

* * * * *

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2018.

The Advisory Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2018 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 2002 (Notices). A package of amendments to Rule 2002 was published that would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Three different subdivisions of the rule are affected.

- *Rule 2002(f)(7)* currently requires the clerk, or someone else designated by the clerk, to give notice to the debtor, all creditors, and indenture trustees of the "entry of an order confirming a chapter 9, 11, or 12 plan." The amendment would include chapter 13 plans within this provision.
- *Rule 2002(h)* provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the

court) to give "the debtor, the trustee, all creditors and indenture trustees" at least 21 days' notice of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement in chapter 7 cases with respect to creditors that fail to file a timely proof of claim. The amendment would make this exception also applicable to chapter 12 and 13 cases and would change the time provisions in the subdivision to conform to recent amendments to Rule 3002 setting deadlines for filing proofs of claim.

- *Rule 2002(k)* provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee, including notices under subdivision (b). Because the deadline for giving notice of the time for filing objections to confirmation of chapter 13 plans was recently moved from subdivision (b) to subdivision (a)(9), which currently is not specified in subdivision (k), the provision would be amended to include a reference to (a)(9) to ensure that the U.S. trustee continues to receive notice of this deadline.

Six sets of comments were submitted on one or more of these proposed amendments. Four of the comments (submitted by Danielle Young, Nancy Whaley, Ellie Bertwell of Aderant CompuLaw, and the National Association of Bankruptcy Trustees) included brief statements of support for the amendments.

Ryan Johnson, the clerk of the Bankruptcy Court for the Northern District of West Virginia, was generally supportive of the amendments, but he raised two additional points about Rule 2002(h). First, he said that in a chapter 13 case, the clerk's noticing responsibilities should extend beyond the 70-day proof-of-claim deadline as stated in Rule 3002(c). The applicable deadline, he said, should include the additional 30 days afforded to a debtor or trustee to file a claim on behalf of a creditor under Rule 3004. He also stated that with respect to notices required by Rule 2002(a)(2) and (a)(3), Rule 2002(h) should require notice to creditors that were entitled to service of the noticed motion even if those entitled to service did not file a proof of claim.

The Bankruptcy Section of the Federal Bar Association, while supporting the other Rule 2002 amendments, questioned the need for including the entry of an order confirming a chapter 13 plan within the notice requirement of Rule 2002(f)(7). It noted that in the Bankruptcy Court for the Western District of Texas, the clerk already is responsible for "publishing the order confirming the plan through its Bankruptcy Noticing Center . . . [, and] [s]ervice is accomplished by first class mail and, where applicable, electronic mail." As a result, the Section argued, "there appears to be little benefit requiring a notice of an order confirming plan that has already been served on parties in interest."

After carefully considering the comments, the Advisory Committee voted unanimously to approve the amendments to Rule 2002 as published.

Action Item 2. Rule 2004 (Examination). Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information ("ESI"). The Advisory Committee discussed the suggestion at the fall 2017 and spring 2018 meetings. By a close vote,

the Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Three sets of comments were submitted in response to publication. The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan commented that proportionality should be a factor that a bankruptcy judge has the discretion to consider in ruling on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004 examination. It argued that in the bankruptcy context, where resources are already limited in many cases, the impact of having to produce all ESI, without consideration of proportionality, could significantly impact the likely success of a case.

The other two comments were supportive of the amendments as proposed. The National Association of Bankruptcy Trustees supported the inclusion of electronic records within the rule and the updating to conform to Rule 45 as promoting clarity of scope. The Federal Bar Association's Bankruptcy Section supported the published changes to Rule 2004(c) and urged caution before imposing a proportionality requirement. It expressed concern that doing so would likely increase litigation.

The Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. It saw no reason to revisit the question of proportionality since that issue had recently been carefully considered and rejected by the Advisory Committee.

Action Item 3. Rule 8012 (Corporate Disclosure Statement). Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party's stock (or file a statement that there is no such corporation). It is modeled on FRAP 26.1. The Appellate Rules Committee proposed amendments to FRAP 26.1 that have been approved by Supreme Court, including one that is specific to bankruptcy appeals.

At the spring 2018 meeting, the Advisory Committee considered and approved for publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1. These amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the debtor. This subdivision would require the disclosure of the names of any debtors in the underlying bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in the underlying bankruptcy case, the disclosure of the information required of corporations under subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements.

Three comments were submitted in response to publication. All were supportive.

In light of the conforming nature of the amendments and the lack of any negative comment on them, the Advisory Committee gave them final approval. One member of the Advisory Committee expressed the need for additional amendments to the disclosure statement rules to

extend the requirements to a broader range of entities. The Advisory Committee, however, concluded that any such expansion should be undertaken in coordination with the other advisory committees and should not hold up amendments that are designed to conform to amendments to FRAP 26.1 that are expected to go into effect on December 1 of this year.

(A2) Conforming or technical amendments proposed for approval without publication.

The Advisory Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule and form amendments that are discussed below. The rules and form as proposed for amendment are in Bankruptcy Appendix A.

* * * * *

Action Item 5. Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The Supreme Court has approved amendments to several Federal Rules of Appellate Procedure that are expected to go into effect in December of this year. The amendment to FRAP 25(d) would eliminate the requirement of proof of service for documents served through the court's electronic-filing system. This amendment parallels the amendment to Bankruptcy Rule 8011(d) that went into effect last December. The other FRAP amendments—to FRAP 5, 21, 26, 32, and 39—would reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the Part VIII Bankruptcy Rules in large part track the language of FRAP counterparts, the Advisory Committee voted to seek approval without publication of conforming changes to three bankruptcy appellate rules.

Rule 8015(g) (Items Excluded from Length), paralleling the amendments to FRAP 32(f), would be amended to eliminate the articles "a" and "the" before the items in a brief excluded in calculating a brief's length. It would also be amended to delete "corporate" before "disclosure statement" to reflect the pending amendment to the title of Rule 8012.

Rule 8021(d) (Bill of Costs; Objections) would be amended to delete the reference to proof of service in order to maintain consistency with FRAP 39(d).

Rule 8013(a)(1) also refers to "proof of service." It states that "[a] request for an order or other relief is made by filing a motion with the district or BAP clerk, with proof of service on the other parties to the appeal." The corresponding FRAP provision (FRAP 27(a)) does not include the last phrase, so no amendment has been proposed to that rule. To take account of situations in which proof of service is not required, Rule 8013(a)(1) would be amended by ending the provision with "clerk," thereby omitting the reference to proof of service. The circumstances under which proof of service would be required would then be governed by Rule 8011(d)(1) (only required for documents served other than through the court's electronic-filing system).

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 23, 2019

MEMORANDUM

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

From: James C. Duff

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 30(b)(6) of the Federal Rules of Civil Procedure, which was approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a copy of the affected rule incorporating the proposed amendment and accompanying committee note; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the [June] 2019 Report of the Advisory Committee on Civil Rules.

Attachments

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(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, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must 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. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. 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.

* * * * *

Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served about the matters for examination. The amendment also requires that a subpoena notify a nonparty

organization of its duty to confer and to designate each person who will testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about the purposes of the deposition and the organization's information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted

to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(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, a governmental agency, or other entity 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

[1] New material is underlined; matter to be omitted is lined through.

consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty ~~to make this designation.~~ to confer with the serving party and to designate each person who will testify. 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.

* * * * *

Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have

included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served about the matters for examination. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about the purposes of the deposition and the organization's information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee's agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;

2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;

4. Forbidding contention questions in Rule 30(b)(6) depositions;

5. Adding a provision to Rule 30(b)(6) for objections; and

6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the "number and description of" the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee's report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the "continuing as necessary" language; (3) deleting the "number and description of" language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

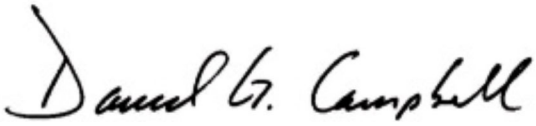
The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee.

* * * * *

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) * * * and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: June 4, 2019

Introduction

The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2-3, 2019.

* * * * *

The Committee has two action items to report. The first is a recommendation for adoption of an amendment of Civil Rule 30(b)(6) that simplifies the proposal published for comment in August 2018.

* * * * *

A. For Final Approval: Rule 30(b)(6)

The Rule 30(b)(6) amendment proposal published for public comment drew much attention. Twenty-five witnesses appeared at the hearing in Phoenix and 55 at the hearing in Washington, DC. Some 1780 written comments were submitted, about 1500 of them during the last week of public comment. Summaries of the testimony and those written comments are included at Appendix A.

Having reviewed the public commentary and received the Subcommittee's report and recommendation, the Advisory Committee is bringing forward a modified version of the preliminary draft amendments with the recommendation that it be forwarded to the Judicial Conference for adoption. The Committee has concluded that an amendment requiring in all cases what many commenters affirmed was best practice – conferring about the matters for examination in order to improve the focus of the examination and preparation of the witness – would improve the rule.

The Advisory Committee also considered an alternative of proposing publication for public comment of a revised amendment that would require the organization to identify the designated witness or witnesses a specified time before the deposition, and also add a 30-day notice requirement for 30(b)(6) depositions. It was agreed that any such revised proposal would require re-publication and public comment. The importance of such additional disclosure and the risks that the information might be misused were addressed. It was noted that good lawyers who testified during the hearings said that they often would agree to identify their witness or witnesses in advance when confident that this information would not be misused, but that several emphasized also that there were cases in which they would not provide advance identification. Advisory Committee members expressed uneasiness about overriding those decisions not to identify witnesses in advance. After extensive discussion described in the minutes of its meeting, the Committee decided not to propose that the Standing Committee direct publication of this alternative.

At the end of this section of the report are a version of the published preliminary draft showing the changes made after public comment as well as a "clean" version of the amended rule and Committee Note. This report explains the changes made to the proposal after the public comment period.

Deleting the requirement to confer about witness identity: Very strong opposition to this directive was expressed by many witnesses and in many comments. Witnesses emphasized that the case law strongly supports the unilateral right of the organization to choose its witness, and asserted that the requirement that the organization confer in "good faith" would undercut that case law. Although the Committee Note said that the choice of the witness remained the sole prerogative of the organization, that raised the question how it could then be the subject of a mandatory requirement to confer in good faith.

It bears mention that there was limited public comment in favor of requiring the organization to confer about witness identity from those who regularly use this rule to obtain information from organizations. Some candidly acknowledged that they had no say in the organization's choice of a

witness so long as the person selected was properly prepared to address the matters for examination on the 30(b)(6) list.

Deleting "continue as necessary": The preliminary draft directed that the conference not only be in good faith but also that it "continue as necessary." To a large extent, that provision was included because the draft directed the parties to confer about the identity of the witness. Very often the organization could not be expected to settle on a specific person to testify without first having obtained a clear understanding of what matters were to be addressed. So there was a need for a rule provision emphasizing that the amendment requires an iterative interaction in most instances. But that need has lessened with deletion of the requirement to confer on witness identity.

Removal of this provision is not meant to say that the parties need never engage in an iterative exchange about the matters for examination. Indeed, even though the conference is now limited to the matters for examination it will often be fruitful for the parties to touch base more than once with regard to the kinds of information available and the burdens of obtaining it. The revised Committee Note makes this point.

Deleting the directive to confer about the "number and description of" the matters for examination: The Advisory Committee did not propose adding to the rule a numerical limitation on matters for examination, though it was urged to do so. But the preliminary draft did direct the parties to discuss "the number" of matters.

The directive to discuss the number of matters in addition to conferring about the matters themselves drew strong objections during the public comment period. The right focus, many said, was on the matters themselves. Discussing an abstract number did not serve a productive purpose. To the extent it might result in some sort of numerical limit, it might also encourage broader descriptions so that the list of matters would be shorter. That seems out of step with both the particularity direction in the rule and with a requirement to confer that is designed in significant part to improve the focus of the listed matters and ensure that the organization understands exactly what the noticing party is trying to find out. The Committee recommends removing "number of" from the conference requirement.

The addition of the words "description of" seemed unnecessary; the basic objective ought to be to confer about and refine the matters for examination.

Adding a reference to Rule 31(a)(4) depositions to the Committee Note. Rule 31(a)(4) authorizes a deposition by written questions of an organization "in accordance with Rule 30(b)(6)." It also requires that the noticing party's questions and any questions any other parties wish the officer to pose to the witness be served in advance. Although it has repeatedly been told about problems with Rule 30(b)(6) depositions, the Advisory Committee has not been advised that there have been any problems with this mode of obtaining testimony from organizations. And the advance exchange of all questions to be asked would make a conference about the matters for examination superfluous.

Accordingly, a paragraph has been added at the end of the Committee Note to explain that the conference requirement does not apply to a deposition under Rule 31(a)(4).

GAP Report: Having received public comment, the Advisory Committee recommends that the proposed requirement to confer about witness identity be removed, that the direction that the parties' conference "continue as necessary" be deleted, and that the directive that the parties confer about the "number and description of" the matters for examination be deleted, with the amendment requiring only that the parties confer about the matters for examination.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 23, 2019

MEMORANDUM

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

From: James C. Duff

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 404 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a copy of the affected rule incorporating the proposed amendment and accompanying committee note; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2019 Report of the Advisory Committee on Evidence Rules.

Attachments

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts

* * * * *

(b) Other Crimes, Wrongs, or Acts.

(1) ***Prohibited Uses.*** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses.*** 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.

(3) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer

at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the

government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See, e.g.*, *United States v. Lopez-Gutierrez,* 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta,* 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs, and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 404. Character Evidence; Other Crimes, Wrongs, or ~~Other~~ Acts

* * * * *

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; ~~Notice in a Criminal Case~~.*** 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. ~~On request by a defendant in a criminal case, the prosecutor must:~~

[1] New material is underlined; matter to be omitted is lined through.

(3) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

(A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; ~~and~~

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When

notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See, e.g.*, *United States v. Lopez-Gutierrez,* 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta,* 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided

> when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word "other" is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs, and acts "other" than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Agenda E-19
Rules
September 2019

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the

current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term "non-propensity purpose" to "permitted purpose."

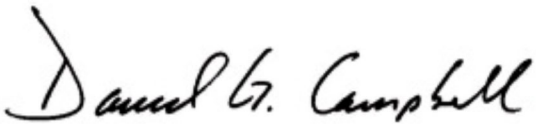
The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee.

* * * * *

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 404 * * * and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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

MEMORANDUM

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

FROM: Hon. Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 30, 2019

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2019, in Washington, D.C.

* * * * *

The Committee made the following determinations at the meeting:

- It unanimously approved the proposed amendment to Rule 404(b) and is submitting it to the Standing Committee for final approval.

* * * * *

II. Action Item

A. Proposed Amendment to Rule 404(b), for Final Approval

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3) Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Committee considered a number of textual changes to address these case law developments. At its April, 2018 meeting the Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law, because they would make the Rule more complex without rendering substantial improvement. Thus, any attempt to define "inextricably intertwined" is unlikely to do any better than the courts are already doing, because each case is fact-sensitive, and line-drawing between "other" acts and acts charged will always be indeterminate. Further, any attempt to codify an "active dispute" raises questions about how "active" a dispute would have to be, and is a matter better addressed by balancing probative value and prejudicial effect. Finally, an attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference --- an example would be use of the well-known "doctrine of chances" to prove the unlikelihood that two unusual acts could have both been accidental.

The Committee also considered a proposal to provide a more protective balancing test for bad acts offered against defendants in criminal cases: that the probative value must outweigh the prejudicial effect. While this proposal would have the virtue of flexibility and would rely on the traditional discretion that courts have in this area, the Committee determined that it would result in too much exclusion of important, probative evidence.

The Committee did recognize, however, that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Committee determined that

the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, in light of the prosecution's expanded notice obligations under the DOJ proposal. And the Committee easily determined that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "*other* crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

The proposal to amend Rule 404(b), focusing mainly on a fortified notice requirement in criminal cases, was released for public comment in August, 2018. The public comment was sparse, but largely affirmative. At its May, 2019 meeting, the Committee considered the public comments, as well as comments made at the Standing Committee meeting of June, 2018. The Committee made minor changes to the proposal as issued for public comment --- the most important change being that the term "non-propensity purpose" in the text was changed to "permitted purpose."

The Committee unanimously approved proposed amendments to the notice provision of Rule 404(b), and the textual clarification of "other" crimes, wrongs, or acts. The Committee recommends that these proposed changes, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

* * * * *