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**COMMITTEE ON  
RULES OF PRACTICE AND PROCEDURE**

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**June 22, 2021**

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**JUDICIAL CONFERENCE OF THE UNITED STATES  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
June 22, 2021**

**AGENDA**

**1. Opening Business**

- A. Welcome and Opening Remarks – Judge John D. Bates, Chair
- B. **ACTION:** The Committee will be asked to approve the minutes of the January 5, 2021 Committee meeting
- C. Status of Rules Amendments
  - Report on rules adopted by the Supreme Court and transmitted to Congress on April 14, 2021 (potential effective date of December 1, 2021)

**2. Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**

- **ACTION:** The Committee will be asked to recommend the following be published for public comment:
  - Proposed amendment to Appellate Rules 2 (Suspension of Rules) and 4 (conforming amendment to Emergency Civil Rule 6(b)(2))
  - New Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)
  - New Civil Rule 87 (Civil Rules Emergency)
  - New Criminal Rule 62 (Criminal Rules Emergency)

**3. Report of the Advisory Committee on Appellate Rules – Judge Jay S. Bybee, Chair**

- A. **ACTION:** The Committee will be asked to recommend the following for final approval:
  - Rule 25 (Filing and Service)
  - Rule 42 (Voluntary Dismissal)

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

- Rule 4 (Appeal as of Right—When Taken)
- Rule 32 (Form of Briefs, Appendices, and Other Papers)
- Rule 35 (En Banc Determination)
- Rule 40 (Petition for Panel Rehearing)
- Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure

C. Information items

- Report on the work of a subcommittee considering several suggestions related to the filing of amicus briefs.
- Report on the work of a subcommittee considering several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4.
- Report on the work of a subcommittee considering a suggestion to broadly permit the relation forward of notices of appeal.
- Report on consideration of a suggestion to make electronic filing deadline earlier than midnight.

4. **Report of the Advisory Committee on Bankruptcy Rules** – Judge Dennis R. Dow, Chair

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

- Restyled versions of the 1000 rules series (Part I-Commencing a Bankruptcy Case; The Petition and Order for Relief) and 2000 rules series (Part II-Officers and Administration; Notices; Meetings; Examinations; Elections and Appointments; Final Report; Compensation)
- Rules to replace the interim rules issued to implement the Small Business Reorganization Act: Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 1020 (Chapter 11 Reorganization Case for Small Business Debtors), 2009 (Trustees for Estates When Joint Administration Ordered), 2012 (Substitution of Trustee or Successor Trustee; Accounting), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13), 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11,

Chapter 12, and Chapter 13), Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case), 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case), Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11), Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement), Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case)

- Rule 3002(c)(6) (Filing Proof of Claim or Interest)
- Rule 5005 (Filing and Transmittal of Papers)
- New subdivision (i) to Rule 7004 (Process; Service of Summons, Complaint)
- Rule 8023 (Voluntary Dismissal)
- Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)

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

- Restyled versions of the 3000 rules series (Part III-Claims; Plans; Distribution to Creditors and Equity Security Holders); the 4000 rules series (Part IV-The Debtor's Duties and Benefits); the 5000 rules series (Courts and Clerks); and the 6000 rules series (Collecting and Liquidating Property of the Estate)
- Rule 3002.1 (Chapter 13 Claims Secured by a Security Interest in the Debtor's Principal Residence)
- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)
- Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors))
- Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case (for Individuals or Joint Debtors under Subchapter V))
- Official Forms Related to Rule 3002.1 amendments: Form 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim); Form 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)); Form 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)); and Form 410C13-10R



(Response to Trustee’s Motion to Determine the Status of the Mortgage Claim)

C. Information items

- Status of Interim Rule 4001(c) (Obtaining Credit) to be distributed to the courts if the Administrator of the Small Business Administration authorizes debtors in bankruptcy to obtain certain loans under the Small Business Act.
- Director’s Form 4100S (Supplemental Proof of Claim for CARES Forbearance Claim).
- Consideration of *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) and Suggestions 21-BK-B and 21-BK-C for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding
- Consideration of Suggestion 20-BK-E from the Committee on Court Administration and Case Management for rule amendment establishing minimum procedures for electronic signatures of debtors and others

5. **Report of the Advisory Committee on Civil Rules** – Judge Robert M. Dow, Jr., Chair

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

- Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)
- Rule 12(a)(4) – extends time to respond when a federal employee or officer is sued in individual capacity

B. Information items

- Report on the work of the Subcommittee on Multidistrict Litigation and March 24, 2021 conference on issues regarding leadership counsel and judicial supervision of settlement
- Report on the work of the Discovery Subcommittee
- Consideration of suggestion to develop uniform *in forma pauperis* standards and procedures
- Continued consideration of a clarifying amendment to Rule 12(a) regarding situations where a statute sets time to serve responsive pleadings
- Continued consideration of a suggestion to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind)
- Report on items considered and removed from the committee’s agenda

6. **Report of the Advisory Committee on Criminal Rules** – Judge Raymond M. Kethledge, Chair

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

- Rule 16 (Discovery and Inspection)

B. Information items

- Report on the work of the Rule 6 Subcommittee
  - April 13, 2021 miniconference
  - New suggestions referred to the subcommittee for consideration
- Suggestions to amend Rules 16 and Rule 11 that the advisory committee determined to retain on its study agenda
- Suggestion to amend Rule 29.1 that the advisory committee considered and removed from its agenda

7. **Report of the Advisory Committee on Evidence Rules** – Judge Patrick J. Schiltz, Chair

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

- Rule 106 (Remainder of or Related Writings or Recorded Statements)
- Rule 615 (Excluding Witnesses)
- Rule 702 (Testimony by Expert Witnesses)

B. Information items

- Possible amendment to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial.
- Report on consideration of possible amendments to Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006.
- Report on consideration of possible amendments to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest.
- Report on consideration of possible amendments rectify circuit splits in interpreting the Evidence Rules, including Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant).
- Report on decision not to pursue possible amendments to Rule 611(a) or to the Best Evidence rule regarding recordings in a foreign language.

## 8. Other Committee Business

- A. Legislative Update
- B. **ACTION:** The Committee is asked to refresh and report on its consideration of strategic initiatives – projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan for the Federal Judiciary* – while demonstrating the link between its strategic initiatives and one or more of the strategies and goals identified by the Executive Committee to serve as planning priorities for the next two years. The Committee is also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs.
- C. Update on the Judiciary’s Response to the COVID-19 Pandemic
- D. Next Meeting – January 4, 2022 (Miami, FL)

## RULES COMMITTEES — CHAIRS AND REPORTERS

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#### Chair

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**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
**(Standing Committee)**

<b>Chair</b>	<b>Reporter</b>
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## Committee on Rules of Practice and Procedure

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Member: 2020 Chair: 2020	---- 2023
Jesse M. Furman	D	New York (Southern)	2016	2022
Daniel C. Girard	ESQ	California	2015	2021
Robert J. Giuffra, Jr.	ESQ	New York	2017	2023
Frank M. Hull	C	Eleventh Circuit	2016	2022
William J. Kayatta, Jr.	C	First Circuit	2018	2021
Peter D. Keisler	ESQ	Washington, DC	2016	2022
William K. Kelley	ACAD	Indiana	2015	2021
Carolyn B. Kuhl	JUST	California	2017	2023
Patricia A. Millett	C	DC Circuit	2020	2022
Lisa O. Monaco*	DOJ	Washington, DC	----	Open
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2019	2022
Kosta Stojilkovic	ESQ	Washington, DC	2019	2022
Jennifer G. Zips	D	Arizona	2019	2022
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2023

\* Ex-officio - Deputy Attorney General



## RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	<p>Hon. Frank M. Hull <i>(Standing)</i></p> <p>Hon. Bernice B. Donald <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Bankruptcy Rules	<p>Hon. William J. Kayatta, Jr. <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Civil Rules	<p>Peter D. Keisler, Esq. <i>(Standing)</i></p> <p>Hon. Catherine P. McEwen <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Criminal Rules	<p>Hon. Jesse M. Furman <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Evidence Rules	<p>Hon. James C. Dever III <i>(Criminal)</i></p> <p>Hon. Carolyn B. Kuhl <i>(Standing)</i></p> <p>Hon. Sara Lioi <i>(Civil)</i></p>

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*(Evidence)*

**Tim Reagan, Esq.**  
Senior Research Associate  
*(Standing)*

# TAB 1

# TAB 1A

Welcome and Opening Remarks

Item 1A will be an oral report.

# TAB 1B

**MINUTES (APRIL 24, 2021 DRAFT)**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
Meeting of January 5, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on January 5, 2021. The following members participated in the meeting:

Judge John D. Bates, Chair  
Judge Jesse M. Furman  
Daniel C. Girard, Esq.  
Robert J. Giuffra, Jr., Esq.  
Judge Frank Mays Hull  
Judge William J. Kayatta, Jr.  
Peter D. Keisler, Esq.

Professor William K. Kelley  
Judge Carolyn B. Kuhl  
Judge Patricia A. Millett  
Judge Gene E.K. Pratter  
Elizabeth J. Shapiro, Esq.\*  
Kosta Stojilkovic, Esq.  
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –  
Judge Jay S. Bybee, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –  
Judge Robert M. Dow, Jr., Chair  
Professor Edward H. Cooper, Reporter  
Professor Richard L. Marcus,  
Associate Reporter

Advisory Committee on Bankruptcy Rules –  
Judge Dennis R. Dow, Chair  
Professor S. Elizabeth Gibson, Reporter  
Professor Laura Bartell,  
Associate Reporter

Advisory Committee on Evidence Rules –  
Judge Patrick J. Schiltz, Chair  
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –  
Judge Raymond M. Kethledge, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King,  
Associate Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); Dr. Emery G. Lee and Dr. Tim Reagan, Senior Research Associates at the FJC.

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\* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue. Andrew Goldsmith and Jonathan Wroblewski were also present on behalf of the DOJ.



## OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He began by reviewing the technical procedures by which this virtual meeting would operate. He next acknowledged recent changes in the leadership of the Rules Committees. Judge Bates introduced himself, acknowledging that this was his first Standing Committee meeting as Chair, and thanked Judge David Campbell for his wonderful leadership and insight. Judge Bates next recognized new Advisory Committee Chairs: Judge Robert Dow is the new Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee is the new Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz is the new Chair of the Advisory Committee on Evidence Rules. Judge Bates noted next that Rebecca Womeldorf, Secretary to the Standing Committee, would be leaving the Rules Committee Staff to work as the Reporter of Decisions to the Supreme Court. Judge Bates thanked Ms. Womeldorf for her friendship and years of work with the Rules Committees.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the June 23, 2020 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2020. Also included are the rules approved by the Judicial Conference in September 2020 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2021, provided the Supreme Court approves them and Congress takes no action to the contrary. Other rules included in the chart are currently out for public comment. Julie Wilson of the Rules Committee Staff explained that a hearing on the proposed Supplemental Rules for Social Security Review Actions currently out for comment is scheduled for January 22, 2021.

## JOINT COMMITTEE BUSINESS

### *Emergency Rules Project Pursuant to the CARES Act*

Judge Bates introduced this agenda item, included in the agenda book beginning at page 91, which has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He began by highlighting the fact that Chief Justice Roberts had recognized the role of the Rules Committees in his end of the year address on the state of the federal courts. The Chief Justice complimented their efforts thus far, particularly those members who had worked on the videoconferencing provisions included in the CARES Act. Judge Bates also thanked everyone who has worked on this project for their superb efforts. He noted the particular efforts of Professor Capra in coordinating the project across committees and of both him and Professor Struve in preparing the presentation of the advisory committees' suggestions for today's meeting.

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the

Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In the intervening months, each advisory committee – except for the Evidence Rules Committee – developed draft rules for discussion at this Standing Committee meeting. The goal at this meeting was to present the draft rules and to seek initial feedback from the Standing Committee. Comments on details are welcomed, but the focus would primarily be on broader issues. Overarching questions for the members to keep in mind included what degree of uniformity across rules would be desirable and who should have authority to declare an emergency or enact emergency rules. At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

Professor Struve began the presentation of the emergency rules proposals. She echoed Judge Bates’s thanks to all those who have brought the project to this stage, especially the advisory committee chairs, reporters, relevant subcommittee members, and Professor Capra. She explained the structure by which the day’s discussion would proceed. The discussion would be segmented by topic. Professors Struve and Capra would introduce each topic and then advisory committees’ reporters would be invited to summarize their committees’ views on that topic. The topic would then be opened for general discussion among the Standing Committee members.

Professor Capra thanked the advisory committee members and reporters and described the history of the project. He explained that the Evidence Rules Committee would not be presenting a proposal. Its members determined early in the process that there was no need for an emergency rule because the Evidence Rules are already sufficiently flexible to accommodate emergencies.

*“Who Decides” Issue.* This first topic concerns what actor or actors decide whether an emergency is declared. The advisory committees’ subcommittees decided early in the process that a rules emergency should not be tied to a declaration of a presidential emergency. Although the CARES Act relies on a presidential declaration of emergency, and instructed the Rules Committees to consider emergency rules in that context, the advisory committees all agreed that the judiciary would benefit from being able to respond to a broader set of emergencies, and that limiting the emergency rules to only a presidentially declared emergency would not make sense. The advisory committees agreed that the Judicial Conference should have the authority to declare a rules emergency, but they were not in agreement on whether other actors should share this authority. The draft amendment to Appellate Rule 2 grants such authority to “the court” as well, and provides that the chief circuit judge can exercise the same authority unless the court orders otherwise. Draft Bankruptcy Rule 9038 grants the authority first to the Judicial Conference either for all federal courts or for one or more courts, second to the chief circuit judge for one or more courts within the circuit, and third to the chief bankruptcy judge for one or more locations in the district.

Professor Gibson and Judge Dennis Dow summarized the position of the Bankruptcy Rules Committee. Professor Gibson explained that the Advisory Committee thought there could be emergencies of different scope – some might be on a national scale like the COVID-19 pandemic, others might be confined to a circuit, a state, or to one district or part of a district within a state. The Advisory Committee thought it was more efficient for local actors to be able to declare an emergency and to act more quickly to respond to a localized emergency. She noted that the Advisory Committee was not concerned that overeager judges would be too quick to declare an emergency, and pointed out that paragraph (b)(4) of draft Bankruptcy Rule 9038 would allow the Judicial Conference to review and revise any declaration. A majority of the Advisory Committee favored giving actors at all three levels the authority to declare an emergency. Judge Dow explained that his committee thought that in the case of a localized emergency, decisionmaking should be at the local level, where the effects of the situation would be felt. He thought this was similar to the proposal put forward by the Appellate Rules Committee. He emphasized the stakes of the issue – draft Rule 9038 only deals with procedural issues, not substantive rights. Finally, he noted that the bankruptcy draft rule balances the need for rapid response with the opportunity for modification after the fact by the Judicial Conference. Professor Capra added that because the draft rule allows a number of actors to declare an emergency, it had to be drafted differently from the other advisory committees' proposals, which introduced some additional lack of conformity.

Judge Bybee and Professor Hartnett explained the Appellate Rules Committee's proposal. Judge Bybee began by noting that Appellate Rule 2 already allows a court of appeals to "suspend any provision of" the appellate rules "in a particular case." The proposed appellate emergency rule would amend Appellate Rule 2 to allow the courts of appeals to make these kinds of changes across all cases. The Appellate Rules Committee thought it was important to allow the chief judge of a circuit or a court to make these changes. Most of the appellate rules, like the bankruptcy rules, are procedural, limiting any impact on substantive rights when the rules are suspended. Jurisdiction, for example, would never be affected. Further, Judge Bybee explained the Advisory Committee's view that courts of appeals are accustomed to having to deal collegially. This would provide a check on the judgment of a chief judge. He added that the Advisory Committee preserved the backup option of allowing the Judicial Conference authority to exercise the same rule-suspending powers. Professor Hartnett noted the long history of flexibility in the appellate rules. Rule 2 has existed since the Appellate Rules were first promulgated and the circuit courts' authority to suspend their rules predates the Appellate Rules. The nature of a court of appeals is that it speaks with one voice and its procedures are designed to that end. Finally, Professor Hartnett addressed the dignity of the courts of appeals, explaining that there is no right of appeal from these courts. They are courts of last resort and courts with that authority ought to be able to suspend the rules.

Judge Kethledge and Professors Beale and King spoke on behalf of the Criminal Rules Committee. That committee determined that the Judicial Conference was the ideal body to make emergency declarations because it has input from around the country and authority to act. The Criminal Rules Committee has long been the recipient of suggestions that the Criminal Rules be amended to allow for greater use of remote proceedings. The Criminal Rules Committee has historically resisted allowing virtual proceedings. Professor Beale noted the critical differences between the kinds of emergency rules being considered by each advisory committee. The need for gatekeeping is much greater when it comes to criminal proceedings because constitutional issues

are implicated most directly by changes to the Criminal Rules. This makes it more important to exercise restraint when suspending any rules. The Judicial Conference is better positioned to act in this manner. The Criminal Rules Committee believed there was no reason to think the Judicial Conference would suffer from a lack of information or that the Judicial Conference and its Executive Committee could not act with appropriate speed. Given the nature of the emergency rules and the values they protect, the Advisory Committee believed it was preferable to have a single gatekeeper deciding when to declare an emergency. Professor King added that the Advisory Committee had considered the concerns – expressed by other committees – that an emergency might be localized, but that their proposal accounted for this possibility. It requires the Judicial Conference to consider moving proceedings to another district or another courthouse before emergency rules can be enacted. Because there is always an obligation to move proceedings and to remain under the normal rules, there is less reason to think that a local decisionmaker is needed or that the Judicial Conference is not well situated to make the necessary decisions.

Judge Robert Dow and Professors Cooper and Marcus spoke on behalf of the Civil Rules Committee. Professor Cooper explained that their committee arrived at the same conclusion as the Criminal Rules Committee. The Civil Rules already allow broad discretion to the trial courts and they seem to be functioning well during the pandemic. Professor Marcus added that confusion could result if two courts or districts located near one another were both affected by the same emergency but chose to respond in different ways. The Judicial Conference would be able to coordinate efforts across districts and could better achieve consistency.

The discussion was then opened to the members of the Standing Committee. Judge Bates spoke first. Moving away from the particular proposals, he reminded the members of the overall goal of uniformity. To the extent that decisionmaking is dispersed, there would be a potential for undermining this uniformity in a way that is undesirable even in an emergency context. The CARES Act had envisioned emergency rules relating to a presidential emergency and some committees were now looking at very localized actors like a small district. The scale of the departure from what Congress originally suggested was worth keeping in mind. Judge Bates's understanding was that the Judicial Conference, and particularly its Executive Committee, was able to act quickly when necessary. He also suggested that he saw little reason to think that the speed of the emergency declaration would matter more for any one set of rules than for another. Speed is equally important for each type of rules and court proceedings. In response to the Appellate Rules Committee's suggestion that the courts of appeals can and should "speak with one voice," Judge Bates thought this could be an argument for keeping the authority at that level rather than at the district level, but did not think it was an argument against giving the authority to the Judicial Conference.

An attorney member spoke in favor of uniformity with respect to 'who decides.' This member thought that in creating emergency rules for the first time, it was preferable to be cautious and incremental and to create a single gatekeeper rather than a complex multitiered system. This member also thought that the challenges created during the current emergency were greatest in the criminal context and thought that there was something to be said for choosing the gatekeeper that makes the most sense for that set of rules.

Another attorney member agreed that uniformity in ‘who decides’ makes sense. If the reasons for decentralization are increased nimbleness and ability to accommodate geographical differences, and the reasons for centralization are the substantive issues raised by the Criminal Rules Committee, then substantive issues should win out. This is particularly so if the Judicial Conference can act with sufficient nimbleness and precision.

One judge member noted that, by definition, an emergency creates an atmosphere of unease. Having the authority to declare an emergency reside in one place – with the Judicial Conference – suggests authority and promotes trust. It makes sense to focus on a single identifiable body that is designed to be sensitive to lots of issues. A member agreed that substantive protections are most important. This member thought that the authority to declare an emergency should be tailored to the kind of nationwide issue – like the pandemic – that Congress had in mind when it suggested emergency rules. Local issues, like floods, hurricanes, or power outages, have been dealt with in the past without an emergency rule and have not prompted Congressional action.

Another judge member also spoke in favor of uniformity and argued that the benefits of uniformity outweigh those of localization.

Another judge member noted that the consideration of emergency rules happens infrequently and that we should consider the types of emergencies that are possible. This member suggested that a situation where the country’s communications infrastructure is damaged might make it infeasible to communicate nationally and might make local control desirable.

One judge member expressed that she was impressed with the drafts and had originally been comfortable with different decisionmakers for different sets of rules, but was now thinking that uniformity was more desirable in light of the scope of the proposed changes. As an alternative means of balancing the values at stake, this member suggested that perhaps the Judicial Conference could be the default decisionmaker but that others could be permitted to determine that the Judicial Conference is unreachable and – in those situations – to act on their own.

Professor Coquillette echoed Judge Bates’s view that the Executive Committee of the Judicial Conference can act very quickly and has done so in the past.

A judge member asked about the extent to which the bankruptcy rules are already sufficiently flexible to allow judges to toll and extend deadlines in particular cases. Professor Gibson responded that there is already a rule that allows flexibility with regard to some deadlines (Bankruptcy Rule 9006(b)), but that, because there are limits on the authority granted and some deadlines are exempt, the subcommittee thought an emergency rule would be helpful. This same committee member then explained his view that although the Bankruptcy Rules Committee’s reasons for allowing emergency declarations at the bankruptcy court level made sense, the other committees’ arguments to the contrary were also compelling. This member also suggested that there was an appearance benefit favoring an Article III over an Article I decisionmaker that might tilt the balance in favor of giving the Judicial Conference sole authority.

Another judge member supported having a different decisionmaker for the appellate rules, but found today's arguments in favor of uniformity compelling. This member thought that the courts of appeals were very different from trial courts – there are fewer substantive rights at stake and they are sufficiently nimble. Circuit-wide orders have been used in the past in order to immediately protect rights when, for example, major weather events necessitate the extension of filing deadlines.

An attorney member thought that perceptions of what constitutes an emergency may vary throughout the country and was initially inclined to favor some devolution of power to regional courts. However, he was persuaded by the flexibility of the existing rules and the need for uniformity and now favored keeping the decisionmaking power in the Judicial Conference, and thought it was important that a uniform federal authority be identifiable in emergencies.

*Definition of a Rules Emergency.* Professor Capra introduced questions concerning what ought to qualify as a “rules emergency.” There was at least some uniformity across advisory committees on this issue. The advisory committees agreed there must be “extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court” which “substantially impair[s] the court’s ability to perform its functions in compliance with the[] rules.” One early issue was whether there should be a requirement that the parties, as well as the courts, are unable to operate under the normal rules. This possibility was rejected because the courts, and particularly the Judicial Conference, would be unlikely to have information about the parties’ access. Further, a problem for the parties is necessarily a problem for the courts so – to the extent the information is available – it makes no difference. The remaining point of inconsistency across committees is that the Criminal Rules Committee, and no other committee, included a requirement (in draft Criminal Rule 62(a)(2)) that before the Judicial Conference declares a Criminal Rules emergency it must determine that “no feasible alternative measures would eliminate the impairment within a reasonable time.”

Judge Kethledge explained this additional requirement. First, he explained that the “extraordinary circumstances” finding under paragraph (a)(1) of the proposed criminal rule – the finding the other committees also require – is a substantive impairment requirement. The additional requirement in paragraph (a)(2) is an exhaustion requirement. These are not redundant. Judge Kethledge emphasized that the committees have thought about different kinds of proceedings and have focused on different things. Procedurally, the Criminal Rules are the only rules the CARES Act directly amended. The Criminal Rules Committee gave intensive consideration to how the rules ought to be abrogated in light of this kind of emergency. They thought it was important that the rules not be abrogated unless doing so proves absolutely necessary. The Criminal Rules protect core substantive interests with a long history in the law. Given how carefully these rules have been crafted in the first place, all feasible alternatives should be explored before any rules are suspended. There might be ways of adapting that cannot be foreseen right now but which the Judicial Conference might be able to learn about in the moment from local actors on the ground. Judge Kethledge thought any remaining disuniformity was worth allowing. Professor Beale added that uniformity on this point was not essential – the Criminal Rules Committee was not asking the other advisory committees to adopt the additional exhaustion requirement. She suggested that it might be fine for a Bankruptcy Rules emergency to be declared

at the local level while extra protections are afforded the substantive rights at issue in the criminal context. Professor King agreed that the Criminal Rules Committee feels very strongly about including the exhaustion requirement.

Professor Cooper spoke on behalf of the Civil Rules Committee. That committee was comfortable with the “no feasible alternative” requirement being included in a criminal emergency rule but not in the civil rule. It did not think it was necessary for the Civil Rules and, in light of the different rights being protected in the criminal context, was not concerned with the disuniformity. Professor Marcus agreed that Civil and Criminal Rules are very different so having a difference on this point made sense.

Professor Gibson said the Bankruptcy Rules Committee felt similarly to the Civil Rules Committee and had decided against including the “no feasible alternative” language. They were not concerned with the disuniformity.

Judge Bybee observed that the only “friction points” for the courts of appeals in an emergency were the filing of briefs and the holding of oral arguments. Neither of these implicated the kinds of values at stake in the Criminal Rules, and the Appellate Rules Committee was therefore also not concerned by the possibility of allowing the additional requirement in the proposed criminal rule to remain in place.

Judge Bates thought the Criminal Rules Committee made a strong argument but he had two points to add. First, he wanted to be sure that the exhaustion requirement was not redundant. He asked whether it might be said that before it could find a “substantial impairment” the Judicial Conference would necessarily have to have considered alternatives? Second, if the Judicial Conference were put in the position of declaring a rules emergency across all the rules sets, was there anything to be said for having the same standard for all the rules? If the rule were to state that declaring a Criminal Rules emergency required consideration of feasible alternatives, might this imply that there was no obligation to consider alternatives outside of the criminal context? What would be the implications of leaving the requirement out for the other sets of rules?

A judge member reminded the Committee of the existing authority of the courts of appeal under Appellate Rule 2 to suspend the Appellate Rules in particular cases and asked whether the proposed amendment to Appellate Rule 2 could be seen as constraining this existing authority to a narrower set of circumstances. This member noted that courts of appeal have been able to respond to emergencies in the past and would not want to see their existing power limited.

An attorney member suggested adding “or set of cases” to Appellate Rule 2(a) in order to avoid constraining the current authority of the courts of appeals. This would make it clear that the courts of appeal could issue suspensions of rules across cases without declaring an emergency. Professor Hartnett thought the Appellate Rules Committee would be receptive to such a change because they did not want the existing authority of the courts of appeals to be constrained. Professor Capra asked whether the issuance of orders under such an authority might start to look like local rulemaking. Professor Hartnett responded that the language “a set of cases” would imply that orders suspending rules cannot be applied to all cases. Professor Struve asked for clarification

on the suggestion that subdivision (a) be modified in a way that would apply even outside of emergency situations.

A judge member thought the higher standard for declaring a Criminal Rules emergency was appropriate. Although the inclusion of the higher standard in only one of four emergency rules would imply that alternatives did not need to be considered in other contexts, this member did not think the drawbacks of this implication outweighed the benefits of the heightened standard for a Criminal Rules emergency.

Another judge member asked whether this language was added in response to any particular situation that had come to the Criminal Rules Committee's attention. Professor King explained that the Criminal Rules' Emergency Rules Subcommittee had held a miniconference and consulted with a broad group of actors. The input received through these avenues influenced the Criminal Rules Committee's thinking. One circumstance that distinguished its approach was the possibility of a hurricane or other major catastrophe rendering all the courthouses in a district not useable. Other advisory committees would consider this a substantial impairment but history had shown – in Puerto Rico and Louisiana – that criminal proceedings could be moved to a different courthouse in another area. Judge Kethledge added that the Emergency Rules Subcommittee had canvassed chief judges around the country. In response to Judge Bates's questions, Judge Kethledge thought that the required determinations were not redundant because paragraph (a)(1) of draft Criminal Rule 62 only looked for an impairment and did not imply any evaluation of alternatives. In a situation like the aftermath of Hurricane Katrina, court proceedings were moved pursuant to 28 U.S.C. § 141. If an option like this is available, courts would be obligated to use it to hold criminal proceedings under the existing rules while an emergency might be declared under the Appellate, Bankruptcy, and Civil rules.

An attorney member said that he had been somewhat confused by the language because it seemed that the “substantial impairment” finding would take into account the possibility of moving court functions. However, this member now thought that a court moving its functions would be “substantially impaired” because relocated proceedings do not constitute normal court operations. The member suggested that it might be worth adding an adverb to modify “eliminate” in paragraph (a)(2) – possibly “sufficiently.” This would indicate that the alternative must be sufficiently effective to mitigate the disruption of court operations.

Ms. Shapiro expressed the DOJ's support for Judge Kethledge's reasoning and for including the additional requirement for the Criminal Rules.

Judge Bates suggested that while the Criminal Rules Committee's reasoning was compelling, it might be worth reevaluating the value of uniformity. He also wanted to be sure that, just as the Criminal Rules Committee had considered dropping the requirement, the other advisory committees had considered adopting it.

*Open-ended Appellate Rule Structure.* Professor Capra explained that the proposed appellate emergency rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency. Nor does it state what the substitute rule (if any) must be when a



rule is suspended. The appellate emergency rule proposal does not specify what provisions need to be included in an emergency rules declaration. It imposes no particular time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules.

Judge Bybee reiterated that the two “friction points” for the courts of appeal operating under emergency situations are filing deadlines and oral argument scheduling. Given the flexibility already available under the current Appellate Rules, the Appellate Rules Committee did not think it made sense to have a more detailed rule for adjusting the timing of these events during emergencies. The Advisory Committee would prefer having no emergency rule to adding more constraints to their proposal because without an emergency rule the courts of appeal can just rely on the flexibility they already have.

Professor Hartnett added that the current Appellate Rule 2 can be thought of as the Appellate Rules’ equivalent to Civil Rule 1, which states that the Civil Rules should be interpreted to preserve justice and efficiency. Professor Hartnett understood that the proposed amendment to Appellate Rule 2 was particularly open-ended and did not identify alternative rules but noted that rule-suspension provisions during the pandemic have often not provided alternatives. For example, an order waiving a paper-filing requirement does not have to include all the details of online filing. Professor Hartnett also suggested that subdivision (a) – the current Appellate Rule 2 – would carry over into an appellate rules emergency and would then authorize courts to create whatever alternatives they might need to operate. In addition, the Appellate Rules Committee did not set timing deadlines for emergency declarations, opting instead for the open-ended instruction that the emergency-declarer “must end the suspension” of rules “when the rules emergency no longer exists.” Finally, he noted that he was not aware of anyone having suggested that Rule 2 had been abused historically.

Judge Bates suggested that the courts of appeals’ normal modification of deadlines and oral argument timing was not quite comparable to the suspension of rules during an emergency. The ability to alter deadlines and scheduling is not unique to the courts of appeal. The distinguishing feature of the courts of appeals might be that there is not much at stake when deadlines and schedules are changed. He said it did not seem to him that this was what the committees were concerned with here. Judge Bates also asked whether there is a downside to not setting out replacement rules. If nothing is set out, it will be left to someone – the chief circuit judge, a panel, the circuit as a whole – to describe specifics.

Judge Bates then pointed out that subdivision (a) says the court “may suspend and order proceedings as it directs” while subdivision (b), the emergency rule, only says the court “may suspend” and does not mention ordering proceedings. He asked whether paragraph (b) needs something about the authority to order proceedings, or whether the omission was intentional. Professor Hartnett explained that the Appellate Rules Committee had assumed that the authority in paragraph (a) was implicit in (b), but he agreed that it should probably be made explicit.

A judge member made a similar drafting note. In paragraph (b)(2) the suspension of rules within a circuit is allowed, but sometimes the rule only needs to be suspended in part of a circuit. The member suggested that perhaps the rule should refer to “all or part of that circuit.”

Another judge member did not think it was a problem for the courts of appeals to have a different structure to their emergency rules, but this member thought that a sunset provision – maybe ninety days – would be an appropriate and important safeguard. Professor Capra added that if the Judicial Conference was, ultimately, the only authority declaring emergencies across all the rule sets, it would be particularly odd for there to be a time limit on the other three types of rules emergencies but not on an appellate rules emergency.

An attorney member had a question about language in paragraph (b)(2) that identifies “time limits imposed by statute and described in Rule 26(b)(1)-(2)” as those that cannot be set aside in an emergency and whether this referred to time limits both “imposed by statute” *and* “described in Rule 26” and about the extent to which these categories overlapped. Professors Hartnett and Struve indicated that they were not aware of any time limits in the Appellate Rules imposed by statute but not covered in Rule 26(b), but recommended keeping the references to both because some requirements covered in Rule 26(b) are not set by statute.

Judge Bybee thought it made sense to add “and order proceedings” to subdivision (b) for consistency with subdivision (a), and he did not have any objection to a ninety-day time limit for an emergency declaration. He agreed with Professor Capra’s point that this would be a particularly good idea if the Judicial Conference were in the position of declaring rules emergencies across rules sets. He also agreed with the proposal to add “or set of cases” and expressed his view that the Appellate Rules Committee would likely be amenable to these suggestions.

Some relatively brief comments rounded out this discussion. One judge member noted that if a ninety-day sunset provision is introduced there should be an option to extend the emergency past the ninety days. Another judge member thought it would be helpful for paragraph (b)(2) to reference both deadlines imposed by statute and Rule 26(b) because it was helpful to the reader to include both, noting that, in this judge’s court, there exists a practice of including sunset provisions when issuing emergency-type orders. Another judge member suggested that paragraph (b)(3) be amended to limit the Judicial Conference’s review authority to review of decisions under subdivision (b) as opposed to all of Rule 2, which would include subdivision (a). Judge Bybee pointed out that the draft committee note addressed some issues that had been raised and that he expected the Advisory Committee would be open to including additional clarifications.

*Authority.* Professor Struve introduced an issue raised in the Appellate Rules Committee meeting, regarding whether rules allowing the Judicial Conference or other actors to declare an emergency might run afoul of the Rules Enabling Act. She framed the issue in this way: a judge presiding over individual cases is generally understood to have authority over her own docket. In the draft emergency rules, the advisory committees give authority to the Judicial Conference. That authority would not be limited to cases on its members’ own dockets. Nor does 28 U.S.C. § 331 – which establishes and lays out the powers of the Judicial Conference – give the Judicial Conference the authority to declare emergencies or suspend rules of procedure. Would there be a problem if rules of procedure enacted through the Rules Enabling Act process gave the Judicial Conference such authority?

Professor Struve reported that the general consensus after discussion among the reporters was that there was not an issue under the Rules Enabling Act. One way of thinking about it was that there are a variety of decisionmakers that exist outside of the courts that make determinations that are incorporated by reference to the ways the courts function. For example, a state can declare a legal holiday and have that decision incorporated into a time-counting provision, giving that holiday declaration a legal effect in the rules. In the draft criminal, civil, and bankruptcy rules, the Judicial Conference would choose from a menu of options and could choose to implement some or all of them. There is less structure to the proposed appellate emergency provisions but as discussed, they already have more flexibility to suspend their rules, and the stakes are somewhat lower.

Professor Capra thought the issue was simple. He pointed out that making a declaration that an existing rule comes into effect is different from making a rule. The rule is preexisting, and triggering it is not rulemaking. Professor Hartnett looked at the question differently. He thought the concern was not that the federal rules cannot incorporate other law by reference, but rather the source of the authority for another body to act in the first place: Where does the Judicial Conference get the authority to declare the emergency? The other way to think about it is that perhaps the rule promulgated under the Rules Enabling Act can itself be the source of the Judicial Conference's authority, but this requires thinking through the implications. Can a rule promulgated under the Rules Enabling Act create authority for a body that did not have such authority already?

Professor Coquillette did not think this presented a practical problem. He added that Congress instructed the Rules Committees to make rules that solve this problem, and he did not think it was likely that anyone would challenge it.

A judge member asked whether paragraph (b)(3) of the draft amendment should refer to a "declaration" under paragraph (b)(1) rather than a "determination," because the word "determination" would seem to suggest that the Judicial Conference can review and revise the rules modifications put in place as well as the emergency declaration. It did not seem to this member that the Judicial Conference should necessarily be reviewing the modifications.

Professor Marcus thought it was very peculiar to suggest that there was an authority problem when Congress had instructed the Rules Committees to do something like this and when Congress would be reviewing the rule before it went into effect.

Professor Cooper thought that it was a very good idea for the Judicial Conference to be the actor empowered to act and that there was therefore likely a way to find authority under either the Rules Enabling Act or 28 U.S.C. § 331.

Professor Beale thought that the Rules Enabling Act provides the necessary authority if such authority did not exist otherwise. If there is a statutory gap – and, in her opinion, one does not appear to exist – she thought that the Rules Enabling Act's supersession could bridge that gap. If the Judicial Conference is the logical place to lodge the power to declare an emergency and if the Rules Committees, the Judicial Conference, the Supreme Court, and Congress affirm that by approving the emergency rules – that ought to be enough to alleviate any lingering concerns.

Professor Gibson noted that although the section of the Rules Enabling Act that applies specifically to Bankruptcy Rules, 28 U.S.C. § 2075, does not include a supersession clause, she nevertheless agreed that it provided sufficient authority.

Professor Cooper said that the Civil Rules had embraced things prescribed by the Judicial Conference in the past. For example, electronic filing was originally permitted according to standards developed by the Judicial Conference. Local rules numbering and the maintenance of district court records were similar examples.

An attorney member asked if there was a gap between the current rule proposals and the CARES Act's focus on presidentially declared emergencies. Is there anything to be pointed to other than the later ratification process? Professor Capra thought that this was only a problem if the CARES Act were relied on for authority to promulgate the emergency rules. Instead the Rules Enabling Act could be relied on as the statutory authority. Judge Bates clarified that the authority question here is different from the statutory authorization.

*Criminal Rules Provisions.* The next topic for discussion was some of the substantive provisions of draft Criminal Rule 62, particularly subdivisions (c) and (d). Subdivision (c) lays out specific substantive changes for emergency circumstances that were developed based on feedback the committee received from participants in the miniconference. Judge Kethledge and Professors Beale and King invited any thoughts from the Standing Committee on these proposals.

Judge Bates had a question concerning paragraph (c)(3), which would allow the court to conduct a bench trial without the government's consent when it finds that doing so "is necessary to avoid violating the defendant's constitutional rights." He asked why the Criminal Rules Committee had limited this to constitutional rights instead of allowing the same procedure when a statutory right was at stake. Judge Kethledge thought the main reason was to avoid any questions under *Singer v. United States*, 380 U.S. 24 (1965), in which the Supreme Court held that a defendant has no constitutional right to waive trial by jury. Professor Beale noted also that the DOJ was opposed to too much of a deviation from the norm and that the subcommittee had taken these views into account. Originally, the rule would have allowed a bench trial without the government's consent whenever doing so would be "in the interest of justice." The Advisory Committee ultimately determined that this provision should be a narrow one. Judge Kethledge noted that there was division over this provision among advisory committee members and that it had not been put forward with unanimous support.

A judge member questioned the extent to which the situation envisioned by paragraph (c)(3) could ever actually arise. Presumably the constitutional right at issue would be a speedy trial right, and evaluating whether an additional delay would violate that right requires a fairly complicated multi-factor decision. If, under the rule as drafted, a judge has to go through all of that analysis and get it right, subject to an interlocutory appeal by the government, in practice it could be very difficult to ever actually order a bench trial over a government objection. The member was not opposed to the provision though because criminal defendants sitting in jail while proceedings are delayed has been a major problem during the current pandemic. Professor Beale thought that as a practical matter the provision could be used. The member asked whether looking at the

statutory speedy trial test rather than the constitutional one might make the provision more likely to actually come into play. Professor King noted that *Singer* concerned the method of trial; it did not involve speedy trial rights. The consensus of the Advisory Committee was to not limit the provision to speedy trial rights because we cannot predict all future emergency circumstances and what constitutional rights they might somehow implicate.

Another judge member expressed the view that this would likely be a null set provision if the government's veto can only be overridden based on constitutional concerns, and that it was not worth writing a rule for a circumstance that would not happen.

A member asked for clarification on whether the rules and statutes normally allow a bench trial without the government's consent. Professor Capra and others confirmed that they do not. This member then asked whether this was a substantive change. Judge Kethledge thought there might be a question there.

An attorney member thought the emergency setting could pit the defendant and government against one another in a new way. In an emergency, the choice between a jury and a bench trial also might implicate a very long incarceration. Judge Kethledge agreed these are serious concerns. Professor King said there had been mixed reports regarding whether the government had been withholding consent to bench trials in situations like these.

Professor Coquillette noted that the Supreme Court routinely approves the Standing Committee's recommendations but that the bench trial provision was the kind of thing that had historically attracted more attention from the Court. Judge Bates agreed. On the other hand, Judge Bates thought members of Congress might want statutory speedy trial rights protected as well as constitutional rights. Accordingly, he thought it important to be very careful.

A judge member appreciated that the proposed rule addressed the issue of extended detention while trials are delayed. This member was not aware of this issue arising but thought there might be a need to think about defendants who want to have a jury trial but are not able to get one for an extended period of time.

Mr. Wroblewski said that the DOJ shared the concerns with delayed trials, especially for detained defendants. It had urged U.S. Attorneys to offer bench trials, and some offices had made blanket offers. Many defendants have not taken this offer. There have been some situations where the government has not consented to a bench trial, but those have been few. While the DOJ does not anticipate that paragraph (c)(3) will have much impact in the end, it is sensitive to concerns about what the Supreme Court will think. It supports the current proposal as a compromise rule.

As a final point on the bench trial issue, a member wondered why this rule was necessary. If constitutional rights are at stake, this member asked, isn't the government always obligated to agree or to drop the case? Frequently the government must choose to prosecute a case in a manner it would not prefer in order to avoid violating a defendant's constitutional rights.

A judge member offered a view on paragraph (c)(1) which, as currently drafted, would establish that “[i]f emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding.” This member felt that the word “preclude” was too strong. At times in the past year, public attendance was severely limited but not totally unavailable. It would be better to encourage or require allowing alternative public access when in-person access is seriously limited but not precluded.

Discussion then proceeded to subdivision (d), which addresses remote proceedings. In general, subdivision (d) is more restrictive than the CARES Act’s remote proceedings provisions. It carries over some aspects but has additional prerequisites that must be met before proceedings may be held remotely.

Judge Bates asked whether subparagraph (d)(2)(A) should refer to “in-person proceedings” rather than “*an* in-person proceeding.” The latter formulation, which is in the current draft, would seem to suggest a case-specific finding, which Judge Bates did not think was the Criminal Rules Committee’s intent.

A judge member asked about subparagraph (d)(3)(B), which requires that – in conjunction with other things – a defendant make a written request that proceedings be conducted by videoconference. The member wanted to know what the Criminal Rules Committee had in mind here. Professor King explained that there are two goals behind this requirement. First, it helps guarantee that the gravity of the waiver is well-understood by both the defendant and counsel. Second, it helps to create a record. The Advisory Committee did envision that the required writing would be filed with the court. An additional provision in paragraph (c)(2) provides for obtaining the defendant’s signature, written consent, or written waiver under emergency circumstances.

A judge member agreed with Judge Bates about subparagraph (d)(2)(A). This member said that there had been concerns among judges regarding whether one judge in a district holding in-person proceedings undermined findings by other judges that in-person proceedings could not be held. This member also asked about the timing requirement in subparagraph (d)(2)(A) and suggested it be mirrored in subparagraph (d)(3)(A).

Professor Capra asked whether there was inconsistency regarding the use of the word “court,” in draft Criminal Rule 62, but he thought it was clear enough in each provision whether the word referred to a single judge or to a court in the sense of a district or courthouse. He observed that the Criminal Rules already use the word “court” in both senses. Professor Beale said this was something each advisory committee should review for consistency and clarity. Professor Garner added that “court” is used to refer to an individual judge throughout the rules and that this was generally not a problem.

*Miscellaneous Emergency Rules Issues.* Professors Cooper and Marcus briefly explained how the Civil Rules Committee’s CARES Act Subcommittee had identified the Civil Rules that might warrant emergency changes. It conducted a thorough review of all the rules and identified only a few that were not sufficiently flexible. These were the rules that are in subdivision (c) of draft Civil Rule 87.

A judge member suggested that if the Judicial Conference is going to be the decisionmaker in all instances, it would be more uniform to rephrase Rule 87 in the same way as the others. Currently draft Bankruptcy Rule 9038 and Criminal Rule 62 default to enacting all the emergency provisions unless the emergency-declarer says otherwise, while draft Civil Rule 87 requires that the emergency-declarer affirmatively identify which emergency rules will go into effect. Professor Capra agreed that consistency would be good here.

Professor Capra next raised the issue of what happens if the Judicial Conference is unable to meet and declare an emergency? Should the rules account for such a situation? He said he didn't think such a provision was needed because if events were so dire that the Judicial Conference or its Executive Committee couldn't communicate for a significant amount of time that the Federal Rules of Practice and Procedure would not be a particularly high priority. There would be bigger problems to deal with. Further, the Executive Committee of the Judicial Conference is a smaller body and that smaller group is the one that would be deciding. The judge member who had raised this issue in the first place found Professor Capra's reasoning was persuasive.

Another judge member thought it was worth considering an emergency in which communications are seriously disrupted. This member suggested that a judge or chief judge who cannot communicate with the Judicial Conference should be able to act. This member thought the fact that the situation was extreme did not mean it was not worth considering.

Finally, Professor Capra raised the issue of the termination of a declared rules emergency. Draft Bankruptcy Rule 9038, Civil Rule 87, and Criminal Rule 62 say that if the emergency situation on the ground ends before the declared rules emergency ends, there is a provision by which the rules emergency may be terminated. The Bankruptcy and Civil Rules Committees' draft rules provide that the rules emergency "may" be terminated; the Criminal Rules Committee's proposal said that it "must" be terminated. Professor Capra suggested that the termination should be permissive, not mandatory because imposing a mandate on the Judicial Conference seems extreme.

One judge member disagreed and thought that the mandatory language was preferable. These emergency rules should be preserved for extreme situations where there are no alternatives. The sunset provisions limit the damage somewhat but still if the emergency is resolved it is important to return to normal court operations. This member was not concerned about the possibility that someone would have a cause of action if the Judicial Conference was required to terminate the emergency but failed to do so. Professor Capra asked whether this would mean the initial emergency-declaring authority should also say "must" instead of "may." This member did not think so, and Professor Capra agreed.

An attorney member agreed that any rules emergency should not last any longer than the actual emergency, but this member thought that it was necessary to allow discretion. The relevant question at the end of an emergency would be how to terminate, not whether to terminate. Suggesting a mandatory obligation at the instant the emergency ends could distort the discussion because, at the end of the day, the Judicial Conference would have to determine the reasonable means of winding down the emergency operations.

A member expressed concern about writing a rule that forces the Judicial Conference to do anything. If – as it seemed – any mandatory language would not be enforceable, then maybe precatory language of some kind would be sufficient.

Judge Bates had one final question concerning proposed draft Bankruptcy Rule 9038. As currently drafted, paragraph (c)(1) provides that certain actions could be taken district-wide “[w]hen an emergency is declared” but paragraph (c)(2) which addresses actions that could be taken in a specific case or proceeding did not include that same phrase. Judge Bates asked whether paragraph (c)(2) should also say “when an emergency is declared.” Professor Gibson explained that the style consultants had thought the current phrasing was clear – that yes, paragraph (c)(2) also requires that an emergency must have been declared, but she and Judge Bates agreed that perhaps it did need to be clarified.

#### *Other Matters Involving Joint Subcommittees*

Judge Bates briefly addressed two ongoing joint subcommittee projects: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

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

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on October 20, 2020. The Advisory Committee presented four information items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 195.

#### *Information Items*

*Proposed Amendments Published for Public Comment.* Judge Bybee explained that at the June 2020 Standing Committee meeting the Appellate Rules Committee had received some feedback concerning proposed Rule 42, which would address voluntary dismissals. The committee addressed the concern and would be seeking final approval of this proposed rule change in the spring of 2021. There was no present action to be taken. Professor Hartnett noted that the concerns raised at the Standing Committee related to how the requirement that parties agree to dismissal of an appeal might interact with local rules requiring the defendant’s consent before dismissal. Judge Bates, who had raised this concern, stated that he was happy with the adjustments that the Appellate Rules Committee had made to proposed Rule 42.

*Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing).* The Appellate Rules Committee is still considering combining Rules 35 and 40.



It was thought that consolidating these rules might eliminate some confusion in the Appellate Rules. This issue remains under careful study.

*Suggestions Related to In Forma Pauperis Relief.* Various suggestions relating to *in forma pauperis* relief had been submitted to the Appellate Rules Committee. Judge Bybee explained that it was not clear that the problems identified were problems with the Appellate Rules. The issues are under consideration, but may be put off.

*Relation Forward of Notices of Appeal.* The relation forward of notices of appeal was still under discussion by the committee.

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

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Bankruptcy Rules Advisory Committee, which last met via videoconference on September 22, 2020. The Advisory Committee presented four action items and two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 241.

### *Action Items*

*Retroactive Approval of Official Form 309A–I (Notice of Bankruptcy Case).* Judge Dow explained this action item concerning a series of forms that are used to notify recipients of the time and place of the first meeting of creditors and certain other deadlines. The information on these forms includes the web address of the PACER system. This web address had been changed, so the forms needed to be updated to reflect the new address. The change has already been made pursuant to the Bankruptcy Rules Advisory Committee's authority to make technical changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, and the Advisory Committee now sought that retroactive approval. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the changes to the Official Form 309A–309I.**

*Proposed Amendments for Publication.* An amendment to Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases), was brought up in connection with a project on unclaimed funds and is intended to reduce the amount of such funds and clerks' offices' liabilities with regard to them. The Bankruptcy Rules Advisory Committee asked for a modification of Rule 3011 in order to achieve a wider circulation of information about unclaimed funds. The modification proposed by the Bankruptcy Rules Committee would add a new subdivision (b) that would require court clerks to provide searchable access on court websites to data about unclaimed funds on deposit with the clerk. The Bankruptcy Rules Committee added a proviso that would allow the clerk to limit access to this information in specific cases for cause shown (e.g., to protect sealed information). The Advisory Committee sought publication of this proposed amendment.

Related Amendments to Bankruptcy Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Form 417A (Notice of Appeal and Statement of Election) were proposed in order to maintain uniformity with recent amendments to the Federal Rules of Appellate Procedure. Rule 8003 would be amended to conform to pending amendments to Appellate Rule 3. The amendments would clarify that the designation in a notice of appeal of a particular interlocutory order does not preclude appellate review of all other orders that merge into that judgment or order. Form 417A, the Bankruptcy Notice of Appeal Form, would be amended to conform to the wording changes in Rule 8003. Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendments to Rule 3011, Rule 8003, and Form 417A.**

#### *Information Items*

*Changes to Instructions for Official Form 410A (Proof of Claim, Attachment A).* Judge Dow explained that a bankruptcy judge had pointed out a problem with Form 410A to the Bankruptcy Rules Committee. The Form is an attachment to a Proof of Claim Form that is filed in bankruptcy cases for mortgage-related claims. The problem related to how total debt is calculated when the underlying mortgage claim has been reduced to judgment and has merged into that judgment. A question can arise as to what governs the claim at that point in jurisdictions that have judicial foreclosure. Judge Dow said that the Advisory Committee added a paragraph to the instructions to Form 410A clarifying that the “principal balance” in this situation is the amount due on the judgment along with any other charges that may have been added to the claim by applicable law. Judge Dow explained that because only the instructions were changed, and not the form itself, that no Standing Committee action was required.

*Bankruptcy Rules Restyling.* Professor Bartell explained that the style consultants have been doing great work making the rules more comprehensible. Parts one and two of the restyled rules had been published, consideration of parts three and four were proceeding on schedule, and the style consultants had just given the committee a draft of part five. An official draft of part six was scheduled to be ready in February. Professors Garner and Kimble expressed their appreciation to the Bankruptcy Rules Committee.

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

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Civil Rules Committee, which last met via videoconference on October 16, 2020. The Advisory Committee presented three action items and four information items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

#### *Action Items*

*Proposed Amendment to Rule 7.1 (Disclosure Statement).* The Civil Rules Committee first sought final approval of a proposed amendment to Rule 7.1 which was presented at the Standing Committee’s June 2020 meeting and remanded to the Civil Rules Committee for further

consideration in light of the feedback provided by the Standing Committee. Proposed paragraph (a)(1) and subdivision (b) have not changed since the June 2020 meeting. These provisions deal with adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. Proposed paragraph (a)(2) has been revised since the June 2020 meeting.

Proposed Rule 7.1(a)(2) seeks to require timely disclosure of information necessary to determine diversity of citizenship for jurisdictional purposes. Often this is not complicated, and citizenship is settled when the case is initially filed in federal court or removed from state court. However, determining citizenship is complicated in a number of cases, especially considering the proliferation of LLCs. The Civil Rules Committee thought it was worth amending Rule 7.1 because the consequences of failing to spot a jurisdictional problem early can be severe. As the committee's report explains, the committee came up with two ways to address the issues raised by the Standing Committee at the June meeting – one more detailed than the other. The Advisory Committee prefers the more detailed version but presented an alternative version for the Standing Committee's consideration.

Professor Cooper described the alternatives. As published, the rule would have required disclosure of citizenship at the time the action was filed in federal court, with the idea that this would apply equally to cases removed from state court because the time at which the case is removed is the time at which it is first filed in federal court. Public comments suggested that the rule would be clearer if it referred to the time at which an action is “filed in or removed.” Proposed subparagraph (a)(2)(A) was revised and now reflects these suggestions. In committee discussion, it was noted that diversity may need to be evaluated at other times as well. Subparagraph (a)(2)(B) was added to account for this and required filing “at another time that may be relevant to determining the court's jurisdiction.” Last June, some Standing Committee members were concerned that the language of this subparagraph was too open-ended. The proposal was remanded to the Advisory Committee for further consideration.

After extensive discussion, the Advisory Committee concluded again that it would be worthwhile to draw judges' and practitioners' attention to the complexity of the diversity rules and to the fact that diversity jurisdiction is not permanently fixed at the moment when the case first arrives in federal court. This led to the proposed revision of subparagraph (a)(2)(B)'s language presented at this meeting. The proposal would now require the filing of disclosures when “any subsequent event occurs that could affect the court's jurisdiction.” The Advisory Committee recognized that this was still somewhat nonspecific, but felt that the alternative of trying to spell out all the events that could affect diversity jurisdiction as an action progresses was simply not feasible. The Advisory Committee also suggested that the Standing Committee could approve a version that simply omits subparagraphs (a)(2)(A) and (B) (and dropping the word “when” from the end of paragraph (a)(2)), but Professor Cooper explained that the Advisory Committee did not recommend this course of action.

Judge Bates wondered whether there was still ambiguity in the word “when” in paragraph (a)(2). He was concerned that someone could be confused as to whether this refers to the time for filing or the time the citizenship is attributed. Professor Cooper said that, in the Civil Rules, the word “when” is often used to mean “at the time.” He said that it was possible to add a few more

words if it would help to clarify, but the Advisory Committee believed it was not necessary and was better to avoid unnecessary verbiage. Judge Bates noted that the second alternative proposed would avoid the problem by dropping subparagraphs (A) and (B).

A judge member offered a number of suggested alterations to the text of the proposed amendment. First, this member noted that no matter whether “when” or “at the time” was used, it was unlikely that practitioners would assume that the filing had to be made immediately. It might be helpful to provide a time limit to ensure prompt filing. This particular suggestion was later withdrawn. The member also asked whether the word “or” might be preferable to “and” at the end of subparagraph (A). Professor Cooper explained that “and” was used because the filing under subparagraph (A) would have to be made in every case and would often be sufficient to resolve questions. If something happens after that, having fulfilled the subparagraph (A) requirement in the past does not make the subparagraph (B) filing unnecessary. The member then suggested moving the word “when” from before the colon to, instead, the start of both of subparagraphs (A) and (B). This same member suggested that the reference to a party that “seeks to intervene” in paragraph (a)(1) ought to be reflected in paragraph (a)(2) which currently refers only to an “intervenor.” Professor Cooper did not recall this issue having been raised before the Advisory Committee. For paragraph (2), though, Professor Cooper thought it might make sense to wait for intervention to be granted under some circumstances. Judge Bates noted that, if implemented in paragraph (a)(2), this change should also be made in subdivision (b). The committee member also suggested subparagraph (2)(B)’s reference to “any subsequent event . . . that could affect the court’s jurisdiction,” might be too broad. If, for example, a case arguably became moot, this would be an event that could affect the court’s jurisdiction. But this is not a circumstance where the re-filing of disclosures would be necessary or desirable. Professor Cooper agreed that an amendment to narrow the filing requirement could be added.

Professor Kimble said that although moving the word “when” to both (A) and (B) would not change the meaning, the current draft was consistent with what the style consultants would typically recommend. He said that the style consultants would typically change “at that time” to “when.”

Professor Hartnett asked if it would be helpful to break paragraph (a)(2) into two sentences. (“ . . . a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must . . . .”) Professor Cooper thought this was a good idea. Judge Dow wondered whether “intervenor or proposed intervenor” would be an appropriate way to refer to the party seeking to intervene, and he endorsed the suggestion that (a)(2) be split into two sentences.

Another attorney member asked why paragraph (a)(1) referred to “A nongovernmental corporate party” but to “*any* nongovernmental corporation that seeks to intervene,” rather than using “any” in both places. Professor Cooper thought it should be changed to whichever conforms to the Appellate and Bankruptcy Rules, and Judge Bates agreed. Professor Garner suggested that the style consultants would normally change “any” to “a” and that if other rules were phrased differently, those rules were inconsistent with the style guidelines.

Judge Bates reviewed and summarized the changes under consideration. A judge member pointed out that revisions to the committee note might also be necessary. Judge Bates determined that it was better to circulate the proposed amendment incorporating the changes made during the meeting via email, with an opportunity for discussion, followed by a vote by email. This was done later in the week. There was no call for discussion and, upon a motion that was seconded, the Standing Committee voted unanimously to **recommend for approval the proposed amendment to Rule 7.1**. The agenda book has been updated to reflect the final version of the proposed amendment that the committee approved.

*Proposed Amendment to Rule 15(a)(1)*. Judge Dow presented a proposed amendment to Rule 15(a)(1), with a request that it be approved for publication for public comment. The proposed amendment is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently provides, in part, that “[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” A literal reading of “within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.” **The Committee approved for publication the proposed amendment to Rule 15(a)(1)**.

*Proposed Amendment to Rule 72(b)(1)*. Judge Dow next presented a proposed amendment to Rule 72(b)(1), with a request that it be published for public comment. The rule currently directs that the clerk “must promptly mail a copy” of a magistrate judge’s recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means.

The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be “immediately served” on the parties as provided in Rule 5(b). In determining how to amend the rule to bring it in line with current practice, the Advisory Committee referred to Rule 77(d)(1) which was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment “as provided in Rule 5(b).” In addition, Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: “The clerk must immediately serve copies on all parties.” Criminal Rule 49, like Civil Rule 5, contemplates service by electronic means. Professor Kimble asked why the word “promptly” had been changed to “immediately.” Professor Cooper said this change was made for conformity with Criminal Rule 59(b)(1). Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 72(b)(1)**.

*Information Items*

*Subcommittee on Multidistrict Litigation.* Judge Dow provided the report of the Multidistrict Litigation (MDL) Subcommittee. The first topic, formerly called “early vetting” is now called “initial census.” In three of the largest MDLs going on right now, a form of initial census has occurred over the past year. Judge Dow had spoken with the judges overseeing two of these three cases. Rather than have lengthy fact sheets, the judges in these cases have relied on the basic information on the first few pages of the fact sheets. The judges in these cases have used this basic information to organize the plaintiffs’ steering committee, to organize discovery, and to dismiss certain plaintiffs. The subcommittee has been very happy with how this has been developing in the big MDLs. It remains on the study agenda because a rule may be helpful, but it is also possible that these practices may just be circulated as best practices and could belong in the *Manual on Complex Litigation* or spread as a model by discussion at conferences. A rule may not be necessary.

An attorney member wanted to share his view. In this member’s experience, courts and the plaintiffs’ bar think there is little need for change and the defense bar does think there is a need for change. This makes rulemaking difficult. On paper, the rules seem to suggest that defendants could have a number of cases that they might want to join together into an MDL. In practice, though, the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining – and in fact the plaintiffs’ bar wants more plaintiffs. Additionally, MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle. This member understood that the Advisory Committee was not inclined toward allowing interlocutory appeals, but thought that it was worth looking at the initial census option as a way of avoiding the multiplicity problem.

Another attorney member thought there might be an opportunity to craft a flexible rule that would allow the courts to craft an initial census tailored to the particular case. Judge Dow agreed that this was what the Advisory Committee had in mind – something prompting the lawyers and the judge to consider an initial census in every case.

Judge Dow next explained that the subcommittee had also been very focused on interlocutory appeals. The subcommittee had held a conference of judges and lawyers working on MDLs, including a particularly good representation of non-mass tort MDLs. The conference had had a large influence on the subcommittee’s thinking and in the recommendation that an interlocutory appeal rule should not be pursued at this time. Some feel that the current interlocutory appeal options (and mandamus) are sufficient. Other interested persons think that even if there are some gaps, there is no need for new rules or rules amendments because the current rules are good enough and any delays caused by interlocutory appeals would not be worth it. As an example of one problem that could arise if interlocutory appeals were permitted, Judge Dow explained that state courts might not be willing to wait around while a federal Court of Appeals takes up a case. At the end of the day, the members of the subcommittee all thought that an interlocutory appeal rule was not worth pursuing at this time. Professor Marcus added that there had also been definitional issues concerning what kinds of cases to which such a rule would apply.

Finally, Judge Dow explained that equity and fairness and the role of the court in the endgame of settlements of large MDLs was the area that the subcommittee would likely be focused on in the near term. There are obvious similarities between MDLs and class actions, and for class actions the rules require that courts approve settlements. This is not the case for MDLs unless they are resolved through a class action mechanism. Questions can arise about whether all parties are treated the same and about what the court's role should be. Professor Cooper drafted a memo on these issues. At the last subcommittee meeting it was resolved that a conference convening stakeholders would be useful to help determine whether action should be taken on this issue.

An attorney member thought that it might be worth considering whether the attorneys with the most clients or client with the largest interest ought to be lead counsel, or at least whether this ought to be a factor in determining lead counsel. One criticism of MDLs is that they are lawyer-driven litigation and hinging lead counsel assignments on characteristics of the clients might ameliorate this somewhat (as opposed to giving prominence to the lawyer who files first or who is best-known in the district).

Another judge member suggested that in preparation for the conference, it might be worth asking the Federal Judicial Center to survey clients who received settlements in MDLs. An attorney member said he feared the proposal of rewarding the lawyers who aggregated the most clients. This would incentivize lawyers to form coalitions and would undermine the courts' control overall. In securities litigation, there are policy reasons to put institutional shareholders in the lead, but those reasons don't necessarily carry over to MDLs across all kinds of subject areas. This member agreed it was worth investigating what happens with money that ends up in common benefit funds. Lawyers applying to be lead counsel could be questioned regarding what has happened to funds they have won or overseen in the past. The member cautioned these issues might not be appropriately resolved through a civil rule.

*Items Carried Forward or Removed from the Advisory Committee's Agenda.* Judge Dow briefly summarized items on the Advisory Committee's agenda. He explained that the Civil Rules Committee is continuing to consider an amendment to Rule 12(a) that would clarify the time to file where a statute sets time to serve responsive pleadings but that the Advisory Committee had not yet come to an agreement on that issue. The Advisory Committee was also interested in investigating a potential ambiguity lurking in Rule 4(c)(3)'s provision for service by a U.S. Marshal in *in forma pauperis* cases. This investigation had not proceeded recently because the Marshals Service had been preoccupied with pandemic-related security concerns and the committee did not want to bother them at this time. There had been suggestions that the Advisory Committee look into amending Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege. The Civil Rules Committee plans to create a new Discovery Subcommittee to look into these issues. An Advisory Committee member submitted a suggestion to amend Rule 9(b), on pleading special matters – this would be discussed at the Advisory Committee's next meeting. Finally, Judge Dow explained that the Advisory Committee had removed from its agenda suggestions to amend Rule 17(d) (regarding the naming of defendants in suits against officers in their official capacity) and Rule 45 (concerning nationwide subpoena service).

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

Judge Kethledge presented the report of the Criminal Rules Committee, which met via videoconference on November 2, 2020. The Advisory Committee presented two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 395.

### *Information Items*

*Rule 6 Subcommittee.* Judge Kethledge reported that the Advisory Committee was continuing to consider suggestions to amend the grand jury secrecy provisions in Rule 6. Since the last meeting, the Advisory Committee has received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances. The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers). The Advisory Committee anticipates having more to report at the June 2021 meeting.

*Items Removed from the Advisory Committee's Agenda.* A number of items had been removed from the Advisory Committee's agenda. Discussion of these items is in the committee's report.

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

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on November 13, 2020. The Advisory Committee presented three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 441.

### *Information Items*

*Amendment to Rule 702 (Testimony by Expert Witnesses).* Judge Schiltz explained that the committee was looking at two issues relating to testimony by expert witnesses. The first was what standard a judge should apply when considering whether to allow expert testimony. It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. The requirements are that the testimony will assist the trier of fact, that it is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reasonably applied those principles and methods to the facts at hand. It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a



reasonable jury *could* find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met. This would not be a change in the law, but rather would consolidate information available in two different rules and two Supreme Court opinions.

The second expert testimony issue being considered by the Evidence Rules Committee is the problem of overstatement. Judge Schiltz explained that this refers to the problem of experts overstating the strength of the conclusions that can reasonably be drawn by the application of their methods to the facts. For example, an expert will testify that a fingerprint “was the defendant’s” or that a bullet did come from a gun, with no qualification or equivocation. Experts will make these claims with certainty when the science does not support such strong conclusions. The defense bar has been asking for an amendment that would not permit such overstatements. The Evidence Rules Committee was divided on this suggestion from the defense bar. Only the DOJ, however, was opposed to a more modest proposed amendment that would draw attention to the need for every expert conclusion to meet the standard set under Rule 702. Judge Schiltz anticipates that the Advisory Committee will present something related to Rule 702 at the Standing Committee’s June 2021 meeting, once he has received input from new members who recently joined the Advisory Committee.

*Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements).* The “rule of completeness” requires that if at trial one party introduces part of a writing or recorded statement, the opposing party can introduce other parts of that statement if in fairness those other parts should also be considered. Judge Schiltz explained that there are a couple of problems with this rule in practice. One is that the circuits are split on whether the “completing portion” can be excluded as hearsay. This can arise, for example, when a prosecutor misleadingly introduces only part of a statement and the defendant wants the jury to hear the completing portion. Some courts will exclude the completing portion under the hearsay rule out of a concern that the jury will overweight it. Other courts will allow the completing portion in but will instruct the jury not to consider it for the truth of the matter but only as providing context. Other courts just let it all in with no limit. The Evidence Rules Committee plans to draft an amendment to Rule 106 that would say that a judge cannot exclude the completing portion for hearsay, but that a judge may issue a limiting instruction.

Another problem with Rule 106 is that it only applies to written or recorded statements. If the statement was made orally, the common law governs and there is a lot of inconsistency in how it is applied. This is one of few areas of evidence law where the Evidence Rules are not considered to preempt the field. It is an odd area for that to be the case because generally this issue arises at trial and must be addressed on the fly, with minimal time for a judge to research the common law. The Evidence Rules Committee plans to draft an amendment rule that would apply to oral statements and supersede the common law.

The Evidence Rules Committee agreed to proceed with both changes to Rule 106. The Department of Justice opposed both changes.

*Proposed Amendment to Rule 615 (Excluding Witnesses).* Judge Schiltz explained that Rule 615 is, on its face, quite simple. It says that a judge must exclude witnesses from the courtroom during trial if the opposing side asks the judge to do so. These requests are common. There is confusion, though, over whether the ruling granting such a request only keeps the witness out of the courtroom or whether it also implies that the witness may not learn about what has been said in court – through conversations, reading a transcript, reading a newspaper, etc. Some circuits have said that the order automatically prevents the excluded witness from learning through these other avenues, while other circuits view the order as only effecting the physical exclusion. Because of this confusion, it can be very easy for witnesses to accidentally violate the order and find themselves in contempt of court. The Evidence Rules Committee unanimously agreed to draft an amendment retaining the part of Rule 615 that requires the court to exclude witnesses if any party asks but making clear that courts can also go further to prevent witnesses from learning about in court testimony. This should clarify that any additional restrictions must be made explicit.

A judge member noted that it was worth thinking about the implications of Rule 615 during trials held over videoconference or otherwise remotely. Additionally, this member noted that in bench trials direct testimony can be taken by affidavit and that it might be worth referring to that sort of testimony in the rule as well. Professor Capra thought the rule would help with these situations because it draws attention to methods of hearing about other witnesses' testimony beyond simply sitting in the courtroom while the witness testifies.

### **OTHER COMMITTEE BUSINESS**

The meeting concluded with a series of reports on other committee business. First Judge Bates addressed the *2020 Strategic Plan for the Federal Judiciary*. The agenda book contains material concerning the strategic plan, beginning at page 471. Judge Bates explained that the Judicial Conference committees – including this one – were asked to provide input on what strategies and goals reflected in the *Plan* should receive priority in the next two years. Those recommendations would be reviewed at the upcoming meeting of the Executive Committee of the Judicial Conference. Committee members were instructed to send any suggestions to Judge Bates and to Shelly Cox of the Rules Committee Staff.

Julie Wilson delivered a report on the Judiciary's Response to the COVID-19 pandemic. Judge Campbell had discussed this at the Standing Committee's June meeting. The Administrative Office's COVID-19 Task Force was established early last year and continues to meet bi-weekly. The Task Force remains focused on safely expanding face-to-face operations at the AO and in the courts. Notably, the Task Force has formed a Virtual Judiciary Operations Subgroup, which will recommend technical standards along with policies and procedures regarding the operation of remote communications, including with defendants in detention. Another big part of their work will be to standardize virtual operations throughout the judiciary. In the Administrative Office, guidelines, data, and information are being posted regularly on the JNet website, including information about the resumption of jury proceedings. These materials are available to judges and their staff. The only Judicial Conference activity relating to COVID-19 that has occurred since the last meeting was the extension of the CJRA reporting period from September 30 to November 30.

Ms. Wilson also delivered a legislative report. She explained that the Administrative Office had requested supplemental appropriations from Congress to address various needs within the judiciary due to the pandemic. These appropriations were not made. The Administrative Office also submitted 17 legislative proposals. These were not taken up by the recently concluded 116th Congress. One notable law enacted last year was the Due Process Protections Act. This was introduced in the Senate in May 2019 and had been tracked by the Rules Committee Staff. It was passed quickly and unanimously in 2020. The Act statutorily amended Criminal Rule 5 (Initial Appearance) to require that judges issue an oral and written order confirming prosecutors' disclosure obligations under *Brady* and its progeny. The Act required the creation of model orders for each district. Judge Campbell and Judge Kethledge had sent a letter to the leadership of the House Judiciary Committee expressing the Rules Committees' preference for amending the rules through the Rules Enabling Act process, but the Act passed regardless. The 117th Congress was sworn in on January 3, 2021, just a few days before the Committee met. Some legislation that has been of interest to the Rules Committees in the past had already been reintroduced. Representative Andy Biggs reintroduced the Protect the Gig Economy Act. It would expand Civil Rule 23 to require that the prerequisites for a class action be amended to include a requirement that the claim does not concern misclassification of workers as independent contractors as opposed to employees. Representative Biggs also introduced the Injunctive Authority Clarification Act. This would prohibit the issuance of nationwide injunctions. Other familiar pieces of legislation will likely also be introduced in the coming weeks. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

### CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 22, 2021. The hope is that the meeting will be in person in Washington, D.C. if doing so is safe and feasible at that time.

# TAB 1C

**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective December 1, 2020**

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Amendment (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.	
BK 2004	Subdivision (c) amended 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.	CV 45
BK 8012	Conforms rule to proposed amendment to Appellate Rule 26.1.	AP 26.1
BK 8013, 8015, and 8021	Eliminated or qualified the term “proof of service” when documents are served through the court’s electronic-filing system, conforming the rule to the 2019 amendments to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, amended to require that the parties confer about the matters for examination before or promptly after the notice or subpoena is served. The subpoena must notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Subdivision (b) amended to expand the prosecutor’s notice obligations by: (1) requiring the prosecutor to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose”; (2) deleting the requirement that the prosecutor must disclose only the “general nature” of the bad act; and (3) deleting the requirement that the defendant must request notice. The phrase “crimes, wrongs, or other acts” replaced with the original “other crimes, wrongs, or acts.”	

Revised June 3, 2021

**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2021**

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the <i>expressio unius</i> approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendment to the proposed amendment to Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised June 3, 2021

**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.”	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(j) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Revised June 3, 2021

**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	<p>An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021.</p> <p>The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.</p>	AP 26.1 and BK 8012
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	

Revised June 3, 2021



**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Revised June 3, 2021

**PENDING AMENDMENTS TO THE FEDERAL RULES**

<b>Effective (no earlier than) December 1, 2023</b>		
<u>Current Step in REA Process:</u>		
<ul style="list-style-type: none"> <li>Approved by relevant advisory committee for publication (Mar/April/May 2021 unless otherwise noted)</li> </ul>		
<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi).	CV 87 (Emergency Civil Rule 6(b)(2))
AP 32	The proposed amendment would remove references to Appellate Rule 35.	AP 35
AP 35	The proposed amendment would abrogate the rule, with the provisions of the rule combined into an amended Appellate Rule 40.	AP 40 and 32
AP 40	The proposed amendment would address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). Under the proposed amendments, Rule 35 would be abrogated, and Rule 40 would be expanded to address both panel rehearings and en banc determinations.	AP 35
Appellate Appendix	The proposed amendments to the Appellate Appendix would make conforming changes to the last line of the chart of length limits in the Appendix to the rules to conform to the proposed amendments to Rules 35 and 40 and to add length limits for responses to petitions.	AP 35 and 40
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor’s mortgage and of claims secured by a debtors home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If	

Revised June 21, 2021

**PENDING AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2023**

Current Step in REA Process:

- Approved by relevant advisory committee for publication (Mar/April/May 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of “A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.”	
CV 72	The proposed amendment to Rule 72(b)(1) was approved for publication by the Civil Rules Committee in Oct 2020 and the Standing Committee in Jan 2021. The amendment to would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.” Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d).	

Revised June 21, 2021

**SUMMARY OF THE**  
**REPORT OF THE JUDICIAL CONFERENCE**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Civil Rule 7.1 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..... pp. 9-10

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

- Impact of the COVID-19 Pandemic on Jury Operations ..... pp. 2-3
- Emergency Rules ..... pp. 3-6
- Federal Rules of Appellate Procedure .....p. 6
- Federal Rules of Bankruptcy Procedure ..... pp. 6-9
- Federal Rules of Civil Procedure..... pp. 10-12
- Federal Rules of Criminal Procedure..... pp. 13-14
- Federal Rules of Evidence .....p. 14
- Other Items .....p. 15

<p><b>NOTICE</b> <b>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE</b> <b>UNLESS APPROVED BY THE CONFERENCE ITSELF.</b></p>
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**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:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S.

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

### **IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS**

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

### **EMERGENCY RULES**

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:

- (1) identifying rules that might need to be amended to account for emergency situations; and
- (2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts “when the President declares a national emergency under the National Emergencies Act,” the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts’ ability to function under the existing rules.

A guiding principle in the advisory committees’ work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably



practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term “rules emergency” is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found when “extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.” (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee’s style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee’s discussion addressed the advisory committees’ request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that “no feasible alternative measures would eliminate the impairment within a reasonable time.” As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Information Items***

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

### ***Official Rules and Form Approved for Publication and Comment***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

Official Form 417A (Notice of Appeal and Statement of Election)

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

***Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I***

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from [pacer.gov](http://pacer.gov) to [pacer.uscourts.gov](http://pacer.uscourts.gov). Because the PACER address is incorporated in several places on the eleven versions of the “Meeting of Creditors” forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff’s concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

***Information Item***

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

## **FEDERAL RULES OF CIVIL PROCEDURE**

### ***Rule Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as “the time the action was filed.” In light of public comments received, as well as discussion at the Committee’s June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule’s reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed “when the action is filed in or removed to federal court” and “when any later event occurs that could affect the court’s jurisdiction under § 1332(a).”

The Standing Committee unanimously approved the Advisory Committee’s recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, 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.

### *Rules Approved for Publication and Comment*

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee’s request.

#### Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently

provides, in part, that “[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier” (emphasis added).

The difficulty lies in the use of the word “within.” A literal reading of “within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period *does not commence until* the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word “within” with “no later than.”

#### Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

Rule 72(b)(1) directs that the clerk “mail” a copy of a magistrate judge’s recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

#### ***Information Item***

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee’s ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a “census” approach that employs a simplified version of a plaintiff fact sheet;
2. Interlocutory appellate review of district court orders in MDL proceedings; and
3. Settlement review, attorney’s fees, and common benefit funds.

At the Advisory Committee’s meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)’s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee’s recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.



## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Information Item*

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee’s draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee’s agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of “historical importance” to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended “to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public.” The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in “appropriate cases” outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that “[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.” *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

*Judiciary*, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts’ inherent authority as an alternative ground for upholding the lower court’s decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ’s proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

## **FEDERAL RULES OF EVIDENCE**

### ***Information Items***

The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements ) to exempt the “completing” portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit “overstatement” by forensic experts.

## OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Respectfully submitted,



John D. Bates, Chair

Richard P. Donoghue	William K. Kelley
Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Kosta Stojilkovic
William J. Kayatta Jr.	Jennifer G. Zipp
Peter D. Keisler	

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

# TAB 2

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

**JOHN D. BATES**  
CHAIR

**CHAIRS OF ADVISORY COMMITTEES**

**JAY S. BYBEE**  
APPELLATE RULES

**DENNIS R. DOW**  
BANKRUPTCY RULES

**ROBERT M. DOW, JR.**  
CIVIL RULES

**RAYMOND M. KETHLEDGE**  
CRIMINAL RULES

**PATRICK J. SCHILTZ**  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Committee on Rules of Practice and Procedure

**FROM:** Catherine T. Struve, Reporter  
Committee on Rules of Practice and Procedure

Daniel J. Capra, Reporter  
Advisory Committee on Evidence Rules

**RE:** CARES Act Project Regarding Emergency Rules

**DATE:** June 1, 2021

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This memo summarizes the continuing collaboration of the advisory committees in drafting rules to govern emergencies. It provides an update on the coordinated work of the advisory committees to develop rules for extreme situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure, and to make those rules as uniform as possible. This report recounts the efforts of the advisory committees to adapt their proposals in light of the extremely helpful guidance provided by the Standing Committee at its January 2021 meeting.

As you know, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act,"<sup>1</sup> which among other things addresses the use of videoconferences and telephone

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<sup>1</sup> Pub. L. No. 116-136, March 27, 2020, 134 Stat 281.

conferences in criminal cases during the period of the current national emergency relating to COVID-19.

In addition to addressing these criminal-procedure issues for purposes of the current emergency, Section 15002 of the CARES Act also assigns a broader project to the Judicial Conference and the Supreme Court for consideration within the Rules Enabling Act framework:

The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

CARES Act § 15002(b)(6).

As this provision indicates, the scope of the project is not limited to pandemics, but extends to other possible types of emergencies that might affect the courts. The advisory committees have invested hundreds of hours of work on this project. We have now reached the point where the advisory committees on Appellate, Bankruptcy, Civil, and Criminal Rules are seeking the Standing Committee’s approval to release proposed emergency rules for public comment. These proposals are on track to take effect in December 2023 (if they are approved at each stage of the Enabling Act process and if Congress takes no contrary action).

This memo provides an overview of the collective work of the advisory committees to date. Each advisory committee is also filing a report to the Standing Committee on issues particular to that committee.<sup>2</sup> Here, we focus on the work that has been done to incorporate the suggestions made by Standing Committee members at the last meeting, and on the continuing efforts to propose rules that are uniform to the extent possible.<sup>3</sup>

## **I. Who Declares an Emergency?**

At the time of the last meeting, the advisory committee proposals diverged on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some rules also allowed certain courts and judges to do so as well. The consensus at the Standing Committee meeting was that the authority to declare a rules emergency should be left solely in the hands of the Judicial Conference. Consequently all of the proposed rules now leave authority solely with the Judicial Conference to declare a rules emergency.

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<sup>2</sup> Those advisory committee reports are attached to this report.

<sup>3</sup> In our December 2020 memo, we discussed questions that a member of the Appellate Rules Committee had raised concerning the appropriateness of the role that the emergency rules would assign to the Judicial Conference. At the Appellate Rules Committee’s spring meeting, that member stated that his concerns had been alleviated by the fact that the Judicial Conference will not be engaged in rulemaking but only in declaring a rules emergency. In light of this, and in light of the full airing this topic received during the Standing Committee’s January 2021 meeting, we do not discuss it in this memo.

## **II. Definition of a Rules Emergency**

The basic definition of a rules emergency is uniform in the four sets of rules. A rules emergency is found when:

extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.

In addition to the uniform basic definition of “rules emergency” set forth above, the Criminal Rule adds the requirement that “no feasible alternative measures would sufficiently address the impairment within a reasonable time.” The other advisory committees found no reason to impose this extra requirement, given the very strict standards set forth in the basic definition of a rules emergency. The consensus at the Standing Committee meeting was that it is appropriate to place this language in the Criminal Rules alone, given the importance of the Criminal Rules that would be affected in a rules emergency, including rules designed to protect constitutional rights. Accordingly, this divergence has been retained.

## **III. The Less-Detailed Appellate Rule**

The emergency Appellate Rule that was reviewed at the last Standing Committee meeting set few limits on the range of Appellate Rules that are subject to suspension in a rules emergency; nor did it state what the substitute rule (if any) would be when a rule is suspended. That version of the emergency Appellate Rule differed, in those respects, from the other three draft emergency rules. The Appellate Rules Committee justified this divergence on the ground that the emergency Appellate Rule proceeds from a different starting point than the other rules. Appellate Rule 2 already allows the court to suspend almost any rule in a particular case. Because the Appellate Rules proceed from the premise that all rules are subject to change in a case, the Appellate Rules Committee contended that it is not much different to authorize a change across a class of cases—at least in a rules emergency.

At the Standing Committee meeting, members appeared to accept the argument that the emergency Appellate Rule could be less detailed and more open-ended. But some members suggested that the Appellate Rule would be improved by including procedural requirements governing a rules declaration. Accordingly, the revised emergency Appellate Rule now submitted to the Standing Committee contains procedural features—concerning the Judicial Conference’s declaration of an emergency, the content of the declaration, early termination of a declaration, and additional declarations – that largely track those in the other sets of proposed emergency rules.

## **IV. Subparagraph (b)(1)(B)**

Other than the “no feasible alternative” language in Criminal Rule 62(a), discussed above, there is only one more disuniformity in the first two subdivisions of the Bankruptcy, Civil, and Criminal emergency rules (which we call the “uniformity provisions”). In subparagraph (b)(1)(B),

the Bankruptcy, Civil, and Criminal Rules all require the declaration of a rules emergency to specify any limitations on alteration of the rules that are listed (in later subdivisions) as subject to being changed in a rules emergency. But the language of the Civil Rule differs from the other two. The Civil Rule states that the declaration of emergency must “adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them.” The Bankruptcy and Criminal Rules provide that a declaration of emergency must “state any restrictions on the authority granted in” the relevant subpart(s) of the emergency rule in question.

This difference is not dramatic. These rules end up in the same place—the emergency declaration has to specify which rules subject to change are actually going to be changed. But there is a subtle difference between requiring the declaration to adopt emergency rules subject to specific exception, and automatic applicability subject to a specified limitation. Asking the Judicial Conference to provide two different specifications, one for Civil and the other for Criminal and Bankruptcy, might strike some as unnecessarily complicated, especially given the circumstances under which by definition these declarations will be prepared. The ordinary justification for any difference in this project has been that there is more at stake for the Criminal Rules than for the other rule sets. But in this instance, the Bankruptcy and Criminal Rules are uniform.

## **V. Termination of Emergency Rules Order: Mandatory or Discretionary?**

Each set of rules, including Appellate, provides for termination of an emergency declaration when the rules emergency conditions no longer exist. But there was a dispute about whether the rule should provide that the Judicial Conference must or may enter the termination order. This matter was discussed at the Standing Committee meeting, and referred back to the advisory committees for further discussion. At this time, the advisory committees all agree that the termination order should be discretionary. There are two rationales for that uniform determination: 1) It is problematic to impose an obligation on the Judicial Conference, and it is especially anomalous to require a termination order when the initial declaration is itself discretionary; and 2) Discretion is warranted because in many situations the end of the emergency will likely occur near the built-in termination date of the emergency declaration itself—and the Judicial Conference should have the discretion to simply allow the time to run out.

## **VI. Drafting for the Possibility that the Judicial Conference May Be Unable to Declare a Rules Emergency**

At the January Standing Committee meeting, the Committee discussed a suggestion that the rule should address the possibility that the Judicial Conference might be so affected by the emergency that it would be unable to declare a rules emergency. The question is whether the emergency rules should provide for the possibility of the Judicial Conference being unable to act. At the meeting, most of the members who spoke about the proposal thought such a provision to be unnecessary, but some members thought it worthy of further consideration. Accordingly, further discussions of the issue occurred in spring 2021 with respect to each emergency rule. None of those discussions revealed support for drafting a ‘doomsday’ provision and, ultimately, each advisory committee approved the emergency rules without one. The rationales for that rejection appeared to be the following: 1) It seems highly unlikely that the Executive Committee of the



Judicial Conference would be disabled for an extended period of time from making an emergency declaration; 2) if there were a catastrophe so grave as to incapacitate virtually everyone for a lengthy period of time, there would be much more to worry about than a rules emergency; and 3) difficult policy and drafting decisions would have to be made about who would decide whether the Executive Committee was unable to act, and what would happen if decisionmakers around the country reached differing views on that question.

## VII. “Soft Landing” Provision

The Bankruptcy, Civil, and Criminal Advisory Committees have spent considerable time discussing what should happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated. The proposed Criminal Rule 62(c) provides:

**(c) Continuing a Proceeding After a Termination.** Termination of a declaration for a court ends its authority under (d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant’s consent as if the declaration had not terminated.

The midstream change in criminal cases could cover such important issues as remote testimony and public access to criminal proceedings. In contrast, the midstream change in bankruptcy cases would affect time limits and the midstream change in civil cases would affect methods of service and deadlines for post judgment motions. It would not make sense to try to draft a single, uniform “soft landing” provision to address all of these types of issues. Accordingly, the Bankruptcy and Civil Committees decided to place “soft landing” provisions directly in each of the individual provisions that would operate during a rules emergency—each tailored to the specific interests at stake.

# ATTACHMENT A

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
<p><b>Rule 2. Suspension of Rules</b></p> <p><b>(a) In a Particular Case.</b> On its own or a party’s motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).</p>	<p><b>Rule 9038. Bankruptcy Rules Emergency</b></p> <p><b>(a) CONDITIONS FOR AN EMERGENCY.</b> The Judicial Conference of the United States may declare a Bankruptcy Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a bankruptcy court, substantially impair the court’s ability to perform its functions in compliance with these rules.</p>	<p><b>Rule 87. Civil Rules Emergency</b></p> <p><b>(a) Conditions for an Emergency.</b> The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.</p>	<p><b>Rule 62. Criminal Rules Emergency</b></p> <p><b>(a) Conditions for an Emergency.</b> The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:</p> <p style="padding-left: 40px;">(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules; and</p> <p style="padding-left: 40px;">(2) no feasible alternative measures would sufficiently address the impairment within a reasonable time.</p>

## Emergency Rules Side-By-Side Comparison

June 2021

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Appellate	Bankruptcy	Civil	Criminal
<p><b>(b) In an Appellate Rules Emergency.</b></p> <p>(1) <b>Conditions for an Emergency.</b> The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.</p> <p>(2) <b>Content.</b> The declaration must:</p> <p>(A) designate the circuit or circuits affected; and</p> <p>(B) be limited to a stated period of no more than 90 days.</p> <p>(3) <b>Early Termination.</b> The Judicial Conference may terminate a declaration for one or more circuits before the termination date.</p>	<p><b>(b) DECLARING AN EMERGENCY.</b></p> <p>(1) <i>Content.</i> The declaration must:</p> <p>(A) designate the bankruptcy court or courts affected;</p> <p>(B) state any restrictions on the authority granted in (c); and</p> <p>(C) be limited to a stated period of no more than 90 days.</p> <p>(2) <i>Early Termination.</i> The Judicial Conference may terminate a declaration for one or more bankruptcy courts before the termination date.</p>	<p><b>(b) Declaring an Emergency.</b></p> <p>(1) <i>Content.</i> The declaration must:</p> <p>(A) designate the court or courts affected;</p> <p>(B) adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them; and</p> <p>(C) be limited to a stated period of no more than 90 days.</p> <p>(2) <i>Early Termination.</i> The Judicial Conference may terminate a declaration for one or more courts before the termination date.</p>	<p><b>(b) Declaring an Emergency.</b></p> <p>(1) <i>Content.</i> The declaration must:</p> <p>(A) designate the court or courts affected;</p> <p>(B) state any restrictions on the authority granted in (d) and (e); and</p> <p>(C) be limited to a stated period of no more than 90 days.</p> <p>(2) <i>Early Termination.</i> The Judicial Conference may terminate a declaration for one or more courts before the termination date.</p>

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
<p>(4) <b>Additional Declarations.</b> Additional declarations may be made under Rule 2(b).</p> <p>(5) <b>Proceedings in a Rules Emergency.</b> When a rules emergency is declared, the court may:</p> <p>(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and</p> <p>(B) order proceedings as it directs.</p>	<p>(3) <i>Additional Declarations.</i> The Judicial Conference may issue additional declarations under this rule.</p> <p>(c) TOLLING AND EXTENDING TIME LIMITS.</p> <p>(1) <i>In an Entire District or Division.</i> When an emergency is in effect for a bankruptcy court, the chief bankruptcy judge may, for all cases and proceedings in the district or in a division:</p> <p>(A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, a clerk, a party in interest, or the United States trustee, by a specified deadline, to commence a proceeding, file or send a document, hold or conclude a hearing, or take any other action, despite any other Bankruptcy Rule, local rule, or order; or</p>	<p>(3) <i>Additional Declarations.</i> The Judicial Conference may issue additional declarations under this rule.</p> <p>(c) <b>Emergency Rules.</b></p> <p>(1) <i>Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person.</i> The court may order service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A method of service authorized by the order may be completed under the order after the declaration ends unless the court modifies or rescinds the order.</p>	<p>(3) <b>Additional Declarations.</b> The Judicial Conference may issue additional declarations under this rule.</p> <p>(c) <b>Continuing a Proceeding After a Termination.</b> Termination of a declaration for a court ends its authority under (d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant’s consent as if the declaration had not terminated.</p>

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
	<p>(B) order that, when a Bankruptcy Rule, local rule, or order requires that an action be taken “promptly,” “forthwith,” “immediately,” or “without delay,” it be taken as soon as is practicable or by a date set by the court in a specific case or proceeding.</p> <p>(2) <i>In a Specific Case or Proceeding.</i> When an emergency is in effect for a bankruptcy court, a presiding judge may take the action described in (1) in a specific case or proceeding.</p> <p>(3) <i>When an Extension or Tolling Ends.</i> A period extended or tolled under (1) or (2) terminates on the later of:</p> <p>(A) the last day of the time period as extended or tolled or 30 days after the emergency declaration terminates, whichever is earlier; or</p>	<p>(2) <i>Emergency Rule 6(b)(2).</i></p> <p>(A) <i>Extension of Time to File Certain Motions.</i> A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).</p> <p>(B) <i>Effect on Time to Appeal.</i> Unless the time to appeal would otherwise be longer:</p> <p>(i) if the court denies an extension, the time to file an appeal runs for all parties from the date the order denying the motion to extend is entered;</p> <p>(ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed “within the time allowed by” the Federal Rules of Civil Procedure; and</p>	<p><b>(d) Authorized Departures from These Rules After a Declaration.</b></p> <p>(1) <i>Public Access to a Proceeding.</i> If emergency conditions substantially impair the public’s in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.</p> <p>(2) <i>Signing or Consenting for a Defendant.</i> If any rule, including this rule, requires a defendant’s signature, written consent, or written waiver—and emergency conditions limit a defendant’s ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant’s consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.</p>

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
	<p>(B) the last day of the time period originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was extended or tolled.</p> <p>(4) <i>Further Extensions or Shortenings.</i> A presiding judge may lengthen or shorten an extension or tolling in a specific case or proceeding. The judge may do so only for good cause after notice and a hearing and only on the judge’s own motion or on motion of a party in interest or the United States trustee.</p> <p>(5) <i>Exception.</i> A time period imposed by statute may not be extended or tolled.</p>	<p>(iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.</p> <p>(C) <i>Declaration Ends.</i> An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.</p>	<p>(3) <i>Alternate Jurors.</i> A court may impanel more than 6 alternate jurors.</p> <p>(4) <i>Correcting or Reducing a Sentence.</i> Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.</p> <p>(e) <b>Authorized Use of Videoconferencing and Teleconferencing After a Declaration.</b></p> <p>(1) <i>Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).</i> This rule does not modify a court’s authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2), except that if emergency conditions substantially impair the defendant’s opportunity to consult with counsel, the court</p>

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
			<p>must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings.</p> <p><b>(2) Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present.</b> Except for felony trials and as otherwise provided under (e)(1) and (3), for a proceeding at which a defendant has a right to be present, a court may use videoconferencing if:</p> <p>(A) the district’s chief judge finds that emergency conditions substantially impair a court’s ability to hold in-person proceedings in the district within a reasonable time;</p> <p>(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and</p>



Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
			<p>(C) the defendant consents after consulting with counsel.</p> <p><b>(3) Videoconferencing for Felony Pleas and Sentencings.</b>                      For a felony proceeding under Rule 11 or 32, a court may use videoconferencing only if, in addition to the requirements in (2)(A) and (B):</p> <p>(A) the district’s chief judge finds that emergency conditions substantially impair a court’s ability to hold in-person felony pleas and sentencings in the district within a reasonable time;</p> <p>(B) the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing; and</p> <p>(C) the court finds that further delay in that particular</p>

Emergency Rules Side-By-Side Comparison

Appellate	Bankruptcy	Civil	Criminal
			<p>case would cause serious harm to the interests of justice.</p> <p><b>(4) Teleconferencing by One or More Participants.</b> A court may conduct a proceeding, in whole or in part, by teleconferencing if:</p> <p>(A) the requirements under any [applicable] rule, including this rule, for conducting the proceeding by videoconferencing have been met;</p> <p>(B) the court finds that:</p> <p>(i) videoconferencing is not reasonably available for any person who would participate by teleconference; and</p> <p>(ii) the defendant will have [an adequate <del>the</del>] opportunity to consult confidentially with counsel before and during the proceeding if held by teleconference; and</p> <p>(C) the defendant consents.</p>

# ATTACHMENT B

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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ROBERT M. DOW, JR.  
CIVIL RULES

RAYMOND M. KETHLEDGE  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Honorable John Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Honorable Jay Bybee, Chair  
Advisory Committee on Appellate Rules

**RE:** Emergency Appellate Rule 2 and Appellate Rule 4

**DATE:** June 2, 2021

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In accordance with the CARES Act, the Advisory Committee established a subcommittee to consider what amendments, if any, would be appropriate to deal with future emergencies. The members of that subcommittee began by reviewing every Federal Rule of Appellate Procedure to evaluate which ones might be appropriate candidates for amendment. The subcommittee ultimately concluded that the best approach for the Appellate Rules was simply an amendment to the existing Federal Rule of Appellate Procedure 2.

Existing Rule 2 provides:

**Rule 2. Suspension of Rules**

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

That is, under current law, a court of appeals is empowered to suspend *any* provision of the Federal Rules of Appellate Procedure in a particular case, except those that govern the time to appeal, the time to seek permission to appeal, and the time to review administrative action. This broad suspension power is nothing new: it has been a part of the Federal Rules of Appellate Procedure from the very beginning of those Rules.

At the January 2021 meeting, the Standing Committee considered a discussion draft that would have amended Rule 2 to

- empower not only the Judicial Conference but also each court of appeals to declare a rules emergency;
- empower the chief circuit judge to act on the court’s behalf; and
- permit broader suspension than current Rule 2—reaching all cases during a rules emergency and permitting the suspension of non-statutory time limits to appeal or otherwise seek review.

The Standing Committee seemed comfortable with broadening the suspension authority. However, in large part due to the importance of uniformity, the Standing Committee preferred to vest the power to declare a rules emergency in the Judicial Conference alone.

The Standing Committee also favored the inclusion of a sunset provision and was concerned that the discussion draft did not clearly state what happens once a rule is suspended.

The Advisory Committee incorporated this feedback into a proposal that it now asks for approval to publish for public comment. This proposal vests the power to declare a rules emergency solely in the Judicial Conference. It includes a sunset provision. And it makes explicit, using language from the existing Rule 2, that when a rule is suspended, the court may order proceedings as it directs.

There was no dissent in the Advisory Committee. The member of the Advisory Committee who had previously raised concerns about the authority of the Judicial Conference—concerns that were discussed at the January meeting of the Standing Committee—stated that his prior concerns about authority were largely addressed. Under this proposal, the Judicial Conference simply declares the emergency exists. The court can then fall back on its preexisting power once the rules back off.

Here is the proposal as revised after review by the style consultants and coordination with reporters for other advisory committees to achieve as much uniformity as possible:

**Rule 2. Suspension of Rules**

**(a) In a Particular Case.** On its own or a party’s motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

**(b) In an Appellate Rules Emergency.**

**(1) Conditions for an Emergency.** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.

**(2) Content.** The declaration must:

**(A) designate the circuit or circuits affected; and**

**(B) be limited to a stated period of no more than 90 days.**

**(3) Early Termination.** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

**(4) Additional Declarations.** Additional declarations may be made under Rule 2(b).

**(5) Proceedings in a Rules Emergency.** When a rules emergency is declared, the court may:

**(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and**

**(B) order proceedings as it directs.**

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court’s ability to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a

sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to “order proceedings as it directs,” the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

The Advisory Committee also seeks approval to publish for public comment a proposed amendment to Appellate Rule 4. This proposed amendment is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time. Long effort went into trying to craft Emergency Civil Rule 6(b)(2) in a way that did not require any changes to the Appellate Rules, but every attempt ran into considerable complexity, considerable difficulty, or both.

Some background is useful to put the problem—and the proposed solution—in context.

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Appellate Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); and 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. See Civil Rule 60(c)(1) (“A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”).

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be

filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Appellate Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

Enter proposed Emergency Civil Rule 6(b)(2). That emergency rule would authorize district courts to grant extensions that they are otherwise prohibited from granting. Under it, district courts would be able to grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Appellate Rule 4 would continue to work seamlessly. Appellate Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

But if Appellate Rule 4 were not amended, Appellate Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the proposed amendment to Appellate Rule 4 replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

Significantly, this proposed amendment to Appellate Rule 4 is not itself an emergency rule, but instead would be a regular, ordinary part of the Appellate Rules. At all times that no Civil Rules emergency has been declared, the amended Rule 4 would function exactly as it has without the proposed amendment. A Civil Rule 60(b) motion would have resetting effect only if it were filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”



Here is the proposed amendment to Rule 4:

**Rule 4. Appeal as of Right—When Taken**

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

\* \* \*

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ **within the time allowed for filing a motion under Rule 59.**

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in

the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

Attachment B1

Report to the Standing Committee – Emergency Rule 2 and Rule 4

Advisory Committee on Bankruptcy Rules

June 2, 2021

Page 8

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 2. Suspension of Rules**

2 **(a) In a Particular Case.** On its own or a party's  
3 motion, a court of appeals may—to expedite its  
4 decision or for other good cause—suspend any  
5 provision of these rules in a particular case and order  
6 proceedings as it directs, except as otherwise  
7 provided in Rule 26(b).

8 **(b) In an Appellate Rules Emergency.**

9 **(1) Conditions for an Emergency.** The Judicial  
10 Conference of the United States may declare  
11 an Appellate Rules emergency if it  
12 determines that extraordinary circumstances  
13 relating to public health or safety, or affecting  
14 physical or electronic access to a court,

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15 substantially impair the court’s ability to  
16 perform its functions in compliance with  
17 these rules.

18 (2) **Content.** The declaration must:

19 (A) designate the circuit or  
20 circuits affected; and

21 (B) be limited to a stated period of  
22 no more than 90 days.

23 (3) **Early Termination.** The Judicial  
24 Conference may terminate a  
25 declaration for one or more circuits  
26 before the termination date.

27 (4) **Additional Declarations.** Additional  
28 declarations may be made under Rule  
29 2(b).

30 (5) **Proceedings in a Rules Emergency.**  
31 When a rules emergency is declared,  
32 the court may:

- 33 (A) suspend in all or part of that  
34 circuit any provision of these  
35 rules, other than time limits  
36 imposed by statute and  
37 described in Rule 26(b)(1)-  
38 (2); and  
39 (B) order proceedings as it directs.

**Committee Note**

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court’s ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to “order proceedings as it directs,” the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

- 1   **Rule 4.           Appeal as of Right—When Taken**
- 2   **(a)     Appeal in a Civil Case.**
- 3       **(1)     Time for Filing a Notice of Appeal.**
- 4           **(A)**     In a civil case, except as provided in
- 5                    Rules 4(a)(1)(B), 4(a)(4), and 4(c),
- 6                    the notice of appeal required by Rule
- 7                    3 must be filed with the district clerk
- 8                    within 30 days after entry of the
- 9                    judgment or order appealed from.
- 10   \* \* \* \* \*
- 11       **(4)     Effect of a Motion on a Notice of Appeal.**
- 12           **(A)**     If a party files in the district court
- 13                    any of the following motions under
- 14                    the Federal Rules of Civil

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.



2 FEDERAL RULES OF APPELLATE PROCEDURE

15 Procedure—and does so within the  
16 time allowed by those rules—the  
17 time to file an appeal runs for all  
18 parties from the entry of the order  
19 disposing of the last such remaining  
20 motion:

21 (i) for judgment under Rule  
22 50(b);

23 (ii) to amend or make additional  
24 factual findings under Rule  
25 52(b), whether or not  
26 granting the motion would  
27 alter the judgment;

28 (iii) for attorney's fees under Rule  
29 54 if the district court extends  
30 the time to appeal under Rule  
31 58;

- 32 (iv) to alter or amend the  
33 judgment under Rule 59;  
34 (v) for a new trial under Rule 59;  
35 or  
36 (vi) for relief under Rule 60 if the  
37 motion is filed ~~no later than~~  
38 ~~28 days after the judgment is~~  
39 ~~entered~~ within the time  
40 allowed for filing a motion  
41 under Rule 59.

#### Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an

appeal, Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions

that they are otherwise prohibited from granting. If that emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Honorable John D. Bates, Chair  
Standing Committee on Rules of Practice and Procedure

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

**RE:** New Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

**DATE:** May 24, 2021

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At the Advisory Committee's spring meeting, members unanimously approved for publication new Rule 9038, which would allow extensions of time limits in the Bankruptcy Rules to be granted if the Judicial Conference declared a Bankruptcy Rules emergency. The draft of the rule that was approved was the result of extensive work by a special Emergency Rule Subcommittee chaired by Judge Melvin Hoffman; consultation among the rules committees' reporters, facilitated by Professor Dan Capra; valuable feedback that the Standing Committee provided at its January 2021 meeting; stylistic suggestions offered by the style consultants; and careful deliberation and discussion by members of the Advisory Committee.

Subdivisions (a) and (b)

Much of the Advisory Committee's discussion of this rule at the April meeting was devoted to an attempt to respond to the Standing Committee's comments and to make subdivisions (a) and (b) of the rule as uniform as possible with the emergency rules being considered by the other

advisory committees. As indicated in Professor Capra’s and Professor Struve’s memo, the effort to achieve uniformity was largely successful. Most significantly, the Advisory Committee agreed to limit the authority to declare a rules emergency to the Judicial Conference of the United States, thereby bringing the bankruptcy rule into line with the other emergency rules. The Advisory Committee also agreed to make permissive the Judicial Conference’s authority to terminate a rules emergency declaration early, and it adhered to its earlier decision not to include a “no feasible alternative” requirement in the definition of a rules emergency.

In two limited respects, Rule 9038(a) and (b) differ from one or more of the other emergency rules. All of the emergency rule drafts presented at the January Standing Committee meeting referred to emergencies in one or more “courts.” In the various sets of federal rules, however, “court” usually means the judge presiding over a case. Bankruptcy Rule 9001(4), for example, provides that “court” as used in the rules means “the judicial officer before whom a case or proceeding is pending.” That meaning, however, is not what is intended in the emergency rules when they refer to “the court or courts affected” by an emergency.

Following the Standing Committee’s discussion of this issue in January, the advisory committees were asked to consider whether “court” should be changed to “district” in the emergency rules. The other committees concluded that there was no need to make that change because in context the meaning of the word “court” is clear. Our Advisory Committee agreed that the use of “court” does not create an ambiguity in the bankruptcy emergency rule. However, to avoid inconsistency with the Rule 9001 definition, it accepted the subcommittee’s recommendation to substitute “bankruptcy court” for “court” in Rule 9038.

Professors Capra and Struve also point out that subparagraph (b)(1)(B) in the Bankruptcy and Criminal Rules differs from that subparagraph in the civil rule by requiring the emergency declaration to “state any restrictions on the authority granted,” rather than stating—as the Civil Rule does—that a declaration of emergency must “adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them.” Insofar as the bankruptcy emergency rule is concerned, this difference from the civil rule is appropriate because the bankruptcy rule does not create new rules in subdivision (c); it only authorizes deviation from the existing rules’ time periods. It would make no sense therefore to require “adoption” of the emergency rules in (c).

#### Subdivision (c)

Subdivision (c) of the emergency rule is unique to bankruptcy, and there was no attempt to achieve uniformity here. Unlike some of the other emergency rules, Rule 9038 leaves up to the chief and presiding judges the decision whether to deviate from the existing rules once the Judicial Conference has declared a rules emergency. This authorization is not a backdoor attempt to retain in the bankruptcy courts some degree of authority following the decision to allow only the Judicial Conference to declare a rules emergency. Instead, it results from the underlying purpose of the rule and the Advisory Committee’s determination of the type of emergency rule that is needed.

Rule 9038 is basically an expansion of existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. During this pandemic, many courts have relied on this provision to grant extensions of time. The existing rule, however, does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. One of these is the time limit for holding meetings of creditors, a limitation that either caused problems for courts during the current emergency or was honored in the breach. Also, it probably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases.

The Advisory Committee concluded that this scheme is preferable to one in which the Judicial Conference would specify which rules or deadlines could be altered. There are literally hundreds of time periods in the Bankruptcy Rules, and the Judicial Conference may not be in the best position to identify which ones need extending. Furthermore, even with a nationwide emergency, circumstances may vary from one place to another. To use the same meeting of creditors example, one district might be well positioned to immediately move to remote meetings, while another may encounter a significant delay in making that shift. As a result, the first district may be able to comply with the existing deadline, while the second one will not be able to. Judges at the local level can best assess which time periods need extending.

Except for stylistic changes, subdivision (c) remains essentially the same as it was in January. Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. It also applies to directives to take quick action, such as rule provisions that require action to be taken “promptly,” “forthwith,” “immediately,” or “without delay.”

Subdivision (c)(3), which addresses the termination of extensions and tolling, provides a “soft landing” upon the termination of a Bankruptcy Rules emergency. It looks to three possible dates for a time period to expire. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration’s termination. In that case, the extended expiration date will apply.

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted. And subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

- 1 **Rule 9038. Bankruptcy Rules Emergency**
- 2 (a) CONDITIONS FOR AN EMERGENCY.
- 3 The Judicial Conference of the United States may declare a
- 4 Bankruptcy Rules emergency if it determines that
- 5 extraordinary circumstances relating to public health or
- 6 safety, or affecting physical or electronic access to a
- 7 bankruptcy court, substantially impair the court’s ability to
- 8 perform its functions in compliance with these rules.
- 9 (b) DECLARING AN EMERGENCY.
- 10 (1) Content. The declaration must:
- 11 (A) designate the bankruptcy
- 12 court or courts affected;
- 13 (B) state any restrictions on the
- 14 authority granted in (c); and

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<sup>1</sup> New material is underlined in red.



Attachment B2

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 (C) be limited to a stated period of  
16 no more than 90 days.

17 (2) Early Termination. The Judicial  
18 Conference may terminate a declaration for one or  
19 more bankruptcy courts before the termination date.

20 (3) Additional Declarations. The  
21 Judicial Conference may issue additional  
22 declarations under this rule.

23 (c) TOLLING AND EXTENDING TIME  
24 LIMITS.

25 (1) In an Entire District or Division.  
26 When an emergency is in effect for a bankruptcy  
27 court, the chief bankruptcy judge may, for all cases  
28 and proceedings in the district or in a division:

29 (A) order the extension or tolling  
30 of a Bankruptcy Rule, local rule, or order that  
31 requires or allows a court, a clerk, a party in  
32 interest, or the United States trustee, by a

33 specified deadline, to commence a  
34 proceeding, file or send a document, hold or  
35 conclude a hearing, or take any other action,  
36 despite any other Bankruptcy Rule, local  
37 rule, or order; or

38 (B) order that, when a Bankruptcy  
39 Rule, local rule, or order requires that an  
40 action be taken “promptly,” “forthwith,”  
41 “immediately,” or “without delay,” it be  
42 taken as soon as is practicable or by a date set  
43 by the court in a specific case or proceeding.

44 (2) *In a Specific Case or Proceeding.*  
45 When an emergency is in effect for a bankruptcy  
46 court, a presiding judge may take the action  
47 described in (1) in a specific case or proceeding.

48 (3) *When an Extension or Tolling Ends.*  
49 A period extended or tolled under (1) or (2)  
50 terminates on the later of:

Attachment B2

4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

51 (A) the last day of the time period  
52 as extended or tolled or 30 days after the  
53 emergency declaration terminates, whichever  
54 is earlier; or

55 (B) the last day of the time period  
56 originally required, imposed, or allowed by  
57 the relevant Bankruptcy Rule, local rule, or  
58 order that was extended or tolled.

59 (4) Further Extensions or Shortenings.  
60 A presiding judge may lengthen or shorten an  
61 extension or tolling in a specific case or proceeding.  
62 The judge may do so only for good cause after notice  
63 and a hearing and only on the judge's own motion or  
64 on motion of a party in interest or the United States  
65 trustee.

66 (5) Exception. A time period imposed by  
67 statute may not be extended or tolled.

### **Committee Note**

The rule is new. It provides authority to extend or toll the time limits in these rules during times of major emergencies affecting the bankruptcy courts. The continuing operation of the bankruptcy courts during the COVID-19 pandemic showed that the existing rules are flexible enough to accommodate remote proceedings, service by mail, and electronic transmission of documents. Nevertheless, it appeared that greater flexibility than Rule 9006(b) provides might be needed to allow the extension of certain time periods in specific cases or any extension on a district-wide basis in response to an emergency.

Emergency rule provisions have also been added to the Civil, Criminal, and Appellate Rules. Along with the Bankruptcy Rule, these rules have been made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Subdivision (a) specifies the limited circumstances under which the authority conferred by this rule may be exercised. The Judicial Conference of the United States has the exclusive authority to declare a Bankruptcy Rules emergency, and it may do so only under extraordinary circumstances. Those circumstances must relate to public health or safety or affect physical or electronic access to a bankruptcy court. And, importantly, the court's ability to operate in compliance with the Bankruptcy Rules must be substantially impaired.

Under subdivision (b)(1), a Bankruptcy Rules emergency declaration must specify the bankruptcy courts to which it applies because, instead of being nationwide, an

emergency might be limited to one area of the country or even to a particular state. The declaration must also specify a termination date that is no later than 90 days from the declaration's issuance. Under subdivisions (b)(2) and (b)(3), however, that time period may be extended by the issuance of additional declarations or reduced by early termination if circumstances change. The declaration must also specify any limitations placed on the authority granted in subdivision (c) to modify time periods.

Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. Unless limited by the emergency declaration, this authority extends to all time periods in the rules that are not also imposed by statute. It also applies to directives to take quick action, such as rule provisions that require action to be taken “promptly,” “forthwith,” “immediately,” or “without delay.”

Subdivision (c)(3), which addresses the termination of extensions and tolling, provides a “soft landing” upon the termination of a Bankruptcy Rules emergency. It looks to three possible dates for a time period to expire. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, the extended expiration date will apply.

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted.

Subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

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

**JOHN D. BATES**  
CHAIR

**CHAIRS OF ADVISORY COMMITTEES**

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CRIMINAL RULES

**PATRICK J. SCHILTZ**  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Robert M. Dow, Jr., Chair  
Advisory Committee on Civil Rules

**RE:** New Civil Rule 87 (Civil Rules Emergency)

**DATE:** May 21, 2021

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1 The sustained efforts that brought a great measure of uniformity among all of the proposed  
2 rules for rules emergencies are described in the joint section of this Report. This section explains  
3 the considerations that require nonuniformity in three aspects of Rule 87.

4 These three areas of nonuniformity appear in rule text in this order: (1) Rule 87(b)(1)(B),  
5 which describes Judicial Conference responsibility to select which of the emergency rules to  
6 authorize by a declaration; (2) Emergency Rules 4 and 6(b)(2) themselves; and (3) the provisions  
7 for completing action authorized by an order entered under a declaration of a civil rules emergency  
8 after the declaration ends. Explaining these aspects of Rule 87 follows a different order because  
9 understanding the nature of the emergency rules and the rules for completing authorized action  
10 after a declaration ends is necessary to understand the provision for selecting which emergency  
11 rules to include in a declaration.

12            The Emergency Rules. Nonuniformity with other sets of rules is a given in adopting  
13 Emergency Civil Rules. The rules actually proposed were identified by reading through all Civil  
14 Rules, looking for texts that might raise obstacles to effective procedure in emergency  
15 circumstances. Each reporter and some subcommittee members undertook this task. Long initial  
16 lists were generated. Careful examination and subcommittee deliberations, however, continually  
17 reduced the list to a small set of rules. This process was influenced by reports about widespread  
18 success in developing the inherent flexibility of the rules to meet the problems arising from the  
19 Covid-19 pandemic. The decision to proceed with Emergency Rules 4 and 6(b)(2), indeed, rested  
20 on examination of the rules texts for barriers to effective action, not on reports of actual problems  
21 in practice.

22            Rule 87(c)(1) includes several Emergency Rules 4. Each authorizes a court to order service  
23 by a method that is reasonably calculated to give notice. A court order is required, ordinarily resting  
24 on a case-specific evaluation of the emergency circumstances; the nature of the case; and the nature  
25 of the parties--particularly the defendant, recognizing that some methods of service may be well  
26 designed to provide notice to some defendants but not others. It may be, however, that some  
27 emergency circumstances might justify a standing order that provides general authority for service  
28 by a specified means, such as by commercial carrier with confirmation of delivery. Only some  
29 parts of Rule 4 are brought within the Emergency Rules. Rules 4(e), (h)(i), (i), and (j)(2) address  
30 service on individuals'; corporations, partnerships, and other associations; the United States and  
31 its agencies, officers, and employees; and state or local governments. One part of Rule 4(g) is also  
32 included, providing for service on a minor or incompetent person in a judicial district of the United  
33 States. The omitted parts of Rule 4 all tie to service in a foreign country or service on a foreign  
34 state or its subdivision. These situations are pervasively affected by international agreements or  
35 the Foreign Sovereign Immunities Act and seemed better left out of the emergency rules.

36            Rule 87(c)(2) creates Emergency Rule 6(b)(2). Rule 6(b)(2) qualifies the general power in  
37 Rule 6(b)(1) to extend a time to act by an impermeable barrier: "A court must not extend the time  
38 to act under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b)." The time to act on post-judgment  
39 motions under Rules 50, 52, and 59 is set at 28 days, reflecting the powerful concern for finality  
40 that arises once judgment is entered. If the judgment is to be upset by the trial court, it should be  
41 done promptly. Whether or not the trial court grants relief, it is important to set or reset appeal  
42 time to avoid a lengthy limbo of uncertainty. Rule 60(b) covers motions for relief from judgment  
43 on grounds that are not available within the 28-day period for the more regular post-judgment  
44 motions, although motions that seek relief available under Rules 52 and 59 – perhaps even  
45 Rule 50(b) – are frequently made within 28 days and captioned under Rule 60(b). Rule 60(c)(1)  
46 sets the time for Rule 60(b) motions as "a reasonable time – and for reasons (1), (2), and (3) no  
47 more than a year after entry of the judgment." (Subdivision (1) covers mistake, inadvertence,  
48 surprise, or excusable neglect; (2) covers newly discovered evidence; and (3) covers fraud,  
49 misrepresentation, or misconduct.)

50            The basic purpose of Emergency Rule 6(b)(2) is to substitute "may extend" for "must not  
51 extend" the time to act. Emergency circumstances may make it extraordinarily difficult or literally  
52 impossible to prepare and file a motion within the prescribed periods. The opportunity to seek  
53 relief from the trial court is an important part of a structure that integrates trial courts with the



54 courts of appeals. Creating authority for the trial judge to preserve the opportunity for post-  
55 judgment relief is important for the trial court, the parties, and the court of appeals.

56 The clear basic purpose of Emergency Rule 6(b)(2) is made complicated, however, by the  
57 interdependence of post-judgment relief in the trial court with the rules that set appeal time. The  
58 basic framework is provided by Appellate Rule 4(a)(4)(A). A timely motion under Rules 50, 52,  
59 and 59 restarts appeal time “for all parties from the entry of the order disposing of the last such  
60 remaining motion.” A special provision for Rule 60 motions, Rule 4(a)(4)(A)(vi), gives the same  
61 effect if the motion “is filed no later than 28 days after the judgment is entered.” This provision  
62 reflects the prospect that in most circumstances a Rule 60(b) motion will be timely – and for that  
63 matter is likely to be needed only – after 28 days from the judgment. In the interest of securing  
64 prompt review of the judgment, a Rule 60(b) motion resets appeal time only when it is made in  
65 the time authorized for the more common Rule 50, 52, and 59 motions. After that, a timely  
66 Rule 60(b) motion supports appeal from the order that grants or denies the motion, but does not  
67 support review of the judgment itself.

68 Integrating Emergency Civil Rule 6(b)(2) with Appellate Rule 4(a)(4)(A) proved a  
69 challenging task. Rule 4 is read and applied with great care. The times reflected in Rule 4 are  
70 mandatory and jurisdictional. A mistake in calculating appeal time is fatal. Rule 4 has been revised  
71 more than once to provide relief from mistakes made by those not intimately familiar with its  
72 terms. Many exchanges, and more than a few missteps, were needed to craft the provisions of  
73 Emergency Rule 6(b)(2)(B) that integrate the effects of a motion to extend the time to act with  
74 Rule 4. The task was made easier by the proposal of the Appellate Rules Committee to amend  
75 Rule 4(a)(4)(A)(vi), striking the explicit provision for a Rule 60 motion made within 28 days and  
76 substituting “if the motion is filed within the time allowed for filing a motion under Rule 59.” But  
77 even with that help, Rule 6(b)(2)(B) remains an inseverable whole.

78 Completing Acts After a Declaration Ends. The differences between the several  
79 Emergency Rules 4 and Emergency Rule 6(b)(2) account for a second area of nonuniformity.  
80 Earlier Rule 87 drafts included a common subdivision (d) that authorized completion of an act  
81 authorized by an order entered under an emergency rule but not completed when the declaration  
82 ends. The test was borrowed from the Rule 86(a)(2) provision for applying rule amendments to  
83 proceedings pending on the effective date of the amendment “unless the court determines that  
84 applying them in a particular action would be infeasible or work an injustice.” The analogy never  
85 seemed precise. More importantly, further reflection showed that the same standard was not  
86 suitable for the methods of serving process as for motions for post-judgment relief. Once a motion  
87 is made under Emergency Rule 6(b)(2), it is imperative to maintain the complete system for  
88 integrating the motion with appeal time, starting with the provision that resets appeal time to run  
89 from an order denying any extension of the time to make a post-judgment motion and on through  
90 the rest. That is accomplished by Emergency Rule 6(b)(2)(C). The methods of serving process do  
91 not encounter problems similar to the need to integrate with Appellate Rule 4. If a declaration of  
92 a rules emergency ends after an order authorizes service by a method or methods not authorized  
93 by Civil Rule 4, the circumstances may make it appropriate to allow completion of service under  
94 the order, to modify the order while still allowing some specified means not authorized by Rule 4,  
95 or to withdraw the order and fall back on the ordinary methods authorized by Rule 4.

96           Judicial Conference Selection of Emergency Rules. The character of Emergency Rules 4  
97 and 6(b)(2) determines the reasons to depart in Rule 87(b)(1)(B) from the formula used in Criminal  
98 Rule 62(b)(1)(B) and Bankruptcy Rule 9038(b)(1)(B): “state any restrictions on the authority  
99 granted in [(c)].”

100           The Emergency Rules 4 provide that a court may order service of process by a method not  
101 authorized by the corresponding subdivision of Rule 4. It makes sense to leave the Judicial  
102 Conference free to select which categories of defendants are made eligible for service by an order  
103 that depends on the particular emergency and, ordinarily, the specific circumstances of a specific  
104 case. It does not make sense to impose on the Judicial Conference the responsibility to consider  
105 and evaluate the possibility of defining more specific “restrictions” on the methods of service that  
106 may be appropriate in specific circumstances. What is appropriate is a choice of which of the  
107 Emergency Rules 4 to authorize, not some further limit.

108           Emergency Rule 6(b)(2) presents an even more compelling need to authorize all of the rule,  
109 without any thought of “restrictions.” The intricate integration of this rule with Appellate  
110 Rule 4(a)(4)(A) cannot be severed by authorizing some parts but not others.

111  
112           Are These Emergency Civil Rules Necessary? One final caution. Rule 87 is proposed for  
113 publication as part of a package with the emergency provisions to be published for the Appellate,  
114 Bankruptcy, and Criminal Rules. Much may be learned from public comments and testimony. It  
115 may be that additional Emergency Civil Rules should be added, perhaps requiring adjustments in  
116 the general provisions. Or it may be that in the end, it will seem better to abandon Rule 87, relying  
117 instead on amendments of any Civil Rules that can be revised to adjust for emergency  
118 circumstances in ways that reflect the success that most of the Civil Rules have met during the  
119 COVID-19 pandemic. Those choices can be made after completion of the publication process.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

- 1 **Rule 87. Civil Rules Emergency**
- 2 **(a) Conditions for an Emergency.** The Judicial
- 3 Conference of the United States may declare a Civil Rules
- 4 emergency if it determines that extraordinary circumstances
- 5 relating to public health or safety, or affecting physical or
- 6 electronic access to a court, substantially impair the court’s
- 7 ability to perform its functions in compliance with these
- 8 rules.
- 9 **(b) Declaring an Emergency.**
- 10 **(1) Content.** The declaration must:
- 11 **(A) designate the court or courts affected;**
- 12 **(B) adopt all the emergency rules in Rule**
- 13 **87(c) unless it excepts one or more of**
- 14 **them; and**

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<sup>1</sup> New material is underlined in red.

15 (C) be limited to a stated period of no  
16 more than 90 days.

17 (2) *Early Termination.* The Judicial Conference  
18 may terminate a declaration for one or more  
19 courts before the termination date.

20 (3) *Additional Declarations.* The  
21 Judicial Conference may issue  
22 additional declarations under this  
23 rule.

24 (c) *Emergency Rules.*

25 (1) *Emergency Rules 4(e), (h)(1), (i), and*  
26 *(j)(2), and for serving a minor or*  
27 *incompetent person.* The court may order  
28 service on a defendant described in Rule 4(e),  
29 (h)(1), (i), or (j)(2)—or on a minor or  
30 incompetent person in a judicial district of the  
31 United States—by a method that is  
32 reasonably calculated to give notice. A

33 method of service authorized by the order  
34 may be completed under the order after the  
35 declaration ends unless the court modifies or  
36 rescinds the order.

37 **(2) Emergency Rule 6(b)(2).**

38 **(A) Extension of Time to File Certain**  
39 **Motions. A court may, by order, apply**  
40 **Rule 6(b)(1)(A) to extend for a period**  
41 **of no more than 30 days after entry of**  
42 **the order the time to act under Rules**  
43 **50(b) and (d), 52(b), 59(b), (d), and**  
44 **(e), and 60(b).**

45 **(B) Effect on Time to Appeal. Unless the**  
46 **time to appeal would otherwise be**  
47 **longer:**

48 **(i) if the court denies an**  
49 **extension, the time to file an**  
50 **appeal runs for all parties**

51 from the date the order  
52 denying the motion to extend  
53 is entered;  
54 (ii) if the court grants an  
55 extension, a motion  
56 authorized by the court and  
57 filed within the extended  
58 period is, for purposes of  
59 Appellate Rule 4(a)(4)(A),  
60 filed “within the time allowed  
61 by” the Federal Rules of Civil  
62 Procedure; and  
63 (iii) if the court grants an  
64 extension and no motion  
65 authorized by the court is  
66 made within the extended  
67 period, the time to file an  
68 appeal runs for all parties

69 from the expiration of the  
70 extended period.  
71 (C) Declaration Ends. An act authorized  
72 by an order under this emergency rule  
73 may be completed under the order  
74 after the emergency declaration ends.

75 **Committee Note**

76 Subdivision (a). This rule addresses the prospect that  
77 extraordinary circumstances may so substantially interfere  
78 with the ability of the court and parties to act in compliance  
79 with a few of these rules as to substantially impair the court’s  
80 ability to effectively perform its functions under these rules.  
81 The responses of the courts and parties to the COVID-19  
82 pandemic provided the immediate occasion for adopting a  
83 formal rule authorizing departure from the ordinary  
84 constraints of a rule text that substantially impairs a court’s  
85 ability to perform its functions. At the same time, these  
86 responses showed that almost all challenges can be  
87 effectively addressed through the general rules provisions.  
88 The emergency rules authorized by this rule allow departures  
89 only from a narrow range of rules that, in rare and  
90 extraordinary circumstances, may raise unreasonably high  
91 obstacles to effective performance of judicial functions.

92 The range of the extraordinary circumstances that  
93 might give rise to a rules emergency is wide, in both time  
94 and space. An emergency may be local—familiar examples  
95 include hurricanes, flooding, explosions, or civil unrest. The  
96 circumstance may be more widely regional, or national. The

97 emergency may be tangible or intangible, including such  
98 events as a pandemic or disruption of electronic  
99 communications. The concept is pragmatic and functional.  
100 The determination of what relates to public health or safety,  
101 or what affects physical or electronic access to a court, need  
102 not be literal. The ability of the court to perform its functions  
103 in compliance with these rules may be affected by the ability  
104 of the parties to comply with a rule in a particular  
105 emergency. A shutdown of interstate travel in response to an  
106 external threat, for example, might constitute a rules  
107 emergency even though there is no physical barrier that  
108 impedes access to the court or the parties.

109           Responsibility for declaring a rules emergency is  
110 vested exclusively in the Judicial Conference. But a court  
111 may, absent a declaration by the Judicial Conference, utilize  
112 all measures of discretion and all the flexibility already  
113 embedded in the character and structure of the Civil Rules.

114           A pragmatic and functional determination whether  
115 there is a Civil Rules emergency should be carefully limited  
116 to problems that cannot be resolved by construing,  
117 administering, and employing the flexibility deliberately  
118 incorporated in the structure of the Civil Rules. The rules  
119 rely extensively on sensible accommodations among the  
120 litigants and on wise management by judges when the  
121 litigants are unable to resolve particular problems. The  
122 effects of an emergency on the ability of the court and the  
123 parties to comply with a rule should be determined in light  
124 of the flexible responses to particular situations generally  
125 available under that rule. And even if a rules emergency is  
126 declared, the court and parties should explore the  
127 opportunities for flexible use of a rule before turning to rely  
128 on an emergency departure. Adoption of this rule, or a  
129 declaration of a rules emergency, does not imply any  
130 limitation of the courts' ability to respond to emergency



131 circumstances by wise use of the discretion and  
132 opportunities for effective adaptation that inhere in the Civil  
133 Rules themselves.

134 Subdivision (b). A declaration of a rules emergency must  
135 designate the court or courts affected by the emergency. An  
136 emergency may be so local that only a single court is  
137 designated. The declaration adopts all of the emergency  
138 rules listed in subdivision (c) unless it excepts one or more  
139 of them. An emergency rule supplements the Civil Rule for  
140 the period covered by the declaration.

141 A declaration must be limited to a stated period of no  
142 more than 90 days, but the Judicial Conference may  
143 terminate a declaration for one or more courts before the end  
144 of the stated period. A declaration may be succeeded by a  
145 new declaration made under this rule. And additional  
146 declarations may be made under this rule before an earlier  
147 declaration terminates. An additional declaration may  
148 modify an earlier declaration to respond to new emergencies  
149 or a better understanding of the original emergency. Changes  
150 may be made in the courts affected by the emergency or in  
151 the emergency rules adopted by the declaration.

152 Subdivision (c). Subdivision (c) lists the only Emergency  
153 Rules that may be authorized by a declaration of a rules  
154 emergency.

155 Emergency Rules 4. Each of the Emergency Rules 4  
156 authorizes the court to order service by means not otherwise  
157 provided in Rule 4 by a method that is appropriate to the  
158 circumstances of the emergency declared by the Judicial  
159 Conference and that is reasonably calculated to give notice.  
160 The nature of some emergencies will make it appropriate to  
161 rely on case-specific orders tailored to the particular  
162 emergency and the identity of the parties, taking account of

163 the fundamental role of serving the summons and complaint  
164 in providing notice of the action and the opportunity to  
165 respond. Other emergencies may make it appropriate for a  
166 court to adopt a general practice by entering a standing order  
167 that specifies one or possibly more than one means of service  
168 appropriate for most cases. Service by a commercial carrier  
169 requiring a return receipt might be an example.

170 The final sentence of Emergency Rule 4 addresses a  
171 situation in which a declaration of a civil rules emergency  
172 ends after an order for service is entered but before service  
173 is completed. Service may be completed under the order  
174 unless the court modifies or rescinds the order. A  
175 modification that continues to allow a method of service  
176 specified by the order but not within Rule 4, or rescission  
177 that requires service by a method within Rule 4, may provide  
178 for effective service. But it may be better to permit  
179 completion of service in compliance with the original order.  
180 For example, the summons and complaint may have been  
181 delivered to a commercial carrier that has not yet delivered  
182 them to the party to be served. Allowing completion and  
183 return of confirmation of delivery may be the most efficient  
184 course. Allowing completion of a method authorized by the  
185 order may be particularly important when a claim is  
186 governed by a statute of limitations that requires actual  
187 service within a stated period after the action is filed.

188 Emergency Rule 6(b)(2). Emergency Rule 6(b)(2)  
189 supersedes the flat prohibition in Rule 6(b)(2) of any  
190 extension of the time to act under Rules 50(b) and (d), 52(b),  
191 59(b), (d), and (e), and 60(b). The court may extend those  
192 times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the  
193 court to find good cause. Some emergencies may justify a  
194 standing order that finds good cause in general terms, but the  
195 period allowed by the extension ordinarily will depend on  
196 case-specific factors as well.

197 Rule 6(b)(1)(A) authorizes the court to extend the  
198 time to act under Rules 50 (b) and (d), 52(b), 59(b), (d), and  
199 (e), and 60(b) only if it acts, or if a request is made, before  
200 the original time allowed by those rules expires. For all but  
201 Rule 60(b), the time allowed by those rules is 28 days after  
202 the entry of judgment. For Rule 60(b), the time allowed is  
203 governed by Rule 60(c)(1), which requires that the motion  
204 be made within a reasonable time, and, for motions under  
205 Rule 60(b)(1), (2), or (3), no more than a year after the entry  
206 of judgment. The maximum extension is not more than 30  
207 days after entry of the order granting an extension. If the  
208 court acts on its own, extensions for Rule 50, 52, and 59  
209 motions can extend no later than 58 days after the entry of  
210 judgment. If an extension is sought by motion, an extension  
211 can extend no later than 30 days after entry of the order  
212 granting the extension. [An extension of the time to file a  
213 Rule 60(b) motion would be superfluous so long as the  
214 motion is made within a reasonable time, except for the  
215 circumstance in which a rules emergency declaration is in  
216 effect and the emergency circumstances make it reasonable  
217 to permit a motion beyond the one-year limit for motions  
218 under Rule 60(b)(1), (2), or (3).]

219 Special care must be taken to ensure that the parties  
220 understand the effect of an order granting or denying an  
221 extension on the time for filing a notice of appeal. Appeal  
222 time must be reset to support an orderly determination  
223 whether to order an extension and, if an extension is ordered,  
224 to make and dispose of any motion authorized by the  
225 extension.

226 Subparagraph 6(b)(2)(B) integrates the emergency  
227 rule with Appellate Rule 4(a)(4)(A) for four separate  
228 situations.

229           The first situation is governed by the initial text:  
230 “Unless the time to appeal would otherwise be longer.” One  
231 example that illustrates this situation would be a motion by  
232 the plaintiff for a new trial within the time allowed by  
233 Rule 59, followed by a timely motion by the defendant for  
234 an extension of time to file a renewed motion for judgment  
235 as a matter of law under Rule 50(b). The court denies the  
236 motion for an extension without yet ruling on the plaintiff’s  
237 motion. The time to appeal after denial of the plaintiff’s  
238 motion is longer for all parties than the time after denial of  
239 the defendant’s motion for an extension.

240           Item (B)(i) resets appeal time to run for all parties  
241 from the date of entry of an order denying a motion to  
242 extend. [The court may need some time to make a careful  
243 decision on the motion, although the time constraints  
244 imposed on post-judgment motions reflect the concerns that  
245 conduce to deciding as promptly as the emergency  
246 circumstances make possible.]

247           Items (B)(ii) and (iii) reset appeal time after the court  
248 grants an extended period to file a post-judgment motion.  
249 Appellate Rule 4(a)(4)(A) is incorporated, giving the  
250 authorized motion the effect of a motion filed “within the  
251 time allowed by” the Federal Rules of Civil Procedure. If  
252 more than one authorized motion is filed, appeal time is reset  
253 to run from the order “disposing of the last such remaining  
254 motion.” If no authorized motion is made, appeal time runs  
255 from the expiration of the extended period.

256           These provisions for resetting appeal time are  
257 supported for the special timing provisions for Rule 60(b)  
258 motions by a parallel amendment of Appellate  
259 Rule 4(a)(4)(A)(vi) that resets appeal time on a timely  
260 motion “for relief under Rule 60 if the motion is filed within  
261 the time allowed for filing a motion under Rule 59.” This

262 Rule 4 provision, as amended, will assure that a Rule 60(b)  
263 motion resets appeal time for review of the final judgment  
264 only if it is filed within the 28 days ordinarily allowed for  
265 post-judgment motions under Rule 59 or any extended  
266 period for filing a Rule 59 motion that a court might  
267 authorize under Emergency Rule 6(b)(2). A timely  
268 Rule 60(b) motion filed after that period, whether it is timely  
269 under Rule 60(c)(1) or under an extension ordered under  
270 Emergency Rule 6(b)(2), supports an appeal from  
271 disposition of the Rule 60(b) motion, but does not support an  
272 appeal from the [original] final judgment.

273 Emergency Rule 6(b)(2)(C) addresses a situation in  
274 which a declaration of a Civil Rules emergency ends after an  
275 order is entered, whether the order grants or denies an  
276 extension. This rule preserves the integration of Emergency  
277 Rule 6(b)(2) with the appeal time provisions of Appellate  
278 Rule 4(a)(4)(A). An act authorized by the order, which may  
279 be either a motion or an appeal, may be completed under the  
280 order. If the order denies a timely motion for an extension,  
281 the time to appeal runs from the order. If an extension is  
282 granted, a motion may be filed within the extended period.  
283 Appeal time starts to run from the order that disposes of the  
284 last remaining authorized motion. If no authorized motion is  
285 filed within the extended period, appeal time starts to run on  
286 expiration of the extended period. Any other approach would  
287 sacrifice opportunities for post-judgment relief or appeal that  
288 could have been preserved if no emergency rule motion had  
289 been made.

290 Emergency rules provisions were added to the  
291 Appellate, Bankruptcy, Civil, and Criminal Rules in the  
292 wake of the COVID-19 pandemic. They were made as  
293 uniform as possible. But each set of rules serves distinctive  
294 purposes, shaped by different origins, traditions, functions,

295 and needs. Different provisions were compelled by these  
296 different purposes.

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

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**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Raymond M. Kethledge, Chair  
Advisory Committee on Criminal Rules

**RE:** New Criminal Rule 62 (Criminal Rules Emergency)

**DATE:** June 1, 2021

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This report presents the Advisory Committee’s draft emergency rule—Rule 62. As noted in the Advisory Committee’s December 2020 report to the Standing Committee, the draft reflects input from the bench and bar, including comments solicited from all chief judges, as well as feedback from judges and attorneys from districts hard hit by hurricanes or the pandemic at a day-long miniconference held last summer. Several principles have guided the Advisory Committee’s work, namely: (1) the rules protect constitutional and statutory rights and other interests, and should not be set aside lightly;<sup>1</sup> (2) any new rule for emergencies must address the range of circumstances that might arise; (3) consideration of the relevant provisions of the CARES Act but is not based on them; and (4) the rule should be developed in consultation with people involved in these issues on the ground.

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<sup>1</sup> Indeed, one member has consistently dissented from the conclusion that the Advisory Committee should draft an emergency rule at all, because among other reasons it would inevitably tend to normalize exceptions to the critical safeguards provided by the Criminal Rules.

The Advisory Committee presented a draft of Rule 62 to the Standing Committee at its last meeting. Since then, the Advisory Committee continued to revise the draft, in part to respond to input from members of the Standing Committee and others. At its May 11 meeting, the Advisory Committee approved the draft rule and note, with the understanding that language in the committee note for the last paragraph of the rule would be circulated to the Advisory Committee for approval by email. The proposal included with this report reflects the changes approved unanimously by email on May 25 along with style changes.<sup>2</sup> Additional changes suggested after the meeting are bracketed for consideration by the Standing Committee.

After a brief review of the uniform provisions of all of the proposed emergency rules, this report focuses on subdivisions (c), (d), and (e), which are unique to the draft emergency rule for criminal proceedings.

### **I. Subdivisions (a) and (b): The Uniform Provisions**

With guidance from Professor Capra and assistance from the style consultants, the reporters of the various advisory committees have coordinated the language among their committees' proposed rules to make them uniform when it made sense to do so. Subdivisions (a) and (b) of the proposed Rule 62 contain these uniform provisions.<sup>3</sup>

As discussed at the last Standing Committee, however, the proposed Criminal Rule contains a second provision that the other rules do not. That provision is (a)(2), which now requires a determination that “no feasible alternative measures would sufficiently address the impairment within a reasonable time.” This provision ensures that the emergency provisions in subdivisions (d) and (e) would be invoked only as a last resort, given the critical interests protected by the existing rules of criminal procedure.

The current language of (a)(2) incorporates a suggestion made at the last Standing Committee meeting. There a member suggested that the Advisory Committee revise (a)(2) to require that any feasible alternative could “sufficiently address” rather than “eliminate” the impairment creating an emergency. The Advisory Committee agreed with that suggestion.

The committee note for paragraph (a)(2) explains:

[P]aragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal

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<sup>2</sup> Several minor corrections involving grammar, punctuation, and capitalization were made to the committee note as well.

<sup>3</sup> No one noticed until after the committee's meeting that the inclusion of the phrase “from the date of the declaration” in (b)(1)(C) as approved by the Advisory Committee was not part of the uniform language the other advisory committees had adopted. After the meeting, Professor Capra pointed out that the phrase did not appear in the other rules and that the Judicial Conference should determine when the 90-day period begins. Because it was clear that the Advisory Committee had intended this provision to be uniform, the chair and the reporters agreed that the inconsistent phrase should be deleted from the version presented to the Standing Committee.



Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141. Another example might be a situation in which the judges in a district were unable to carry out their duties as a result of an emergency that rendered them unavailable, but courthouses remained safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

## **II. Subdivision (c): Effect of Termination**

Subdivision (c) provides a narrow exception for certain proceedings commenced under a declaration of emergency but not yet completed when the declaration terminates. If the court finds that it cannot complete such a proceeding in compliance with the rules, or that resuming compliance with the rules would work an injustice, the court may, with the defendant's consent, complete the proceeding using procedures authorized by the emergency rule. The rule recognizes the need for some flexibility during the transition period, while also recognizing the importance of returning promptly to compliance with the rules.

Since the Standing Committee's last meeting, the Advisory Committee has made several changes to this provision, which was then subdivision (e). The style consultants as well as others were uncertain whether the term "these rules" in this provision referred to the preceding parts of Rule 62, all the rules of criminal procedure other than Rule 62, or both. To clarify that "these rules" means rules other than Rule 62, as in (a), the Advisory Committee approved two changes in the text and added a new paragraph to the committee note. First, the provision was moved up from its former location at the end of the rule, to become subdivision (c), nearer to the other reference to "these rules" in subdivision (a). The Advisory Committee thought this positioning would make readers less likely to interpret "these rules" to refer to the provisions in (d) and (e). Second, the Advisory Committee replaced the words "complying with these rules" with "resuming compliance with these rules." Finally, the Advisory Committee added a clarifying paragraph at the beginning of the note, which reads:

This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

The other change to the text was the addition of “with the defendant’s consent.” An Advisory Committee member was concerned about finishing a proceeding with emergency procedures after a declaration has ended, without the defendant’s consent. The Advisory Committee agreed that, if resuming full compliance with the rules is not yet feasible for a particular proceeding despite the termination of a declaration, the court should not be permitted to continue with emergency procedures without the defendant’s consent. The Advisory Committee thought this situation would seldom arise: most proceedings covered by the emergency provisions are likely to be relatively short, courts can anticipate the expiration of declarations and schedule accordingly, and defendants are unlikely to withhold consent to finishing a proceeding after a declaration has ended with emergency procedures the defendant consented to earlier. But if a defendant did insist on resuming compliance with normal procedures, the court should be able to resume those procedures relatively quickly if indeed the emergency no longer substantially impairs the court’s ability to function under the existing rules. Thus, on balance, the Advisory Committee concluded that the defendant’s interests in the protections provided by the rules are more important than the costs of any delay needed to resume compliance with the rules.

Finally, the Advisory Committee addressed concerns that the consent requirement would allow a defendant to halt a trial in which more than six alternates had been impaneled under (d)(3) while the declaration was in force. The Advisory Committee concluded that the consent requirement would not permit this outcome: the “proceeding” authorized by (d)(3) is simply the impanelment of additional alternates, which itself would have been completed before the declaration terminated. To clarify this point further, the Advisory Committee added the second sentence of the portion of the committee note discussing subdivision (c).

The committee note explains:

**Subdivision (c).** In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court’s authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3). In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant’s rights and other interests.

### **III. Subdivisions (d) and (e): Authority to Depart from the Rules**

After considering comments from the Standing Committee during its last meeting, the Advisory Committee voted to remove from Rule 62 provisions in the earlier draft that would have

authorized a court in certain circumstances to issue a summons instead of a warrant, and to conduct a bench trial without the government’s consent.

#### **A. Paragraph (d)(1): Public Access**

This part of the rule addresses the courts’ obligation to provide alternative access to public proceedings when emergency conditions substantially impair in-person attendance. For example, even if conditions would allow participants to attend in person, the rule requires that alternative access be provided if capacity limits necessary to protect health and safety would exclude in-person attendance by the public. The Advisory Committee accepted the suggestion of a member of the Standing Committee to change the condition triggering a duty to provide alternative access from “preclusion” of in-person public attendance to “substantial impairment” of such attendance. Even when emergency conditions do not entirely “preclude” the public from attending a proceeding, a failure to provide reasonably available alternative access to criminal proceedings for members of the public could risk violating the First and Sixth Amendment rights to public access.

In response to a separate concern by several members that alternative access should be contemporaneous when possible, the Advisory Committee also added “contemporaneous if feasible” at the end of this provision. Although the Advisory Committee declined to detail how such alternative access must be provided, options for providing contemporaneous alternative access were added to the committee note. Finally, “, including victims,” was added after “the public” in the committee note to emphasize the importance of providing victims access to public proceedings in criminal cases.

As revised, the committee note states:

**Paragraph (d)(1)** addresses the courts’ obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term “public proceeding” was intended to capture proceedings that the rules require to be conducted “in open court,” proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public, including victims, with “reasonable alternative access,” notwithstanding Rule 53’s ban on the “broadcasting of judicial proceedings.”

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided. In a proceeding

conducted by videoconference, a court could provide access to the audio transmission if access to the video transmission is not feasible.

### **B. Paragraph (d)(2): Written Consents, Waivers, and Signatures of the Defendant**

This provision was prompted by the difficulty of complying with signature requirements when emergency conditions limit a defendant’s ability to sign. The Advisory Committee made one change to this provision, namely to replace “these rules” with “any rule, including this rule.” This change clarifies that (d)(2) applies not only to the existing rules, but also to Rule 62 (specifically, to the requirement of a written request under (e)(3)(B)).

The Advisory Committee considered but declined to change the requirement that if, the defendant cannot consent on the record, counsel providing consent for the defendant must file an affidavit. There was some support to allow something less formal than an affidavit, such as a letter. But the Advisory Committee concluded that a declaration—which is less burdensome for counsel to produce—is already permitted by 28 U.S.C. § 1746 whenever an affidavit is required. The Advisory Committee also favored keeping the requirement of an affidavit (or declaration) because a letter would not consistently be filed as part of the record. Making the defendant’s consent clear in the record was essential.

Several members supported a policy that the court should have a colloquy with defendant on the issue of consent, both to ensure true consent and a complete record. But the Advisory Committee thought the subject of a colloquy was more appropriate for the committee note than the rule text. As amended, the note now provides:

**Paragraph (d)(2)** recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant’s signature, written consent, or written waiver. If emergency situations limit the defendant’s ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant’s consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant’s consent on the record, defense counsel must file an affidavit attesting to the defendant’s consent to the procedure. The defendant’s oral agreement on the record alone will not substitute for the defendant’s signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant’s consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant’s signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential

protection when the defendant’s own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

### **C. Paragraph (d)(3): Alternate Jurors**

This provision authorizes a court to empanel more than six alternate jurors, which could be particularly useful under circumstances, such as a pandemic, that increase the probability that original jurors would be unable to complete the trial. Indeed, during the meeting, several members related how alternate jurors have been used for trials conducted during the pandemic. There were no changes to this provision.

The committee note states:

**Paragraph (d)(3)** allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

### **D. Paragraph (d)(4): Rule 35 Deadlines**

This provision is unchanged from the earlier Rule 62. Rule 45(b)(2) bars extensions for motions to correct or reduce a sentence under Rule 35. The Advisory Committee concluded that courts should have limited authority to extend the Rule 35 deadlines “if emergency conditions provide good cause.” Paragraph (d)(4) permits these extensions only as “reasonably necessary.” The Advisory Committee concluded there was no need to state the obvious point that, in making a determination of good cause, courts should consider emergency situations. This point was added to the draft committee note.

The Department of Justice requested that the following sentence be added to the committee note: “Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence.” The Advisory Committee approved a modified version that did not

include the last clause, which is already part of the committee note following Rule 35. The Advisory Committee also changed the end of the sentence to read “authority to correct or reduce a sentence under Rule 35.”

The committee note reads:

**Paragraph (d)(4)** provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 “except as stated in that rule.” When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action “as reasonably necessary.” The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party’s motion for good cause shown.

## **E. Subdivision (e): Videoconferencing and Teleconferencing**

### **1. Introduction**

Subdivision (e) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants at criminal proceedings. The Advisory Committee concluded that, given the critical interests served by holding proceedings in-court, any authority to substitute virtual for physical presence must extend no further than necessary.

The Advisory Committee’s draft rule incorporates lessons learned during recent experience with virtual proceedings. The Advisory Committee considered input from its members, reports on court operations from various sources, local orders, suggestions solicited from chief judges around the country by Judge Jim Dever, chair of the Rule 62 Subcommittee, and the valuable insights of practitioners who attended the miniconference last summer. As a result, the proposed rule differs from the CARES Act in several respects. Like the CARES Act, subdivision (e) is arranged by type of proceeding. Proceedings with the fewest restrictions on the use of conferencing technology appear first, followed by proceedings with more stringent prerequisites, again like the CARES Act. The draft rule separates proceedings into three groups, each with a different set of requirements. (This differs from the CARES Act, which provides separate requirements for only two groups of proceedings—the first consisting of an enumerated list of pre- and post-trial proceedings, and the other limited to plea and sentencing proceedings under Rules 11 and 32.)

The first paragraph addresses videoconferencing for proceedings that courts may already conduct by videoconference with the defendant’s consent under existing Rules 5, 10, 40, and 43(b)(2): initial appearances, arraignments, and certain misdemeanor proceedings. The second

paragraph regulates proceedings that are defined not by an enumerated list, but instead by the more inclusive specification that the proceeding be one at which the defendant has a right to be present (other than proceedings addressed in the first and third sections, and trial). The third paragraph addresses pleas and sentencings, where use of conferencing is most restricted, as under the CARES Act. Paragraph (e)(4) addresses a court's authority to use teleconferencing generally.

The committee note introducing subdivision (e) states:

**Subdivision (e)** provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term “videoconferencing” is used throughout, rather than the term “video teleconferencing” (which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from “teleconferencing” with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) [applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it]<sup>4</sup> does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

## **2. Paragraph (e)(1): Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2)**

This provision clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, with one exception. Namely, when emergency conditions significantly impair the defendant's opportunity to consult confidentially with counsel, the court must ensure that the defendant will have that opportunity before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

The committee note explains:

**Paragraph (e)(1)** addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules

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<sup>4</sup> We recommend returning to this bracketed language after considering the changes to the teleconferencing provisions discussed *supra* page 15, where the explanation for this addition appears.

already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the court’s existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant’s opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant’s constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

### **3. Paragraph (e)(2): Videoconferencing for Certain Proceedings at Which the Defendant has a Right to be Present**

Paragraph (e)(2) addresses videoconferencing authority for proceedings “at which a defendant has a right to be present,” other than trial and the proceedings under (e)(1) and (3). The draft note adds that this right to presence might be based on the Constitution, statute, or rule, and lists a few examples: revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b).<sup>5</sup>

During a criminal rules emergency, an affected court may use videoconferencing for these proceedings only if three criteria are met. First, subparagraph (e)(2)(A) restricts videoconferencing authority to districts in which the chief judge has found that emergency conditions “substantially impair a court’s ability to hold” proceedings in person within a reasonable time. Second, the court must find the defendant will have an adequate opportunity for confidential consultation with

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<sup>5</sup> The rule leaves it to courts to decide whether the defendant has a right to be present at certain proceedings if and when such issues arise. The Advisory Committee had three reasons for using the defendant’s right to be present to define the second category of proceedings. First, the primary concern raised by conferencing technology was its impact on the defendant’s right to be physically present. There was no need to address the use of conferencing technology at proceedings such as scheduling conferences, where the defendant had no right to be present in the first place. Second, this definition should provide guidance on the use of conferencing technology during certain proceedings that were not included in the enumerated list in the CARES Act, such as suppression hearings. Third, any attempt to enumerate the proceedings in which a defendant has a right to be present would have been complicated, because the constitutional analysis of that right might depend upon the circumstances of a particular proceeding. Thus, it made more sense to define this middle category by referencing the right to presence itself.



counsel before and during the proceeding. Third, the defendant must consent after consulting with counsel. The only substantive change to this part of the rule since the Standing Committee last saw it is that “substantially impair” replaced “preclude.”

The committee note states:

**Paragraph (e)(2)** addresses videoconferencing authority for proceedings “at which a defendant has a right to be present” under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court’s ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant’s consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court’s finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant’s presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

#### **4. Paragraph (e)(3): Videoconferencing for Pleas and Sentencings**

Like the CARES Act, this rule imposes more restrictions on the use of videoconferencing at pleas and sentencings than on its use at other proceedings. The chief judge of the district (or alternate under 28 U.S.C. § 136(e)) must make a district-wide finding that emergency conditions substantially impair a court’s ability to hold felony pleas and sentencings in person in that district. In addition, the defendant must affirmatively request—in writing—videoconferencing for a plea or sentencing proceeding. And the court must find “that further delay in that particular case would cause serious harm to the interests of justice.” This requirement is quite similar to the finding required by the CARES Act, which requires that “the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice.” Anecdotal accounts suggest that under this language district courts are generally limiting the use of videoconferencing in pleas or sentences to the types of cases suggested in the committee note.

Since the last Standing Committee review, the Advisory Committee approved multiple refinements to this provision, none of them particularly controversial. To ensure that both (2)(A) and (B) are met for videoconferencing a plea or sentence, “and (B)” was added. The parenthetical on chief judge succession was deleted as in (e)(2). The term “substantially impair” took the place of “preclude.” And “within a reasonable time” was added to be consistent with the standard in (2)(A). The Advisory Committee also added to the note some language about ensuring the defendant’s consent was knowing and voluntary.

The committee note now reads:

**Paragraph (e)(3)** addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant’s physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee’s intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court’s ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance

that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of “request” for “consent” was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant’s consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

#### **5. Paragraph (e)(4): Teleconferencing by One or More Participants**

Paragraph (e)(4) regulates the use of teleconferencing for proceedings that a court could conduct by videoconference. The Advisory Committee concluded that the rule should carefully limit a court’s authority to allow audio-only participation, given the patent superiority of video proceedings. The four requirements for the use of teleconferencing reflect this policy. Those requirements are generally the same as those in the version of the draft rule reviewed by the Standing Committee at its last meeting, namely: fulfillment of the requirements for *videoconferencing* for the proceeding; a finding regarding the unavailability of videoconferencing; some assurance that the defendant and defense counsel will have an adequate opportunity to consult confidentially; and the defendant’s consent. But the Advisory Committee made several changes in response to questions raised by Standing Committee members, the style consultants, and other readers.

##### **a. Scope: Audio-Only for One or All**

The Advisory Committee revised the text of the rule and the note to clarify the provision’s scope. The Advisory Committee agreed that the conditions for teleconferencing should apply not only when a court decides in advance that everyone will participate by phone, but also when one

or more participants do so in proceeding otherwise conducted by videoconference. Frequently during the pandemic, at least one participant in a proceeding held by videoconference would be unable to either connect or continue by video, and would have to resort to audio-only participation. The Advisory Committee concluded that the protections in (e)(4) were essential for this situation as well as those where all participants will participate by telephone.

To that end, the Advisory Committee revised both the text and the note. In introducing the enumerated requirements, it added “A court may conduct a proceeding, in whole or in part, by teleconferencing if . . . .” The introductory section of the note includes the policy that underlies the provisions on teleconferencing: “Videoconferencing is always a better option than an audio-only conference because it allows participants to see as well as hear each other. To ensure that participants communicate through audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites.”

The Advisory Committee also revised, as noted below, the requirement in (e)(4)(B)(i) that videoconferencing for the proceeding not be reasonably available “for any person who would participate by teleconference.”

A third change was made after the Advisory Committee meeting, responding to the style consultants’ review of the draft rule text. They pointed out that the caption of (e)(4) might not fully describe its contents, as it could be read as applying only to proceedings conducted entirely by phone, as opposed to proceedings where only some participants are audio-only. To clarify this point, the caption of (e)(4) was changed from “Teleconferencing” to “Teleconferencing by One or More Participants.” The style consultants approved this change.

An addition to the committee note on this point is also bracketed for consideration by the Standing Committee on lines 562-67, in the paragraph introducing (e)(4). The suggested addition explains the “in whole or in part” language, and emphasizes that the provision regulates individual audio-only participation in videoconferences as well as proceedings conducted by phone from start to finish. It reads: “Because the rule applies to teleconferencing ‘in whole or in part,’ it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.” Although this addition drafted in response to the expressed by the style consultants and has never been reviewed by Advisory Committee members, the reporters and the chairs of both the Advisory Committee and the Rule 62 Subcommittee believe it would be helpful.

The word “participate” is important in all of these additions. The Advisory Committee intended to limit the scope of the provision to those who “participate” in the proceeding in some way, and to clarify that observers and others who are not “participating” in the proceeding may connect by audio-only without the judge having to satisfy the requirements in (e)(4). Indeed, the earlier inclusion in Rule 62 of paragraph (d)(1) recognizes the constitutional mandate to provide observers access to public proceedings, and the Advisory Committee anticipated that this access might be provided as audio-only connection to a videoconference. The Advisory Committee chose not to attempt to define who is a participant in these proceedings, concluding that the word is self-explanatory as used here. The word would clearly include the judge, any defendant, the parties’

attorneys, and any witnesses. But it would not include observers or court personnel who may be on the call but do not speak on the record.

Finally, the reporters and chair have included the bracketed language on lines 402-05 as a possible addition to the committee note introducing the videoconferencing provisions. After the Advisory Committee concluded its review of the draft rule and note, the reporters and chair recognized that, although the Advisory Committee had added language clarifying that the teleconferencing requirements apply whenever one or more person participates by audio-only, for all or part of the proceeding, no similar language appeared in the videoconferencing provisions. This might suggest that the Advisory Committee did not intend the videoconferencing provisions to apply to only part of a proceeding or less than all of its participants. If the Standing Committee agrees with that concern, one option to remove any ambiguity for those who will review the videoconferencing provisions during the comment period would be to add the bracketed language to the note.

**b. Prerequisites for Teleconferencing: (e)(4)(A)—Cumulative to Videoconferencing Requirements**

The first prerequisite for teleconferencing—that the requirements for videoconference for the particular proceeding must have been met—was a point lost on some readers of earlier versions. Several readers did not realize that the requirements for videoconferencing for pleas and sentencings applied, for example, when a felony plea or sentencing proceeding involved teleconferencing. To clarify this point, the language about requirements for videoconferencing was placed in its own separate subparagraph (A).

The Advisory Committee also added the language “any rule, including” before “this rule” to recognize that not only Rule 62(e)(1) through (3), but also Rules 5, 10, 40, and 43(b)(2) imposed requirements for videoconferencing that must be met before teleconferencing is authorized. The subcommittee had assumed that, by addressing these proceedings in (e)(1), readers of the rule would know that the requirements in Rules 5, 10, 40, and 43(b)(2) were incorporated into the term “this rule.” The Advisory Committee disagreed with that assumption. A reference to “this rule” in (e)(4) would not, in the view of many members, incorporate the requirements for videoconferencing imposed by rules other than Rule 62. After debating how best to make this clear, the Advisory Committee decided not to enumerate Rules 5, 10, 40, and 43(b)(2) in the text of (e)(4)(A). Instead the Advisory Committee employed a generic reference “any rule, including this rule[,]” which replicated the language used earlier in (d)(2). This approach also avoids the need to amend the rule later if additional requirements for videoconferencing are added to any of the existing rules. For the same reason, the Advisory Committee considered and rejected a suggestion to list Rules 5, 10, 40, and 43(b)(2) in the note. A further addition to the committee note focused on the example of a proceeding under Rule 43(b)(2), which is the only rule among those addressed by (e)(1) that has a requirement for videoconferencing other than defendant’s consent.

Finally, following the Advisory Committee meeting, Judge Bates raised a concern that the language “any rule” does not literally mean any rule, because different rules have different requirements for videoconferencing. For example, Rule 5 requires only the defendant’s consent,

but Rule 43(b)(2) requires that the proceeding involve a misdemeanor punishable by fine or by imprisonment for not more than one year, or both, and that the defendant consent in writing. Judge Bates suggested that the Advisory Committee meant only an “applicable” rule. To clarify this point, “applicable” appears in brackets as an addition for the Standing Committee consideration. The style consultants reviewed and did not object to this addition and the reporters, the subcommittee chair, and the Advisory Committee chair all agree it is a helpful change.

The committee note for (e)(4)(A) includes further explanation:

[A]ll of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

**c. Prerequisites for Teleconferencing: (e)(4)(B)(i)—  
Videoconferencing Unavailable**

The second of the four prerequisites for teleconferencing is a finding by the judge that “videoconferencing is not reasonably available for any person who would participate by teleconference.”

The “not reasonably available” standard was suggested by a member of the Standing Committee. The Advisory Committee agreed and substituted it for “not available within a reasonable time.” It provides flexibility and has proven workable in some districts during the pandemic.

To clarify the application of the provision in situations where not all participants are by phone, the Advisory Committee added a requirement that the court find that videoconferencing for the proceeding “is not reasonably available for any person who would participate by teleconference[.]” This was the subject of considerable discussion. As noted earlier, the language in the draft was intended to provide guidance and flexibility for substituting audio for video access at any stage or by any participant, while at the same time mandating a finding of video unavailability for any participants who would be audio-only. Various simpler alternatives (e.g., “for any participant,” “for all participants,” “for one or more participants”) were rejected. Those alternatives did not focus the finding of unavailability on any person(s) who are unable to connect by video and would participate by phone instead. Members were also concerned that one person’s inability to connect by video should not mean that everyone should participate by telephone. The Advisory Committee was committed to the principle that teleconferencing was a far inferior option that should be used only to the extent necessary. But it also did not want to suggest that teleconferencing for some participants would be authorized only when *everyone* cannot use video.

The note further explains:

[Item] (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is “reasonably available,” this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

**d. Prerequisites for Teleconferencing: (e)(4)(B)(ii)—Finding of Adequate Opportunity for Confidential Consultation**

Item (e)(4)(B)(ii) requires the judge to find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during a proceeding involving teleconferencing. The Advisory Committee recognized that, even though (e)(4)(A) requires a finding that confidential consultation would have been possible if the proceeding had been conducted by videoconference, additional accommodations might be necessary to assure confidential consultation for a telephone conference. For example, when the video fails and the only telephone line available to the defendant or defense counsel is the line required for teleconferencing, the court must take additional steps to provide the opportunity for confidential consultation. This was a major concern of the judges and practitioners who discussed their experiences at the miniconference.

The version approved by the Advisory Committee at the meeting did not include the words “an adequate” before “opportunity.” Instead of “have an adequate opportunity to consult,” the version the Advisory Committee approved read “have the opportunity to consult.” This change appears to have been an unintentional error. No one at the meeting noticed or mentioned, much less discussed, the inconsistency with other portions of the rule that required “an adequate opportunity” to consult counsel. There was some discussion about simplifying (e)(4) generally, and a specific discussion about simplifying the subparagraph (C) on consent that followed, but a review of the meeting by the reporters revealed that no one noticed the change that had been made here. There is no basis for phrasing this point differently here than elsewhere.<sup>6</sup> We have not revisited this issue with the full Advisory Committee, so the words “an adequate” are in brackets in the draft presented for Standing Committee’s consideration.

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<sup>6</sup> Moreover, because the reporters had not yet realized that “an adequate” had been deleted, they included these words in the version purporting to be what the Advisory Committee adopted at the meeting, which they circulated to the Advisory Committee along with the note changes to (e)(4). No one responding raised this issue.

The committee note reads:

[Item] (e)(4)(B)(ii) provides that the court must find the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no “break out rooms” for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. Attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

**e. Prerequisites for Teleconferencing: (e)(4)(C)—Consent by the Defendant**

The last requirement for permitting teleconferencing by one or more participants is the defendant’s consent. The Advisory Committee concluded that prior consent or written request for *videoconferencing* does not necessarily suffice as consent for *teleconferencing*. It discussed several examples of situations where a defendant might very well consent to videoconference but not to a proceeding in which at least some participants must appear by audio only. These examples included situations when the defendant has no video connection but others do, when the judge’s video fails in a sentencing, and when defense counsel’s video is unavailable during a plea proceeding. The Advisory Committee also considered alternatives for modifying this provision so that it did not require that the court insist on consultation with counsel before accepting the defendant’s consent when the need for reverting to audio-only arose in the midst of a videoconference (for example, providing for “the opportunity” to consult instead). Ultimately, the Advisory Committee decided to remove the words “after consultation with counsel” from this particular provision.

The committee note explains:

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to teleconferencing be given only after consultation with counsel. By requiring only “consent,” it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but



not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, “do you want to talk to your lawyer about finishing this now without the video?,” an answer “No, I’m ok, we can finish now” would be sufficient consent under (e)(4)(C).

#### **IV. 2254 and 2255 Rules**

After consulting experienced petitioners’ counsel, states’ attorneys, and the Department of Justice, and reviewing research by the reporters and the Rules Law Clerk, the Rule 62 Subcommittee recommended that an emergency rule was not needed for the rules used in Section 2254 and Section 2255 proceedings. At its May meeting, the Advisory Committee agreed unanimously with the subcommittee’s recommendation.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF CRIMINAL PROCEDURE<sup>1</sup>**

- 1 **Rule 62. Criminal Rules Emergency**
- 2 **(a) Conditions for an Emergency.** The Judicial
- 3 Conference of the United States may declare a
- 4 Criminal Rules emergency if it determines that:
- 5 (1) extraordinary circumstances relating to public
- 6 health or safety, or affecting physical or
- 7 electronic access to a court, substantially impair
- 8 the court's ability to perform its functions in
- 9 compliance with these rules; and
- 10 (2) no feasible alternative measures would
- 11 sufficiently address the impairment within a
- 12 reasonable time.
- 13 **(b) Declaring an Emergency.**
- 14 **(1) Content.** The declaration must:

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<sup>1</sup> New material is underlined in red. Bracketed language at lines 123 and 136 was added after the Advisory Committee's May 11, 2021 meeting. See Advisory Committee Report to the Standing Committee at 16 and 17.

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- 15 (A) designate the court or courts affected;  
16 (B) state any restrictions on the authority  
17 granted in (d) and (e); and  
18 (C) be limited to a stated period of no more  
19 than 90 days.
- 20 (2) *Early Termination.* The Judicial Conference  
21 may terminate a declaration for one or more  
22 courts before the termination date.
- 23 (3) *Additional Declarations.* The Judicial  
24 Conference may issue additional declarations  
25 under this rule.
- 26 (c) *Continuing a Proceeding After a Termination.*  
27 Termination of a declaration for a court ends its authority  
28 under (d) and (e). But if a particular proceeding is already  
29 underway and resuming compliance with these rules for the  
30 rest of the proceeding would not be feasible or would work  
31 an injustice, it may be completed with the defendant's  
32 consent as if the declaration had not terminated.

33 **(d) Authorized Departures from These Rules After a**  
34 **Declaration.**

35 **(1) Public Access to a Proceeding.** If emergency  
36 conditions substantially impair the public’s  
37 in-person attendance at a public proceeding,  
38 the court must provide reasonable alternative  
39 access, contemporaneous if feasible.

40 **(2) Signing or Consenting for a Defendant.** If  
41 any rule, including this rule, requires a  
42 defendant’s signature, written consent, or  
43 written waiver—and emergency conditions  
44 limit a defendant’s ability to sign—defense  
45 counsel may sign for the defendant if the  
46 defendant consents on the record. Otherwise,  
47 defense counsel must file an affidavit  
48 attesting to the defendant’s consent. If the  
49 defendant is pro se, the court may sign for the

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50 defendant if the defendant consents on the  
51 record.

52 (3) *Alternate Jurors.* A court may impanel more  
53 than 6 alternate jurors.

54 (4) *Correcting or Reducing a Sentence.* Despite  
55 Rule 45(b)(2), if emergency conditions  
56 provide good cause, a court may extend the  
57 time to take action under Rule 35 as  
58 reasonably necessary.

59 (e) *Authorized Use of Videoconferencing and*  
60 *Teleconferencing After a Declaration.*

61 (1) *Videoconferencing for Proceedings*  
62 *Under Rules 5, 10, 40, and 43(b)(2).*

63 This rule does not modify a court's  
64 authority to use videoconferencing  
65 for a proceeding under Rules 5, 10,  
66 40, or 43(b)(2), except that if  
67 emergency conditions substantially

68 impair the defendant's opportunity to  
69 consult with counsel, the court must  
70 ensure that the defendant will have an  
71 adequate opportunity to do so  
72 confidentially before and during  
73 those proceedings.

74 (2) *Videoconferencing for Certain*  
75 *Proceedings at Which the Defendant*  
76 *Has a Right to Be Present.* Except for  
77 felony trials and as otherwise  
78 provided under (e)(1) and (3), for a  
79 proceeding at which a defendant has  
80 a right to be present, a court may use  
81 videoconferencing if:

82 (A) the district's chief judge finds  
83 that emergency conditions  
84 substantially impair a court's  
85 ability to hold in-person

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86 proceedings in the district  
87 within a reasonable time;  
88 (B) the court finds that the  
89 defendant will have an  
90 adequate opportunity to  
91 consult confidentially with  
92 counsel before and during the  
93 proceeding; and  
94 (C) the defendant consents after  
95 consulting with counsel.  
96 **(3) *Videoconferencing for Felony Pleas***  
97 **and *Sentencings*.** For a felony  
98 proceeding under Rule 11 or 32, a  
99 court may use videoconferencing  
100 only if, in addition to the  
101 requirements in (2)(A) and (B):  
102 (A) the district's chief judge finds  
103 that emergency conditions

104 substantially impair a court's  
105 ability to hold in-person  
106 felony pleas and sentencings  
107 in the district within a  
108 reasonable time;

109 (B) the defendant, after consulting  
110 with counsel, requests  
111 in writing that the  
112 proceeding be conducted by  
113 videoconferencing; and

114 (C) the court finds that further  
115 delay in that particular case  
116 would cause serious harm to  
117 the interests of justice.

118 **(4) Teleconferencing by One or More**  
119 **Participants.** A court may conduct a  
120 proceeding, in whole or in part, by  
121 teleconferencing if:



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122 (A) the requirements under any  
123 [applicable] rule, including  
124 this rule, for conducting the  
125 proceeding \_\_\_\_\_ by  
126 videoconferencing have been  
127 met;

128 (B) the court finds that:  
129 (i) videoconferencing is  
130 not \_\_\_\_\_ reasonably  
131 available for any  
132 person who would  
133 participate \_\_\_\_\_ by  
134 teleconference; and  
135 (ii) the defendant will  
136 have [an adequate ~~the~~  
137 opportunity to consult  
138 confidentially with  
139 counsel before and

140 during the proceeding  
141 if held by  
142 teleconference; and  
143 (C) the defendant consents.

144 **Committee Note**

145 **Subdivision (a).** This rule defines the conditions for  
146 a Criminal Rules emergency that would support a  
147 declaration authorizing a court to depart from one or more of  
148 the other Federal Rules of Criminal Procedure. Rule 62  
149 refers to the other, non-emergency rules—currently Rules 1-  
150 61—as “these rules.” This committee note uses “these rules”  
151 or “the rules” to refer to the non-emergency rules, and uses  
152 “this rule” or “this emergency rule” to refer to new Rule 62.

153 The rules have been promulgated under the Rules  
154 Enabling Act and carefully designed to protect constitutional  
155 and statutory rights and other interests. Any authority to  
156 depart from the rules must be strictly limited. Compliance  
157 with the rules cannot be cast aside because of cost or  
158 convenience, or without consideration of alternatives that  
159 would permit compliance to continue. Subdivision (a)  
160 narrowly restricts the conditions that would permit a  
161 declaration granting emergency authority to depart from the  
162 rules and defines who may make that declaration.

163 First, subdivision (a) specifies that the power to  
164 declare a rules emergency rests solely with the Judicial  
165 Conference of the United States, the governing body of the  
166 judicial branch. To find that a rules emergency exists, the  
167 Judicial Conference will need information about the ability  
168 of affected courts to comply with the rules, as well as the

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169 existence of reasonable alternatives to continue court  
170 functions in compliance with the rules. The judicial council  
171 of a circuit, for example, may be able to provide helpful  
172 information it has received from judges within the circuit  
173 regarding local conditions and available resources.

174 Paragraph (a)(1) requires that before declaring a  
175 Criminal Rules emergency, the Judicial Conference must  
176 determine that circumstances are extraordinary and that they  
177 relate to public health or safety or affect physical or  
178 electronic access to a court. These requirements are intended  
179 to prohibit the use of this emergency rule to respond to other  
180 challenges, such as those arising from staffing or budget  
181 issues. Second, those extraordinary circumstances must  
182 substantially impair the ability of a court to perform its  
183 functions in compliance with the rules.

184 In addition, paragraph (a)(2) requires that even if the  
185 Judicial Conference determines the extraordinary  
186 circumstances defined in (a)(1), it cannot declare a Criminal  
187 Rules emergency unless it also determines that no feasible  
188 alternative measures would sufficiently address the  
189 impairment and allow the affected court to perform its  
190 functions in compliance with the rules within a reasonable  
191 time. For example, in the districts devastated by hurricanes  
192 Katrina and Maria, the ability of courts to function in  
193 compliance with the rules was substantially impaired for  
194 extensive periods of time. But there would have been no  
195 Criminal Rules emergency under this rule because those  
196 districts were able to remedy that impairment and function  
197 effectively in compliance with the rules by moving  
198 proceedings to other districts under 28 U.S.C. § 141.  
199 Another example might be a situation in which the judges in  
200 a district were unable to carry out their duties as a result of  
201 an emergency that rendered them unavailable, but  
202 courthouses remained safe. The unavailability of judges

203 would substantially impair that court’s ability to function in  
204 compliance with the rules, but temporary assignment of  
205 judges from other districts under 28 U.S.C. § 292(b) and (d)  
206 would eliminate that impairment.

207 Subdivision (a) also recognizes that emergency  
208 circumstances may affect only one or a small number of  
209 courts—familiar examples include hurricanes, floods,  
210 explosions, or terroristic threats—or may have widespread  
211 impact, such as a pandemic or a regional disruption of  
212 electronic communications. This rule provides a uniform  
213 procedure that is sufficiently flexible to accommodate  
214 different types of emergency conditions with local, regional,  
215 or nationwide impact.

216 **Paragraph (b)(1).** Paragraph (b)(1) specifies what  
217 must be included in a declaration of a Criminal Rules  
218 emergency. Subparagraph (A) requires that each declaration  
219 of a Criminal Rules emergency designate the court or courts  
220 affected by the Criminal Rules emergency as defined in  
221 subdivision (a). Some emergencies may affect all courts,  
222 some will be local or regional. The declaration must be no  
223 broader than the Criminal Rules emergency. That is, every  
224 court identified in a declaration must be one in which  
225 extraordinary circumstances that relate to public health or  
226 safety or that affect physical or electronic access to the court  
227 are substantially impairing its ability to perform its functions  
228 in compliance with these rules, and in which compliance  
229 with the rules cannot be achieved within a reasonable time  
230 by alternative measures. A court may not exercise authority  
231 under (d) and (e) unless the Judicial Conference includes the  
232 court in its declaration, and then only in a manner consistent  
233 with that declaration, including any limits imposed under  
234 (b)(1)(B).

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235 Subparagraph (b)(1)(B) provides that the Judicial  
236 Conference's declaration of a Criminal Rules emergency  
237 must state any restrictions on the authority granted by  
238 subdivisions (d) and (e) to depart from the rules. For  
239 example, if the emergency arises from a disruption in  
240 electronic communications, there may be no reason to  
241 authorize videoconferencing for proceedings in which the  
242 rules require in-person appearance. But (b)(1)(B) does not  
243 allow a declaration to expand departures from the rules  
244 beyond those authorized by subdivisions (d) and (e).

245 Under (b)(1)(C), each declaration must state when it  
246 will terminate, which may not exceed 90 days from the date  
247 of the declaration. This sunset clause is included to ensure  
248 that these extraordinary deviations from the rules last no  
249 longer than necessary.

250 **Paragraph (b)(2).** If emergency conditions end  
251 before the termination date of the declaration for some or all  
252 courts included in that declaration, (b)(2) provides that the  
253 Judicial Conference may terminate the declaration for the  
254 courts no longer affected. This provision also ensures that  
255 any authority to depart from the rules lasts no longer than  
256 necessary.

257 **Paragraph (b)(3)** recognizes that the conditions that  
258 justified the declaration of a Criminal Rules emergency may  
259 continue beyond the term of the declaration. The conditions  
260 may also change, shifting in nature or affecting more  
261 districts. An example might be a flood that leads to a  
262 contagious disease outbreak. Rather than provide for  
263 extensions, renewals, or modifications of an initial  
264 declaration, paragraph (b)(3) gives the Judicial Conference  
265 the authority to respond to such situations by issuing  
266 additional declarations. Each additional declaration must

267 meet the requirements of subdivision (a), and must include  
268 the contents required by (b)(1).

269           **Subdivision (c).** In general, the termination of a  
270 declaration of emergency ends all authority to depart from  
271 the other Federal Rules of Criminal Procedure. It does not  
272 terminate, however, the court’s authority to complete an  
273 ongoing trial with alternate jurors who have been impaneled  
274 under (d)(3). In addition, subdivision (c) carves out a narrow  
275 exception for certain proceedings commenced under a  
276 declaration of emergency but not completed before the  
277 declaration terminates. If it would not be feasible to conclude  
278 a proceeding commenced before a declaration terminates  
279 with procedures that comply with the rules, or if resuming  
280 compliance with the rules would work an injustice, the court  
281 may complete that proceeding using procedures authorized  
282 by this emergency rule, but only if the defendant consents to  
283 the use of emergency procedures after the declaration ends.  
284 Subdivision (c) recognizes the need for some  
285 accommodation and flexibility during the transition period,  
286 but also the importance of returning promptly to the rules to  
287 protect the defendant’s rights and other interests.

288           **Subdivisions (d) and (e)** describe the authority to  
289 depart from the rules after a declaration.

290           **Paragraph (d)(1)** addresses the courts’ obligation to  
291 provide alternative access when emergency conditions have  
292 substantially impaired in-person attendance by the public at  
293 public proceedings. The term “public proceeding” was  
294 intended to capture proceedings that the rules require to be  
295 conducted “in open court,” proceedings to which a victim  
296 must be provided access, and proceedings that must be open  
297 to the public under the First and Sixth Amendments. The rule  
298 creates a duty to provide the public, including victims, with

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299 “reasonable alternative access,” notwithstanding Rule 53’s  
300 ban on the “broadcasting of judicial proceedings.”

301 The duty arises only when the substantial impairment  
302 of in-person access by the public is caused by emergency  
303 conditions. The rule does not apply when reasons other than  
304 emergency conditions restrict access. The duty arises not  
305 only when emergency conditions substantially impair the  
306 attendance of anyone, but also when conditions would allow  
307 participants but not the public to attend, as when capacity  
308 must be restricted to prevent contagion.

309 Alternative access must be contemporaneous when  
310 feasible. For example, if public health conditions limit  
311 courtroom capacity, contemporaneous transmission to an  
312 overflow courthouse space ordinarily could be provided. In  
313 a proceeding conducted by videoconference, a court could  
314 provide access to the audio transmission if access to the  
315 video transmission is not feasible.

316 **Paragraph (d)(2)** recognizes that emergency  
317 conditions may disrupt compliance with a rule that requires  
318 the defendant’s signature, written consent, or written waiver.  
319 If emergency situations limit the defendant’s ability to sign,  
320 (d)(2) provides an alternative, allowing defense counsel to  
321 sign if the defendant consents. To ensure that there is a  
322 record of the defendant’s consent to this procedure, the  
323 amendment provides two options: (1) defense counsel may  
324 sign for the defendant if the defendant consents on the  
325 record, or, (2) without the defendant’s consent on the record,  
326 defense counsel must file an affidavit attesting to the  
327 defendant’s consent to the procedure. The defendant’s oral  
328 agreement on the record alone will not substitute for the  
329 defendant’s signature. The written document signed by  
330 counsel on behalf of the defendant provides important  
331 additional evidence of the defendant’s consent.

332           The court may sign for a pro se defendant, if that  
333 defendant consents on the record. There is no provision for  
334 the court to sign for a counseled defendant, even if the  
335 defendant provides consent on the record. The Committee  
336 concluded that rules requiring the defendant's signature,  
337 written consent or written waiver protect important rights,  
338 and permitting the judge to bypass defense counsel and sign  
339 once the defendant agrees could result in a defendant  
340 perceiving pressure from the judge to sign. Requiring a  
341 writing from defense counsel is an essential protection when  
342 the defendant's own signature is not reasonably available  
343 because of emergency conditions.

344           It is generally helpful for the court to conduct a  
345 colloquy with the defendant to ensure that defense counsel  
346 consulted with the defendant with regard to the substance  
347 and import of the pleading or document being signed, and  
348 that the consent to allow counsel to sign was knowing and  
349 voluntary.

350           **Paragraph (d)(3)** allows the court to impanel more  
351 than six alternate jurors, creating an emergency exception to  
352 the limit imposed by Rule 24(c)(1). This flexibility may be  
353 particularly useful for a long trial conducted under  
354 emergency conditions—such as a pandemic—that increase  
355 the likelihood that jurors will be unable to complete the trial.  
356 Because it is not possible to anticipate all of the situations in  
357 which this authority might be employed, the amendment  
358 leaves to the discretion of the district court whether to  
359 impanel more alternates, and if so, how many. The same  
360 uncertainty about emergency conditions that supports  
361 flexibility in the rule for the provision of additional  
362 alternates also supports avoiding mandates for additional  
363 peremptory challenges when more than six alternates are  
364 provided. Nonetheless, if more than six alternates are  
365 impaneled and emergency conditions allow, the court should



366 consider permitting each party one or more additional  
367 peremptory challenges, consistent with the policy in  
368 Rule 24(c)(4).

369 **Paragraph (d)(4)** provides an emergency exception  
370 to Rule 45(b)(2), which prohibits the court from extending  
371 the time to take action under Rule 35 “except as stated in that  
372 rule.” When emergency conditions provide good cause for  
373 extending the time to take action under Rule 35, the  
374 amendment allows the court to extend the time for taking  
375 action “as reasonably necessary.” The amendment allows the  
376 court to extend the 14-day period for correcting a clear error  
377 in the sentence under Rule 35(a) and the one-year period for  
378 government motions for sentence reductions based on  
379 substantial assistance under Rule 35(b)(1). Nothing in this  
380 provision is intended to expand the authority to correct or  
381 reduce a sentence under Rule 35. This emergency rule does  
382 not address the extension of other time limits because  
383 Rule 45(b)(1) already provides the necessary flexibility for  
384 courts to consider emergency circumstances. It allows the  
385 court to extend the time for taking other actions on its own  
386 or on a party’s motion for good cause shown.

387 **Subdivision (e)** provides authority for a court to use  
388 videoconferencing or teleconferencing under specified  
389 circumstances after the declaration of a Criminal Rules  
390 emergency. The term “videoconferencing” is used  
391 throughout, rather than the term “video teleconferencing”  
392 (which appears elsewhere in the rules), to more clearly  
393 distinguish conferencing with visual images from  
394 “teleconferencing” with audio only. The first three  
395 paragraphs in (e) describe a court’s authority to use  
396 videoconferencing, depending upon the type of proceeding,  
397 while the last describes a court’s authority to use  
398 teleconferencing when videoconferencing is not reasonably  
399 available. The defendant’s consent to the use of

400 conferencing technology is required for all proceedings  
401 addressed by subdivision (e).

402 Subdivision (e) [applies to the use of  
403 videoconferencing and teleconferencing for the proceedings  
404 defined in paragraphs (1) through (3), for all or part of the  
405 proceeding, by one or more participants. But it]<sup>2</sup> does not  
406 regulate the use of video and teleconferencing technology  
407 for all possible proceedings in a criminal case. It does not  
408 speak to or prohibit the use of videoconferencing or  
409 teleconferencing for proceedings, such as scheduling  
410 conferences, at which the defendant has no right to be  
411 present. Instead, it addresses three groups of proceedings: (1)  
412 proceedings for which the rules already authorize  
413 videoconferencing; (2) certain other proceedings at which a  
414 defendant has the right to be present, excluding felony trials;  
415 and (3) felony pleas and sentencings. The new rule does not  
416 address the use of technology to maintain communication  
417 with a defendant who has been removed from a proceeding  
418 for misconduct.

419 **Paragraph (e)(1)** addresses first appearances,  
420 arraignments, and certain misdemeanor proceedings under  
421 Rules 5, 10, 40, and 43(b)(2), where the rules already  
422 provide for videoconferencing if the defendant consents. *See*  
423 Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This  
424 paragraph was included to eliminate any confusion about the  
425 interaction between existing videoconferencing authority  
426 and this rule. It clarifies that this rule does not change the  
427 court's existing authority to use videoconferencing for these  
428 proceedings, except that it requires the court to address

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<sup>2</sup> Bracketed language in the committee note was added after the Advisory Committee's May 11, 2021 meeting. *See* Advisory Committee Report to the Standing Committee at 14 and 15.

429 emergency conditions that significantly impair the  
430 defendant’s opportunity to consult with counsel. In that  
431 situation, the court must ensure that the defendant will have  
432 an adequate opportunity for confidential consultation before  
433 and during videoconference proceedings under Rules 5, 10,  
434 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this  
435 requirement to all emergency video and teleconferencing  
436 authority granted by the rule after a declaration.

437 The requirement is based upon experience during the  
438 COVID-19 pandemic, when conditions dramatically limited  
439 the ability of counsel to meet or even speak with clients. The  
440 Committee believed it was essential to include this  
441 prerequisite for conferencing under Rules 5, 10, 40, and  
442 43(b)(2), as well as conferencing authorized only during a  
443 declaration by paragraphs (e)(2), (3), and (4), in order to  
444 safeguard the defendant’s constitutional right to counsel.  
445 The rule does not specify any particular means of providing  
446 an adequate opportunity for private communication.

447 **Paragraph (e)(2)** addresses videoconferencing  
448 authority for proceedings “at which a defendant has a right  
449 to be present” under the Constitution, statute, or rule,  
450 excluding felony trials and proceedings addressed in either  
451 (e)(1) or (e)(3). Such proceedings include, for example,  
452 revocations of release under Rule 32.1, preliminary hearings  
453 under Rule 5.1, and waivers of indictment under Rule 7(b).  
454 During a declaration, an affected court may use  
455 videoconferencing for these proceedings, but only if the  
456 three circumstances are met.

457 First, subparagraph (e)(2)(A) restricts  
458 videoconferencing authority to affected districts in which the  
459 chief judge (or alternate under 28 U.S.C. § 136(e)) has found  
460 that emergency conditions substantially impair a court’s  
461 ability to hold proceedings in person within a reasonable

462 time. Recognizing that important policy concerns animate  
463 existing limitations in Rule 43 on virtual proceedings, even  
464 with the defendant's consent, this district-wide finding is not  
465 an invitation to substitute virtual conferencing for in-person  
466 proceedings without regard to conditions in a particular  
467 division, courthouse, or case. If a proceeding can be  
468 conducted safely in-person within a reasonable time, a court  
469 should hold it in person.

470 Second, subparagraph (e)(2)(B) conditions  
471 videoconferencing upon the court's finding that the  
472 defendant will have an adequate opportunity to consult  
473 confidentially with counsel before and during the  
474 proceeding. If emergency conditions prevent the defendant's  
475 presence, and videoconferencing is employed as a substitute,  
476 counsel will not have the usual physical proximity to the  
477 defendant during the proceeding and may not have ordinary  
478 access to the defendant before and after the proceeding.

479 Third, subparagraph (e)(2)(C) requires that the  
480 defendant consent to videoconferencing after consulting  
481 with counsel. Insisting on consultation with counsel before  
482 consent assures that the defendant will be informed of the  
483 potential disadvantages and risks of virtual proceedings. It  
484 also provides some protection against potential pressure to  
485 consent, from the government or the judge.

486 The Committee declined to provide authority in this  
487 rule to conduct felony trials without the physical presence of  
488 the defendant, even if the defendant wishes to appear at trial  
489 by videoconference during an emergency declaration. And  
490 this rule does not address the use of technology to maintain  
491 communication with a defendant who has been removed  
492 from a proceeding for misconduct. Nor does it address if or  
493 when trial participants other than the defendant may appear  
494 by videoconferencing.

495           **Paragraph (e)(3)** addresses the use of  
496 videoconferencing for a third set of proceedings: felony  
497 pleas and sentencings under Rules 11 and 32. The physical  
498 presence of the defendant together in the courtroom with the  
499 judge and counsel is a critical part of any plea or sentencing  
500 proceeding. Other than trial itself, in no other context does  
501 the communication between the judge and the defendant  
502 consistently carry such profound consequences. The  
503 importance of defendant's physical presence at plea and  
504 sentence is reflected in Rules 11 and 32. The Committee's  
505 intent was to carve out emergency authority to substitute  
506 virtual presence for physical presence at a felony plea or  
507 sentence only as a last resort, in cases where the defendant  
508 would likely be harmed by further delay. Accordingly, the  
509 prerequisites for using videoconferencing for a felony plea  
510 or sentence include three circumstances in addition to those  
511 required for the use of videoconferencing under (e)(2).

512           Subparagraph (e)(3)(A) requires that the chief judge  
513 of the district (or alternate under 28 U.S.C. § 136(e)) make a  
514 district-wide finding that emergency conditions substantially  
515 impair a court's ability to hold felony pleas and sentencings  
516 in person in that district within a reasonable time. This  
517 finding serves as assurance that videoconferencing may be  
518 necessary and that individual judges cannot on their own  
519 authorize virtual pleas and sentencings when in-person  
520 proceedings might be manageable with patience or  
521 adaptation. Although the finding serves as assurance that  
522 videoconferencing might be necessary in the district, as  
523 under (e)(2), individual courts within the district may not  
524 conduct virtual plea and sentencing proceedings in  
525 individual cases unless they find the remaining criteria of  
526 (e)(3) and (4) are satisfied.

527  
528           Subparagraph (e)(3)(B) states that the defendant  
529 must request in writing that the proceeding be conducted by

530 videoconferencing, after consultation with counsel. The  
531 substitution of “request” for “consent” was deliberate, as an  
532 additional protection against undue pressure to waive  
533 physical presence. This requirement of writing is, like other  
534 requirements of writing in the rules, subject to the  
535 emergency provisions in (d)(2), unless the relevant  
536 emergency declaration excludes the authority in (d)(2). To  
537 ensure that the defendant consulted with counsel with regard  
538 to this decision, and that the defendant’s consent was  
539 knowing and voluntary, the court may need to conduct a  
540 colloquy with the defendant before accepting the written  
541 request.

542           Subparagraph (e)(3)(C) requires that before a court  
543 may conduct a plea or sentencing proceeding by  
544 videoconference, it must find that the proceeding in that  
545 particular case cannot be further delayed without serious  
546 harm to the interests of justice. Examples may include some  
547 pleas and sentencings that would allow transfer to a facility  
548 preferred by the defense, or result in immediate release,  
549 home confinement, probation, or a sentence shorter than the  
550 time expected before conditions would allow in-person  
551 proceedings. A judge might also conclude that under certain  
552 emergency conditions, delaying certain guilty pleas under  
553 Rule 11(c)(1)(C), even those calling for longer sentences,  
554 may result in serious harm to the interests of justice.

555           **Paragraph (e)(4)** details conditions for the use of  
556 teleconferencing to conduct proceedings for which  
557 videoconferencing is authorized. Videoconferencing is  
558 always a better option than an audio-only conference  
559 because it allows participants to see as well as hear each  
560 other. To ensure that participants communicate through  
561 audio alone only when videoconferencing is not feasible,  
562 (e)(4) sets out four prerequisites. [Because the rule applies  
563 to teleconferencing “in whole or in part,” it mandates these

564 prerequisites whenever the entire proceeding is held by  
565 teleconference from start to finish, or when one or more  
566 participants in the proceeding are connected by audio only,  
567 for part or all of a proceeding.]

568

569 The first prerequisite, in (e)(4)(A), is that all of the  
570 conditions for the use of videoconferencing for the  
571 proceeding must be met before a court may conduct a  
572 proceeding, in whole or in part, by audio-only. For example,  
573 videoconferencing for a sentencing under Rule 32 requires  
574 compliance with (e)(3)(A), (B), and (C). No part of a felony  
575 sentencing proceeding may be held by teleconference, nor  
576 may any person participate in such a proceeding by audio  
577 only, unless those videoconferencing requirements have  
578 been met. Likewise, for a misdemeanor proceeding,  
579 teleconferencing requires compliance with (e)(1) and  
580 Rule 43(b)(2).

581 Second, (e)(4)(B)(i) requires the court to find that  
582 videoconferencing for all or part of the proceeding is not  
583 reasonably available before allowing participation by audio  
584 only. Because it focuses on what is “reasonably available,”  
585 this requirement is flexible. It is intended to allow courts to  
586 use audio only connections when necessary, but not  
587 otherwise. For example, it precludes the use of  
588 teleconferencing alone if videoconferencing—though  
589 generally limited—is available for all participants in a  
590 particular proceeding. But it permits the use of  
591 teleconferencing in other circumstances. For example, if  
592 only an audio connection with a defendant were feasible  
593 because of security concerns at the facility where the  
594 defendant is housed, a court could find that  
595 videoconferencing for that defendant in the particular  
596 proceeding is not reasonably available. Or, if the video  
597 connection fails for one or more participants during a  
598 proceeding started by videoconference and audio is the only

599 option for completing that proceeding expeditiously, this  
600 rule permits the affected participants to use audio technology  
601 to finish the proceeding.

602 Third, (e)(4)(B)(ii) provides that the court must find  
603 that the defendant will have an adequate opportunity to  
604 consult confidentially with counsel before and during the  
605 teleconferenced proceeding. Opportunities for confidential  
606 consultation may be more limited with teleconferencing than  
607 they are with videoconferencing as when a defendant or a  
608 defense attorney has only one telephone line to use to call  
609 into the conference, and there are no “breakout rooms” for  
610 private conversations like those videoconferencing  
611 platforms provide. This situation may arise not only when a  
612 proceeding is held entirely by phone, but also when, in the  
613 midst of a videoconference, video communication fails for  
614 either the defendant or defense counsel. An attorney or client  
615 may have to call into the conference using the devices they  
616 had previously been using for confidential communication.  
617 Experiences like these prompted this requirement that the  
618 court specifically find that an alternative opportunity for  
619 confidential consultation is in place before permitting  
620 teleconferencing in whole or in part.

621 Finally, recognizing the differences between  
622 videoconferencing and teleconferencing, subparagraph  
623 (e)(4)(C) provides that the defendant must consent to  
624 teleconferencing for the proceeding, even if the defendant  
625 previously requested or consented to videoconferencing. A  
626 defendant who is willing to be sentenced with a  
627 videoconference connection with the judge may balk,  
628 understandably, at being sentenced over the phone.  
629 Subparagraph (e)(4)(C) does not require that consent to  
630 teleconferencing be given only after consultation with  
631 counsel. By requiring only “consent,” it recognizes that the  
632 defendant would have already met the consent requirements



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633 for videoconferencing for that proceeding, and it allows the  
634 court more flexibility to address varied situations. To give  
635 one example, if the video but not audio feed drops for the  
636 defendant or another participant near the very end of a  
637 videoconference, and the judge asks the defendant, “do you  
638 want to talk to your lawyer about finishing this now without  
639 the video?,” an answer “No, I’m ok, we can finish now”  
640 would be sufficient consent under (e)(4)(C).

# TAB 3

# TAB 3A

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

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ROBERT M. DOW, JR.  
CIVIL RULES

RAYMOND M. KETHLEDGE  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Honorable John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Judge Jay Bybee, Chair  
Advisory Committee on Appellate Rules

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

**DATE:** June 1, 2021

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**I. Introduction**

The Advisory Committee on the Appellate Rules met on Wednesday, April 7, 2021, via Teams. The draft minutes from the meeting are attached to this report.

The Committee approved proposed amendments previously published for public comment for which it now seeks final approval. One is a proposed amendment to Rule 42, dealing with stipulated dismissals. A second is a proposed amendment to Rule 25, dealing with privacy protections in Railroad Retirement Act cases. (Part II of this report.)

As discussed in a separate memo, the Committee also seeks approval for publication of a proposed amendment to Rule 2, dealing with the suspension of rules in an emergency, and an amendment to Rule 4, to coordinate with a proposed emergency Civil Rule.

In addition, the Committee seeks approval for publication of a consolidation of Rule 35 and Rule 40, dealing with rehearing. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- n    expanding disclosures by amici curiae;
- n    amicus briefs and recusal;
- n    regularizing the criteria for granting in forma pauperis status and revising Form 4;
- n    a proposed amendment to Rule 4 to deal with premature notices of appeal;
- n    in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and
- n    in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal.

The Committee also considered other items, removing several from its agenda and tabling one. (Part V of this report.)

## **II. Action Items for Final Approval After Public Comment**

### **A. Rule 42—Voluntary Dismissal**

The proposed amendment to Rule 42 was published for public comment in August 2019. At the June 2020 meeting of the Standing Committee, the Committee presented it for final approval. The Standing Committee was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

The Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent. The Committee added a sentence to guard against the risk that these local rules might be superseded by the proposed amendment, and now seeks final approval of the following:

#### **Rule 42. Voluntary Dismissal**

\* \* \* \* \*

#### **(b) Dismissal in the Court of Appeals.**

**(1) Stipulated Dismissal.** The circuit clerk ~~may~~ **must** dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any **court** fees that are due. ~~But no mandate or other process may issue without a court order.~~

**(2) Appellant's Motion to Dismiss.** An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

**(3) Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

**(c) Court Approval.** This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

**(d) Criminal Cases.** A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

#### **Committee Note**

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit

clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney’s fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order. Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, “appeal” should be understood to include a petition for review or application to enforce an agency order.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

## **B. Rule 25—Railroad Retirement Act**

The proposed amendment to Rule 25 was published for public comment in August 2020. It would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The Committee replaced both the phrase “remote access” in the text of the proposed amendment and the phrase “electronic access” in the Committee Note with the phrase “remote electronic access.” With this change, the Committee seeks final approval of the following:

### **Rule 25. Filing and Service**

#### **(a) Filing**

\* \* \* \* \*

**(5) Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other

proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

\* \* \* \* \*

### **Committee Note**

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting remote electronic access. The amendment extends those protections to Railroad Retirement cases.

### **III. Action Items for Approval for Publication**

#### **A. Proposed Amendments to Rule 2 and Rule 4**

See the report from this Committee on the proposed amendments to Rule 2 and Rule 4, which is attached to the report on the CARES Act prepared by Daniel Capra and Catherine Struve.

#### **B. Consolidation of Rules 35 and 40—Rehearing**

For several years, the Advisory Committee has been considering a comprehensive revision of Rules 35 and 40. (See June 2018 Standing Committee Agenda Book at 85). Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.



For a time, the Committee decided to forego any comprehensive revision and focus instead on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. The goal was to make clear that a panel can act while still preserving a party's ability to access the full court. (See June 2019 Standing Committee Agenda Book at 98-99; January 2020 Standing Committee Agenda Book at 98-101). But working on the specifics led the Committee to revisit the possibility of a comprehensive revision. (See June 2020 Standing Committee Agenda Book at 114).

The Committee's report at the January 2020 meeting of the Standing Committee included a working draft showing substantial progress toward creating an integrated draft that would enable the Committee—and others in the Rules Enabling Act process—to decide whether the benefits of such a revision are worth the costs. It also noted issues that were still under discussion. (See January 2020 Standing Committee Agenda Book at 204-08).

After considerable discussion, the Committee now recommends publication of a proposed amendment that abrogates Rule 35 and unites the two rules under Rule 40. With this proposed amendment, the Committee seeks to achieve the clarity and user-friendliness of unification while avoiding unnecessary changes. Many existing provisions are retained but relocated, important differences between panel rehearing and rehearing en banc are clarified, duplication and cross-references are reduced, and matters such as timing, form, and length are made mostly uniform. Although there had been some opposition on the Committee to embarking on this project, once the Committee produced this proposed amendment, all agreed that it is clearer than the existing rules and no one dissented from the decision to seek publication.

The central feature of the proposed amendment is that it abrogates Rule 35 and revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc).

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both.
- Rule 40(b) sets forth the criteria for each kind of rehearing, drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).
- Rule 40(c) describes when rehearing en banc may be ordered and the applicable voting protocols, drawn from existing Rule 35(a) and (f).
- Rule 40(d) brings together in one place uniform provisions governing matters such as the time to file, form, and length, drawn from existing Rule 35(b), (c), (d), and existing Rule 40(a), (b), and (d). It generally requires a party seeking

both panel rehearing and rehearing en banc to file a single petition, but in deference to existing practice in the Fifth Circuit—a practice authorized by existing Rule 35(b)(3)—permits a local rule to provide otherwise. It adds that any amendment to a decision restarts the clock for seeking rehearing.

- n Rule 40(e) clarifies for litigants some of the actions a court that grants rehearing might take by clarifying the language of existing Rule 40(a)(4) and extending these provisions to rehearing en banc.
- n Rule 40(f) provides that a petition for rehearing en banc does not limit a panel's authority to grant relief.
- n Rule 40(g) deals with initial hearing en banc, drawn from existing Rule 35.

By explicitly providing (in Rule 40(f)) that a petition for rehearing en banc does not limit a panel's authority to grant relief, while providing (in Rule 40(d)) that an amendment to a decision restarts the clock for seeking rehearing, the proposed amendment makes clear that a panel can fix a problem identified by a petition for rehearing while not blocking access to the full court.

The Committee decided that there was no need for the text of the proposed Rule to address whether a party can stand on its previously filed petition for rehearing en banc rather than file a new petition for rehearing when the panel amends its decision. That's because, as the Committee Note mentions, if the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court. The Committee also decided that it was wiser not to include in the text of the proposed Rule explicit mention of foreclosing the ability to file an additional petition for rehearing. Instead, the Committee Note points to various ways a court could deal with the risk that an additional petition might cause inappropriate delay. Those include shortening the time for filing a new petition or for issuance of the mandate or using Rule 2 to suspend the ability to file a new petition for panel rehearing. The Committee Note also suggests that, before doing so, a court ought to consider the difficulty of predicting what a party filing a new petition might say.

Conforming amendments to Rule 32(g) and the Appendix of Length Limits would also be appropriate. (A different amendment to the Appendix of Length Limits will be appropriate if the proposed amendments to Rule 35 and 40 does not go forward; it would simply add the page limits for responses to petitions for rehearing without changing the rule referenced.)

Here is the proposed amendment as approved by the Committee, but with some stylistic changes recommended by the style consultants:

**Rule 35. En Banc Determination (Abrogated.)**

**Rule 40. Petition for Panel Rehearing; En Banc Determination.**

**(a) A Party's Options.** A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for both. Panel rehearing is the ordinary means of reconsidering a panel decision. Rehearing en banc is not favored.

**(b) Criteria; Content of Petition.**

**(1) Petition for Panel Rehearing.** A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

**(2) Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated—for example, by asserting that the panel decision conflicts with the authoritative decisions of other United States courts of appeals that have addressed the issue.

**(c) When Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine

whether the case will be reheard en banc unless a judge calls for a vote. Ordinarily, rehearing en banc will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

**(d) Time to File; Form; Length; Response; Oral Argument.**

**(1) Time.** Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

**(2) Form of the Petition.** The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case. If a party seeks both panel rehearing and rehearing en banc, the party must file a single petition subject to the limits in (3), unless a local rule provides otherwise.

**(3) Length.** Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

**(4) Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)–(3) apply to the response.

**(5) Oral Argument.** Oral argument on whether to grant the petition is not permitted.

**(e) Court Action If a Petition Is Granted.** If a petition is granted, the court may do any of the following:

(A) dispose of the case without further briefing or argument;

(B) order additional briefing or argument; or

(C) issue any other appropriate order.

**(f) Panel’s Authority After a Petition for Rehearing En Banc.** A petition for rehearing en banc of a panel decision does not limit the panel’s authority to grant relief under (e).

**(g) Initial Hearing En Banc For an Appeal or Other Proceeding.** A party may petition for an appeal or other proceeding to be heard initially en banc. The petition must be filed no later than the date when the appellee’s brief is due. The provisions of (c) apply to an initial hearing en banc, and those of (b)(2) and (d)(2)–(5) apply to a petition for one. But an initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). Rule 35 is abrogated, and Rule 40 is expanded to address both panel rehearing and en banc determination.

**Subdivision (a).** The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine. The ordinariness of panel rehearing is only by way of contrast to the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed.

**Subdivision (b).** Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the criteria for and required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with those relating to a petition for rehearing en banc (preserved from Rule 35(b)(1)).

**Subdivision (c).** The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

**Subdivision (d).** The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions on responses to the petition and oral argument.

*Time.* The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, on filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

*Form.* The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended Rule also preserves the court's existing power (previously found in Rule

35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing. Finally, the amended Rule requires a party seeking both panel rehearing and rehearing en banc to file a single petition subject to the same length limitations as any other petition, preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

*Length.* The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)).

*Response.* The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. It also extends to rehearing en banc the existing suggestion (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

*Oral argument.* The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing, as opposed to oral argument on the reheard case.

**Subdivision (e).** The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

**Subdivision (f).** The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority. A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

**Subdivision (g).** The amended Rule 40 preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is retained; the other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered. As above, the amendment's discussion of petitions for initial hearing en banc is not intended to diminish the court's existing power to order such hearing sua sponte, without any petition having been filed.

## **Rule 32. Form of Briefs, Appendices, and Other Papers**

\* \* \* \*

### **(g) Certificate of Compliance.**

**(1) Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or ~~40(b)(1)~~ **40(d)(3)**—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may



rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

**(2) Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Appendix  
 Length Limits Stated in the  
 Federal Rules of Appellate Procedure

		* * *			
Rehearing and en banc filings	<del>35(b)(2) &amp; 40(b)</del>  <u>40(d)(3)</u>	<ul style="list-style-type: none"> <li>• Petition for <u>initial</u> hearing en banc</li> <li>• Petition for panel rehearing; petition for rehearing en banc</li> <li>• <u>Response if requested by the court</u></li> </ul>	3,900	15	Not applicable

**IV. Other Matters Under Consideration**

**A. Amicus Disclosures—FRAP 29 (21-AP-C)**

In May of 2019, a bill was introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists. Senator Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act (the AMICUS Act). An identical bill, H.R. 3993, sponsored by Representative Henry Johnson, was introduced in the House. Under the bill, the registration and disclosure requirements would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. Fines would be imposed on those who knowingly fail to comply.

In October 2019, the Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to

respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29 currently requires that most amicus briefs include a statement that indicates whether:

- (i) a party's counsel authored the brief in whole or in part;
- (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Both the subcommittee and the full committee have begun careful exploration of whether additional disclosures should be required. While it has not reached any conclusions, some themes have emerged.

First, the question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of “dark money” on the amicus process. Any disclosure requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Supreme Court's forthcoming decision in *Thomas More Law Center v. Bonta*, No. 19-255 (argued April 26, 2021) may provide some additional guidance.

Second, some matters are within the purview of the rule making process under the Rules Enabling Act, while some are not. Changes to the disclosure requirements of Rule 29 are, but public registration and fines are not. A change to Rule 29 would not be limited to those who file multiple amicus briefs.

Third, there is considerable resistance to treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

Fourth, it may well be possible to revise Rule 29 to reduce the possibility of evasion by parties. Rule 29 could be amended to reject an excessively narrow

interpretation of the phrase “preparing or submitting” as reaching only the printing and filing of the amicus brief. Recognizing the fungibility of money, Rule 29 might also be amended to cover contributions by parties to an amicus that are not earmarked for a particular amicus brief. (Careful consideration would be required here to not sweep too broadly.) In addition, Rule 29 might be amended so that parties who are members of an organization submitting an amicus brief could be required to disclose that fact.

Fifth, there is concern about the appropriateness of amending Rule 29 to require broad disclosures about nonparties who contribute to an amicus or are members of an amicus. While it is appropriate to guard against undue influence by the parties and by those who claim to be independent of the parties but aren’t, requiring disclosure of nonparty contributions and nonparty members presents harder questions. Such contributors and members may have no influence on the amicus brief. On the other hand, if one person or a small group of undisclosed persons underwrite numerous amicus briefs, it can look like the court was hoodwinked.

#### **B. Amicus Briefs and Recusal—Rule 29 (20-AP-G)**

In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge’s disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Alan Morrison has suggested that the Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption.

The matter was considered for the first time at the April 2021 meeting and referred to the subcommittee dealing with the AMICUS Act and Rule 29.

#### **C. IFP Status**

The Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. It is gathering information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

#### **D. Relation Forward of Notices of Appeal**

The Committee is continuing to consider a suggestion to deal with premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a

notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. It considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

The Committee explored ways to deal with appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. It has not been able to come up with a good solution. It does not want to allow any premature notice of appeal to become effective once a judgment or appealable order is filed because it fears that this would cause more problems than it solves by inviting premature notices of appeal.

It considered formalizing the process recognized in *Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996), that permits a district court to proceed despite a notice of appeal by certifying that the appeal is frivolous. But this doesn't seem to be an effective solution for the underlying problem: If the party filing the notice of appeal isn't aware of its significance and no one seeks a Rule 54(b) certification, there isn't an obvious trigger to invoke the *Behrens* process.

Nevertheless, the Committee is not ready to take the matter off the agenda. Instead, it will look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. In addition, the Committee will look more closely at the current rule's different treatment of post-trial motions in civil and criminal cases.

#### **E. Deadline For Electronic Filing (with other Advisory Committees)**

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey is on hold due to the pandemic.

#### **F. Finality in Consolidated Cases after *Hall* (with Civil Rules Committee)**

The joint subcommittee dealing with finality in consolidated cases continues to gather information. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and it creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

Research by the Federal Judicial Center did not reveal significant problems and further research by the FJC does not seem warranted at this point. However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it. The joint subcommittee will continue to monitor the situation and consider whether to propose any amendments.

## **V. Items Removed or Tabled**

As noted in the Committee's last report to the Standing Committee, its review of every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies led the Committee to consider some minor amendments that may be appropriate in light of the experience of the pandemic without regard to a rules emergency. (See January 2021 Standing Committee Agenda Book at 200-03). It anticipated that it would seek approval at the June 2021 meeting to publish these minor amendments to Rule 4, Rule 33, Rule 34, and Rule 45. On further consideration, it has decided not to pursue these possible amendments at this time. None of these possible amendments was inspired by any real problem; they all arose when scouring every Appellate Rule for possible amendments. Some risked inviting more problems; others would require coordination with other Advisory Committees because of parallel provisions in other sets of rules. The most promising one—to replace the phrase “by telephone” with the word “remotely” in Rule 33 thereby explicitly authorizing appeal conferences by technology other than telephones—did not appear worth pursuing on its own, especially once one realizes that Federal Rule of Criminal Procedure 1(b)(11) defines “telephone” as “any technology for transmitting live electronic voice communication.” While the Appellate Rules have no similar definition, amending Appellate Rule 33 to preclude objections to appeal conferences via Zoom or Teams did not seem sufficiently pressing.

The Committee also considered and removed from its agenda a suggestion (1) to explicitly provide for an extra three days after service of a judgment to file a motion

that tolls the time to appeal under Rule 4(a)(4) and (2) to delete the 28-day provision from Appellate Rule 4(a)(4), while adding a similar provision to Civil Rule 60. The extra three-day provision applies only to the time limits that run from the date of service, not time limits that run from some other event. The time to file motions that toll the time to appeal runs from the date of entry of the judgment, not the date of service. Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules, and there does not seem to be reason to do so. The provision in Rule 4(a)(4) for Rule 60 motions is not designed to encourage Rule 60 motions to be brought within 28 days of judgment, but to treat Rule 60 motions filed within 28 days of judgment like other post-judgment motions.

Finally, the Committee revisited the possibility of changes to appendices to deal with the problem of including too much material. Three years ago, the Committee had deferred the matter in the hope of a technological fix, such as electronic briefs with hyperlinks to an electronic record. We are not there yet. Upgrades to ECF are being discussed. Coordination with CACM, IT, and district judges would be appropriate. The Committee once again deferred the matter to be revisited in another three years.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 \* \* \* \* \*

4 (5) **Privacy Protection.** An appeal in a case  
5 whose privacy protection was governed by  
6 Federal Rule of Bankruptcy Procedure 9037,  
7 Federal Rule of Civil Procedure 5.2, or  
8 Federal Rule of Criminal Procedure 49.1 is  
9 governed by the same rule on appeal. In all  
10 other proceedings, privacy protection is  
11 governed by Federal Rule of Civil Procedure  
12 5.2, except that Federal Rule of Criminal  
13 Procedure 49.1 governs when an  
14 extraordinary writ is sought in a criminal

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15 case. The provisions on remote electronic  
16 access in Federal Rule of Civil Procedure  
17 5.2(c)(1) and (2) apply in a petition for  
18 review of a benefits decision of the Railroad  
19 Retirement Board under the Railroad  
20 Retirement Act.

21 \* \* \* \* \*

**Committee Note**

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting remote electronic access. The amendment extends those protections to Railroad Retirement cases.

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**Changes Made After Publication and Comment**

The phrase “remote access” in the text of the proposed amendment and the phrase “electronic access” in the committee note were both replaced by the phrase “remote electronic access” to match language used in other federal rules.



**Summary of Public Comment**

Association of the Bar of the City of New York (AP-2020-0001-0006): This limited change is both sensible and narrow, and we therefore support it.

Jean Publiee (AP-2020-0001-0003): Rules need to be reviewed for their ability to be understood and used by the general public.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 42. Voluntary Dismissal**

2 \* \* \* \* \*

3 **(b) Dismissal in the Court of Appeals.**

4 **(1) Stipulated Dismissal.** The circuit clerk ~~may~~  
5 must dismiss a docketed appeal if the parties  
6 file a signed dismissal agreement specifying  
7 how costs are to be paid and pay any court  
8 fees that are due. ~~But no mandate or other~~  
9 ~~process may issue without a court order.~~

10 **(2) Appellant's Motion to Dismiss.** An appeal  
11 may be dismissed on the appellant's motion  
12 on terms agreed to by the parties or fixed by  
13 the court.

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

- 14 (3) Other Relief. A court order is required for  
15 any relief under Rule 42(b)(1) or (2) beyond  
16 the dismissal of an appeal—including  
17 approving a settlement, vacating an action of  
18 the district court or an administrative agency,  
19 or remanding the case to either of them.
- 20 (c) Court Approval. This Rule 42 does not alter the  
21 legal requirements governing court approval of a  
22 settlement, payment, or other consideration.
- 23 (d) Criminal Cases. A court may, by local rule, impose  
24 requirements to confirm that a defendant has  
25 consented to the dismissal of an appeal in a criminal  
26 case.

#### Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney’s fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. *See, e.g.,* F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order. Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, “appeal” should be understood to include a petition for review or application to enforce an agency order.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

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### **Changes Made After Publication and Comment**

The phrase “for any relief beyond the mere dismissal of an appeal” was replaced by the phrase “for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal.”

Subdivision (d) was added to protect local rules that impose requirements to confirm that a criminal defendant has consented to the dismissal of an appeal in a criminal case.

The committee note was revised accordingly. In addition, a stylistic change was made.

### **Summary of Public Comment**

Association of the Bar of the City of New York (AP-2019-0001-0010): We propose that the language of Rule 42(b) be modified to conform with the authorizing statute and to avoid suggesting a substantive entitlement to remand

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that may or not be authorized by law. There is a substantive legal question regarding whether a court of appeals is authorized to “remand” a matter to an administrative agency.

National Association of Criminal Defense Lawyers (AP-2019-0001-0011): The proposed amendments to Rule 42(b) are well taken but should be strengthened to protect defendants from inappropriate “voluntary” dismissal of their appeals by counsel.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 32. Form of Briefs, Appendices, and Other**  
2 **Papers**

3 \* \* \* \* \*

4 **(g) Certificate of Compliance.**

5 (1) **Briefs and Papers That Require a**  
6 **Certificate.** A brief submitted under Rules  
7 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a  
8 paper submitted under Rules 5(c)(1),  
9 21(d)(1), 27(d)(2)(A), 27(d)(2)(C),  
10 ~~35(b)(2)(A)~~, or ~~40(b)(1)~~ 40(d)(3)—must  
11 include a certificate by the attorney, or an  
12 unrepresented party, that the document  
13 complies with the type-volume limitation.  
14 The person preparing the certificate may rely

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15 on the word or line count of the word-  
16 processing system used to prepare the  
17 document. The certificate must state the  
18 number of words—or the number of lines of  
19 monospaced type—in the document.

20 (2) **Acceptable Form.** Form 6 in the Appendix  
21 of Forms meets the requirements for a  
22 certificate of compliance.

**Committee Note**

The amendment changes cross references in order to conform to amendments to Rule 35 and 40.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

- 1 **Rule 35. ~~En Banc Determination~~**  
2 **(Abrogated.)**
- 3 ~~(a) — When Hearing or Rehearing En Banc May Be~~  
4 **~~Ordered.~~** A majority of the circuit judges who are in  
5 regular active service and who are not disqualified  
6 may order that an appeal or other proceeding be  
7 heard or reheard by the court of appeals en banc. An  
8 en banc hearing or rehearing is not favored and  
9 ordinarily will not be ordered unless:
- 10 ~~(1) — en banc consideration is necessary to~~  
11 secure or maintain uniformity of the  
12 court's decisions; or
- 13 ~~(2) — the proceeding involves a question of~~  
14 exceptional importance.

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.



15 ~~(b) — Petition for Hearing or Rehearing En~~

16 ~~Banc.~~ A party may petition for a hearing or  
17 rehearing en banc.

18 ~~(1) — The petition must begin with a~~  
19 ~~statement that either:~~

20 ~~(A) — the panel decision conflicts~~  
21 ~~with a decision of the United~~  
22 ~~States Supreme Court or of~~  
23 ~~the court to which the petition~~  
24 ~~is addressed (with citation to~~  
25 ~~the conflicting case or cases)~~  
26 ~~and consideration by the full~~  
27 ~~court is therefore necessary to~~  
28 ~~secure — and — maintain~~  
29 ~~uniformity of the court's~~  
30 ~~decisions; or~~

31 ~~(B) — the proceeding involves one~~  
32 ~~or more questions of~~

33 ~~exceptional importance, each~~  
34 ~~of which must be concisely~~  
35 ~~stated; for example, a petition~~  
36 ~~may assert that a proceeding~~  
37 ~~presents a question of~~  
38 ~~exceptional importance if it~~  
39 ~~involves an issue on which the~~  
40 ~~panel decision conflicts with~~  
41 ~~the authoritative decisions of~~  
42 ~~other United States Courts of~~  
43 ~~Appeals that have addressed~~  
44 ~~the issue.~~

45 ~~(2) Except by the court's permission:~~

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

4 FEDERAL RULES OF APPELLATE PROCEDURE

50 ~~(B) a handwritten or typewritten~~  
51 ~~petition for an en banc hearing~~  
52 ~~or rehearing must not exceed~~  
53 ~~15 pages.~~

54 ~~(3) For purposes of the limits in Rule~~  
55 ~~35(b)(2), if a party files both a~~  
56 ~~petition for panel rehearing and a~~  
57 ~~petition for rehearing en banc, they~~  
58 ~~are considered a single document~~  
59 ~~even if they are filed separately,~~  
60 ~~unless separate filing is required by~~  
61 ~~local rule.~~

62 ~~(c) **Time for Petition for Hearing or**~~  
63 ~~**Rehearing En Banc.** A petition that an~~  
64 ~~appeal be heard initially en banc must be filed~~  
65 ~~by the date when the appellee's brief is due.~~  
66 ~~A petition for a rehearing en banc must be~~

67           ~~filed within the time prescribed by Rule 40~~  
68           ~~for filing a petition for rehearing.~~

69   ~~(d) —~~ **Number of Copies.** ~~The number of copies to~~  
70           ~~be filed must be prescribed by local rule and~~  
71           ~~may be altered by order in a particular case.~~

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

76   ~~(f) —~~ **Call for a Vote.** ~~A vote need not be taken to~~  
77           ~~determine whether the case will be heard or~~  
78           ~~reheard en banc unless a judge calls for a~~  
79           ~~vote.~~

**Committee Note**

This rule is abrogated.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

- 1   **Rule 40.     Petition for Panel Rehearing; En Banc**  
2                    **Determination.**
- 3   (a)   ~~Time to File; Contents; Response; Action by the~~  
4            ~~Court if Granted.~~ **A Party's Options.** A party may  
5            seek rehearing of a decision through a petition for  
6            panel rehearing, a petition for rehearing en banc, or a  
7            petition for both. Panel rehearing is the ordinary  
8            means of reconsidering a panel decision. Rehearing  
9            en banc is not favored.
- 10   ~~(1) — Time. Unless the time is shortened or~~  
11            ~~extended by order or local rule, a petition for~~  
12            ~~panel rehearing may be filed within 14 days~~  
13            ~~after entry of judgment. But in a civil case,~~  
14            ~~unless an order shortens or extends the time,~~

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15 ~~the petition may be filed by any party within~~  
16 ~~45 days after entry of judgment if one of the~~  
17 ~~parties is:~~

18 ~~(A) the United States;~~

19 ~~(B) a United States agency;~~

20 ~~(C) a United States officer or employee~~  
21 ~~sued in an official capacity; or~~

22 ~~(D) a current or former United States~~  
23 ~~officer or employee sued in an~~  
24 ~~individual capacity for an act or~~  
25 ~~omission occurring in connection~~  
26 ~~with duties performed on the United~~  
27 ~~States' behalf including all~~  
28 ~~instances in which the United States~~  
29 ~~represents that person when the court~~  
30 ~~of appeals' judgment is entered or~~  
31 ~~files the petition for that person.~~



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49 ~~(B) restore the case to the calendar for~~  
50 ~~reargument or resubmission; or~~

51 ~~(C) issue any other appropriate order.~~

52 **(b) ~~Form of Petition; Length. Criteria; Content of~~**

53 **Petition.** ~~The petition must comply in form with~~  
54 ~~Rule 32. Copies must be served and filed as Rule 31~~  
55 ~~prescribes. Except by the court's permission:~~

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

58 **Petition for Panel Rehearing. A petition for**  
59 **panel rehearing must:**

60 **(A) state with particularity each point of**  
61 **law or fact that the petitioner believes**  
62 **the court has overlooked or**  
63 **misapprehended; and**

64 **(B) argue in support of the petition.**

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



67                    **Petition for Rehearing En Banc.** A petition  
68                    for rehearing en banc must begin with a  
69                    statement that either:  
70                    (A) the panel decision conflicts with a  
71                    decision of the United States Supreme  
72                    Court or of the court to which the  
73                    petition is addressed (with citation to  
74                    the conflicting case or cases) and the  
75                    full court’s consideration is therefore  
76                    necessary to secure and maintain  
77                    uniformity of the court’s decisions; or  
78                    (B) the proceeding involves one or more  
79                    questions of exceptional importance,  
80                    each of which must be concisely  
81                    stated—for example, by asserting that  
82                    the panel decision conflicts with the  
83                    authoritative decisions of other

84 United States courts of appeals that  
85 have addressed the issue.

86 **(c) When Rehearing En Banc May Be Ordered. A**  
87 majority of the circuit judges who are in regular  
88 active service and who are not disqualified may order  
89 that an appeal or other proceeding be reheard by the  
90 court of appeals en banc. A vote need not be taken to  
91 determine whether the case will be reheard en banc  
92 unless a judge calls for a vote. Ordinarily, rehearing  
93 en banc will not be ordered unless:

94 (1) en banc consideration is necessary to secure  
95 or maintain uniformity of the court's  
96 decisions; or

97 (2) the proceeding involves a question of  
98 exceptional importance.

99 **(d) Time to File; Form; Length; Response; Oral**  
100 **Argument.**

101           (1) **Time.** Unless the time is shortened or  
102                           extended by order or local rule, a  
103                           petition for rehearing may be filed  
104                           within 14 days after entry of  
105                           judgment—or, if the panel later  
106                           amends its decision (on rehearing or  
107                           otherwise), within 14 days after the  
108                           entry of the amended decision. But in  
109                           a civil case, unless an order shortens  
110                           or extends the time, the petition may  
111                           be filed by any party within 45 days  
112                           after entry if one of the parties is:  
113                           (A) the United States;  
114                           (B) a United States agency;  
115                           (C) a United States officer or  
116   employee sued in an official  
117   capacity; or

118 (D) a current or former United  
119 States officer or employee  
120 sued in an individual capacity  
121 for an act or omission  
122 occurring in connection with  
123 duties performed on the  
124 United States' behalf—  
125 including all instances in  
126 which the United States  
127 represents that person when  
128 the court of appeals' judgment  
129 is entered or files the petition  
130 for that person.

131 (2) **Form of the Petition.** The petition  
132 must comply in form with Rule 32.  
133 Copies must be filed and served as  
134 Rule 31 prescribes, except that the  
135 number of filed copies may be

136 prescribed by local rule or altered by  
137 order in a particular case. If a party  
138 seeks both panel rehearing and  
139 rehearing en banc, the party must file  
140 a single petition subject to the limits  
141 in (3), unless a local rule provides  
142 otherwise.

143 (3) **Length.** Except by the court's  
144 permission:

145 (A) a petition produced using a  
146 computer must not exceed  
147 3,900 words; and

148 (B) a handwritten or typewritten  
149 petition must not exceed 15  
150 pages.

151 (4) **Response.** Unless the court so  
152 requests, no response to the petition is  
153 permitted. Ordinarily, the petition

154 will not be granted without such a  
155 request. If a response is requested, the  
156 requirements of Rule 40(d)(2)-(3)  
157 apply to the response.

158 (5) **Oral Argument.** Oral argument on  
159 whether to grant the petition is not  
160 permitted.

161 (e) **Court Action If a Petition is Granted.** If a  
162 petition is granted, the court may do any of  
163 the following:

164 (1) dispose of the case without further  
165 briefing or argument;

166 (2) order additional briefing or argument;  
167 or

168 (3) issue any other appropriate order.

169 (f) **Panel’s Authority After a Petition for**  
170 **Rehearing En Banc.** A petition for rehearing

171 en banc of a panel decision does not limit the  
172 panel’s authority to grant relief under (e).  
173 **(g) Initial Hearing En Banc For an Appeal or**  
174 **Other Proceeding.** A party may petition for  
175 an appeal or other proceeding to be heard  
176 initially en banc. The petition must be filed  
177 no later than the date when the appellee’s  
178 brief is due. The provisions of (c) apply to an  
179 initial hearing en banc, and those of (b)(2)  
180 and (d)(2)-(5) apply to a petition for one. But  
181 an initial hearing en banc is not favored and  
182 ordinarily will not be ordered.

#### Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). Rule 35 is abrogated, and Rule 40 is expanded to address both panel rehearing and en banc determination.

**Subdivision (a).** The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both.

It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine. The ordinariness of panel rehearing is only by way of contrast to the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed.

**Subdivision (b).** Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the criteria for and required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with those relating to a petition for rehearing en banc (preserved from Rule 35(b)(1)).

**Subdivision (c).** The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

**Subdivision (d).** The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions on responses to the petition and oral argument.

*Time.* The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, on filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.



*Form.* The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended Rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing. Finally, the amended Rule requires a party seeking both panel rehearing and rehearing en banc to file a single petition subject to the same length limitations as any other petition, preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

*Length.* The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)).

*Response.* The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. It also extends to rehearing en banc the existing suggestion (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant

to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

*Oral argument.* The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing, as opposed to oral argument on the reheard case.

**Subdivision (e).** The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari “may be a summary disposition on the merits”).

**Subdivision (f).** The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending. Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority. A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court,

and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

**Subdivision (g).** The amended Rule 40 preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is retained; the other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered. As above, the amendment's discussion of petitions for initial hearing en banc is not intended to diminish the court's existing power to order such hearing sua sponte, without any petition having been filed.

Appendix  
Length Limits Stated in the  
Federal Rules of Appellate Procedure

		* * *			
Rehearing and en banc filings	<del>35(b)(2) &amp; 40(b)</del>  <u>40(d)(3)</u>	<ul style="list-style-type: none"> <li>• Petition for <u>initial</u> hearing en banc</li> <li>• Petition for panel rehearing; petition for rehearing en banc</li> <li>• <u>Response if requested by the court</u></li> </ul>	3,900	15	Not applicable

# TAB 3B

Minutes of the Spring 2021 Meeting of the  
Advisory Committee on the Appellate Rules

April 7, 2021

Via Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, April 7, 2021, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Elizabeth Prelogar was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice. Judge Stephen Joseph Murphy III did not attend due to a power outage. Judges Watford and Wesley each missed different parts of the meeting because they were hearing oral arguments.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Judge Bernice B. Donald, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Julie Wilson, Standing Committee on the Rules of Practice and Procedure and Rules Committee Acting Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Management Analyst, RCS; Kevin Crenny, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Brittany Bunting, Administrative Analyst, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Daniel J. Capra, Reporter, Advisory Committee on the Rules of Evidence and Liaison to the CARES Act Subcommittees; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

## **I. Introduction**

Judge Bybee opened the meeting, acknowledged the work of Committee members, and welcomed guests and observers. He noted that Judge Richard Wesley is a new member of the Committee, and he thanked Judge Stephen Murphy, whose term on the Committee ends in September, for his service.

## **II. Report on Meeting of the Standing Committee**

The draft minutes of the January Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

## **III. Approval of the Minutes**

The draft minutes of the October 10, 2020, Advisory Committee meeting were approved.

## **IV. Discussion of Matters Published for Public Comment**

### **A. Proposed Amendment to Rule 42—Stipulated Dismissal of Appeal (17-AP-G)**

Judge Bybee stated that the proposed amendment to Rule 42 had previously been published for public comment (in August of 2019) and been approved by this Committee but remanded by the Standing Committee. The Reporter added that the Standing Committee had been concerned about how the proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 96), a new paragraph (d) was added at the October 2020 meeting to deal with this concern. This addition met the concern of the Standing Committee, and a corresponding paragraph has since been added to the Committee Note.

The Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment as it appears in the agenda book.

### **B. Proposed Amendment to Rule 25—Railroad Retirement Act (18-AP-E)**

Judge Bybee stated that the proposed amendment to Rule 25 had been published for public comment (in August of 2020). No comment opposing the proposed amendment has been received.

Judge Bates suggested that the phrase “remote access” in the text of the proposed amendment and the phrase “electronic access” in the Committee Note both be replaced by the phrase “remote electronic access.” After a discussion of the phrasing used in parallel provisions of other sets of rules, the Committee agreed with this suggestion.

With these changes, the Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment.

## **V. Discussion of Matters Before Subcommittees**

### **A. Proposed Amendment to Rule 2—CARES Act**

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda book page 106). He stated that the discussion draft that this Committee had forwarded to the Standing Committee had two distinctive features. First, it empowered both the Judicial Conference and each court of appeals to declare a rules emergency, permitting the chief judge to act on behalf of the court of appeals. Second, if a rules emergency were declared, it permitted the court to suspend any provision of the rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).

In large part due to the importance of uniformity, the Standing Committee preferred to vest the power to declare a rules emergency in the Judicial Conference alone. However, it seemed comfortable with the open-ended approach permitting the court to suspend nearly any rule once a rules emergency is declared. It also favored the inclusion of a sunset provision. Another concern the Standing Committee raised was that the discussion draft did not clearly state what happened once a rule was suspended.

The subcommittee incorporated this feedback into a new draft. The new draft vests the power to declare a rules emergency solely in the Standing Committee. It includes a sunset provision. And it makes explicit, using language from the existing Rule 2, that when a rule is suspended, the court may order proceedings as it directs. Some further stylistic changes were made in coordination with other advisory committees. (Agenda book page 122).

In response to a question from Mr. Byron, the Reporter clarified that the plan was to emerge from this meeting with a draft that this Committee would ask the Standing Committee to approve for publication for public comment.

A lawyer member noted that since the latest draft does not empower a chief judge to declare a rules emergency, the first reference to "the court" in 2(b)(1) should be to "a court." Professor Capra stated that this was a good catch. Mr. Byron noted that the singular would include the plural, and Professor Capra said that use of "a court" had gone through style on that point.

An academic member stated that his prior concerns about authority were largely addressed by this change in the rule. The Judicial Conference simply declares



the emergency exists. The court can then fall back on its preexisting power once the rules back off.

In response to a question from Judge Bybee, Professor Struve stated that under the current draft, no individual judge, including the chief judge, would have suspension power, but the full court, or in some circumstances a panel, would. The Reporter agreed that the current draft leaves it to the court; the default would be the full court, but as to matters within the authority of a panel, the panel would have authority.

Judge Bates observed that the court must mean the full court because a panel could not suspend a rule in all or part of a circuit. Judge Bybee stated that his court uses an executive committee, and he would not want to impair that. A judge member added that her court has the same thing and suggested a Committee Note stating that each court can choose how to implement this power, observing that sometimes something is so obvious that the chief does something subject to anyone objecting.

The Reporter agreed that Judge Bates was correct that the power under 2(b)(5)(A) to suspend in all or part of a circuit would not be the sort of power that could be exercised by a panel, but that the power under 2(b)(5)(B) to order proceedings as it directs might be. Judge Bybee stated that he was fond of the ambiguity.

An academic member suggested acting by local rule, or by a majority of active judges. Judge Bybee responded that he did not want to get involved with local rules rather than orders. A judge agreed with leaving the ambiguity and withdrew the suggestion of adding to the Committee Note. Professor Struve observed that Rule 47(b) provides that no disadvantage may be imposed on a litigant for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has notice of the requirement, so there is no risk of harm to litigants.

Mr. Byron drew attention to the distinctive requirement of the proposed Emergency Criminal Rule that no feasible alternative be available. The Reporter noted that there did not appear to be any objection to Criminal being different in this respect. Professor Capra added that Criminal is proud to be different.

With the one change noted above—"the court" to "a court"—the Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 2 for public comment.

The Reporter stated that the subcommittee had also coordinated with the Advisory Committee on the Federal Rules of Civil Procedure regarding the proposed Emergency Civil Rule 6. (Agenda book page 110). Emergency Civil Rule 6 would empower a district court to extend the time to file certain post-judgment motions. Coordination is necessary to be sure that extensions work appropriately with Federal

Rule of Appellate Procedure 4, which resets the time to appeal when certain post-judgment motions are filed.

The draft in the agenda book may be ambiguous whether the extension granted runs from when the period would otherwise have expired or from when the court grants the extension. From the perspective of this Committee, the choice doesn't seem to matter, so long as it is clear. In response to a question by Mr. Byron about why the maximum extension was 30 days rather than 28 days, Professor Struve stated that she had seen drafts both ways.

The Reporter stated that a substantial difficulty has been drafting the rule so that it works appropriately with motions under Civil Rule 60. That's because Appellate Rule 4 gives resetting effect to most of the relevant post-trial motions so long as they are timely filed under the Civil Rules. If an extension is granted under an Emergency Civil Rule and a motion is filed within the time as extended, it is timely under the Civil Rules. That doesn't work for Rule 60 motions, however, because Rule 60(b) motions need only be filed within a reasonable time, with some subject to an outside limit of one year. For that reason, existing Appellate Rule 4(a)(4)(A)(vi) grants resetting effect to Rule 60 motions if they are filed within 28 days of the judgment. Without some specific provision dealing with Rule 60, an extension granted under the Emergency Civil Rule would not result in resetting effect for a Rule 60 motion. Efforts are continuing to solve this problem; one possibility is to favor simplicity and not cover Rule 60 motions in the Emergency Civil Rule at all. From the perspective of this Committee, as long as the working of Emergency Civil Rule is clear, it does not seem to matter whether or not the Emergency Civil Rule covers Rule 60.

An academic member suggested that if drafting the Emergency Civil Rule to integrate with Appellate Rule 4 is so difficult, perhaps the problem could be solved by amending Appellate Rule 4(a)(4)(A)(vi) to refer to "the time for filing the above motions," or "the time to file motions under Rules 50, 52, and 59," rather than "28 days."

Mr. Byron stated that it is an appellate problem if Rule 60 motions are not covered. The existing treatment of Rule 60 motions is that appellate lawyers and courts don't have to worry about the proper characterization of motions; the benefit of the existing treatment of Rule 60 motions is that there is no need to fight about it. He urged that alignment of Rule 60 motions with other post-judgment motions be continued.

The Reporter noted that the problems should be less likely to arise if, as expected, most of the time an extension would be prompted by a motion and order in a particular case. In those circumstances, the litigant would have an order specifying which motion could be filed, making it less likely that a motion other than one authorized would be filed. Professor Struve added that sometimes there would be a district-wide extension order. She also clarified, in response to a question from Judge

Bybee, that the one-year outside limit for some Rule 60(b) motions does not affect the resetting of time to appeal.

Professor Struve indicated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) appeared to work, as did Mr. Byron, who added that we should advise Civil to include Rule 60. The Reporter tentatively agreed.

A judge member thought that the suggested change to Appellate Rule 4(a)(4)(A)(vi) was confusing, and that judges recharacterize filings all the time. Another added that we need to step back from the expertise on this committee and into the shoes of a regular consumer of these rules. A lawyer member suggested explicitly referring to extensions under the Civil Emergency Rule. Professor Struve emphasized that relying on judges to recharacterize filings does not solve the litigant's problem who does not know whether or how a judge will recharacterize and therefore whether it resets appeal time. Two lawyer members stated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) did not make the rule that much more complicated; the rule already refers to motions under various Civil Rules. Mr. Byron suggested that Appellate Rule 4(a)(4)(A)(vi) refer only to Rule 59(e).

A judge member suggested referring to any extension. Professor Struve responded that such a provision would suggest that extensions are more readily available than they are. Under the non-emergency rules, a district court can't extend these times, and if a court does so anyway, a litigant can't rely on the extension.

The Reporter suggested that a reference to Rule 59 would be sufficient, noting that it is more likely that a district court would grant an extension for a Rule 59 motion but not a Rule 50 motion than the other way around. Mr. Byron added that he is not so concerned about Rule 50 motions. A lawyer member agreed that a reference to Rule 59 is clearest.

Professor Capra noted that while he thinks Civil will ultimately advise an Emergency Rule, it is not committed to it. A judge member suggested keeping the existing 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) and adding the reference to Rule 59. This would give resetting effect to a motion "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered or within the time allowed for filing a motion under Rule 59," letting a litigant rely on the number of days without having to cross-reference the Civil Rules.

A lawyer member noted that Appellate Rule 4 requires a litigant to look to the Civil Rules anyway. Professor Struve added that including both 28 days and the time for filing a Rule 59 motion suggests that there is some daylight between the two. In non-emergencies, there isn't.

After a ten-minute break, the Reporter shared a screen with the relevant provisions of Rule 4 and reviewed how Rule 4(a)(4)(A) currently works. He suggested

that Rule 4(a)(4)(A)(vi) be amended to give resetting effect to a motion “for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59.”

Judge Bybee noted that while most of the subdivisions of Civil Rule 59 have 28-day time limits, Rule 59(c) refers to 14 days. The Reporter noted that the 14-day requirement applies to opposing affidavits, not to motions.

After a brief discussion, no one was uncomfortable with a change from “no later than” to “within the time allowed.”

An academic member noted that there might be extensions to file motions under Rule 50 or Rule 54, without an extension to file a motion under Rule 59. For example, there might be an issue about the admissibility of evidence that could result in judgment as a matter of law but not a new trial. And there might be a bench trial, with a motion under Rule 52. To account for these, Rule 4(a)(4)(A)(vi) could be amended to give resetting effect to a motion “for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing any of the above motions.”

Mr. Byron stated that complications would arise under Rule 58; it is cleaner with just Rule 59. Professor Struve added that adding Rule 58 would lead to more analysis but unlikely it would operate to make the time limit more permeable. Referring to Rule 59 is simpler.

Judge Bates stated that if the goal is to capture extensions granted under the CARES Act, Rule 59 is the way to go. If the goal is broader than that, the broader language may be appropriate, but they have not been thought through. Changing 28 days to Rule 59 makes no substantive change (in how Rule 4 operates in a non-emergency).

Judge Bybee suggested keeping it simple. Referring to Rule 59 in (vi) keeps it parallel to the other romanettes. The proposed amendment to Rule 4(a)(4)(A)(vi) is as follows:

“for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59.”

The Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 4(a)(4)(A)(vi) for public comment.

## **B. Various Amendments Occasioned by CARES Act Review**

The Reporter presented the report of the subcommittee regarding various amendments occasioned by the CARES Act review. (Agenda book page 113). He explained that early in the process called for by the CARES Act, the subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review led the subcommittee to present to the full Committee at the last meeting some minor amendments that might be appropriate in light of the experience of the pandemic without regard to a rules emergency. The subcommittee met again to review these possible minor amendments.

Upon further review, the subcommittee decided to not recommend any amendment to Rule 4(c), the prisoner mailbox rule. One concern is that an amendment providing additional time when an internal mail system is not available might be an invitation to inmates to contend that the mail system was not available to them because of their own individual circumstances. In response to a question, the Reporter explained that the idea for an amendment had not arisen from any sense that there is a problem, but rather from a CARES Act review of every Appellate Rule. Judge Bybee noted that the problem can be dealt with on an ad hoc basis under the existing rule.

The Committee agreed to propose no change to Rule 4(c).

The Reporter stated that the subcommittee did recommend a minor change to Rule 33, dealing with appeal conferences. The current rule states that conferences may be conducted “in person or by telephone”; the subcommittee suggested amending to allow conferences to be conducted “in person or remotely.”

The Committee approved this minor amendment.

The Reporter presented the subcommittee’s suggestion that Rule 34(b), dealing with oral argument, be amended to directly address remote arguments. In particular, the amended Rule 34 would continue to require the Clerk to inform the parties of the “place” of in-person argument, but require the Clerk, for an argument that was to be heard remotely in whole or in part, the “manner” in which the argument would be heard. He noted that one concern was, if an argument were partly remote because of the particular circumstances of a judge, that there was a risk of revealing the composition of the panel before the court would otherwise do so. Ms. Dwyer stated that there was no need for this change. Clerks let parties know what they need to know. If the argument is being held remotely, parties will know that the “place” of the argument can be their own home. Mr. Byron stated that it may be better to retain the flexibility of the existing rule.

The Reporter presented the subcommittee's suggestion that Rule 34(g), dealing with the use of physical exhibits at oral argument and requiring arrangements for placing them in the courtroom and removing them from the courtroom, be amended to deal only with in-person arguments. While a remote oral argument may involve exhibits, there is no need to arrange for placing them in and removing them from the courtroom. Ms. Dwyer stated that if an argument is held via Zoom, then Zoom is the courtroom.

The Committee agreed to propose no change to Rule 34.

The Reporter presented the subcommittee's suggestion that Rule 45, which requires that the clerk's office "must" be open with a clerk or deputy in attendance during business hours except for weekends and holidays, be amended to state that it "will" be open with a clerk or deputy in attendance at those times. The idea is to recognize that circumstances may prevent someone from being present. He noted that the Civil and Criminal Rules have similar provisions.

Mr. Byron noted that this change would require coordination with other Advisory Committees and would be on a slower track. Ms. Dwyer noted that "in attendance" could be read as "be available" and that the Clerk's Office has been available through remote work.

The Committee agreed to propose no change to Rule 45.

The Reporter then asked the Committee whether it was worth going forward with the only change of this group that the Committee had approved, the replacement of "by telephone" with "remotely" in Rule 33, dealing with appeal conferences. Judge Bybee said that it would depend on whether the word "telephone" appears in other rules. Ms. Dwyer noted that there will probably be lots of remote proceedings going forward. Mr. Byron noted that we should keep in mind that Rule 2 is available. Judge Bybee added that further coordination might be appropriate.

The Committee reconsidered its earlier decision and agreed to propose no change to Rule 45 at this time, leaving any possible change along these lines to the future.

The Committee took a short lunch break.

### **C. Proposed Amendments to FRAP 35 and 40—Rehearing (18-AP-A)**

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 125). He noted that the Committee had been considering small changes to these rules, but the result was a spaghetti string of cross-references, leading to an effort at a comprehensive revision that abrogates Rule

35 and unites the two rules under Rule 40. The proposed comprehensive revision leaves some provisions in the same place they have been, preserves some provisions from the two rules where there are important differences, and creates mostly uniform provisions for matters such as timing, form, and length.

There are three issues addressed by the subcommittee.

First, should separate petitions for panel rehearing and rehearing en banc be permitted? The Fifth Circuit requires separate petitions by local rule, as current Rule 35 allows. The subcommittee draft requires a single petition unless a local rule provides otherwise.

Second, what happens if the panel acts and changes its decision while a petition for rehearing en banc is pending? Rather than address this situation in the text of the rule, the subcommittee draft has a Committee Note that explains that the petition for rehearing en banc remains pending until the en banc court deals with it. If a party thinks that a new petition is needed, either because the panel did not fix the problem or created a new problem, proposed Rule 40(d)(1) provides the time to file a new petition.

Third, what happens if the panel changes its decision and doesn't want to hear any more; should it be able to order that no further petitions for panel rehearing will be entertained? The subcommittee was loath to officially close those off. Instead, the Committee Note mentions the many tools available for dealing with this situation, including a short deadline for filing a new petition, a shorter time for issuing the mandate, or invoking Rule 2 to prevent a new petition. It also adds a note of caution because the court doesn't know what the parties would say in a new petition.

The subcommittee also moved the provision dealing with oral argument.

Rule 40(d)(4) states that "ordinarily" a petition will not be granted in the absence of a request for a response, leaving enough wriggle room for the court to act without a response where appropriate.

Rule 40(d)(5) simplifies the existing provision regarding what the court might do, eliminating somewhat dated language that is unneeded.

Judge Bybee stated that the subcommittee worked very hard, and that not everyone is uniformly in favor. Judges may have a different reaction. He reached out to the Chief Judge of the Fifth Circuit to ask how strongly that court is committed to its requirement of separate petitions but has not yet heard back, perhaps because that court just issued a 325-page decision.

A judge member commended the work of the subcommittee. She explained that she had thought that the two rules should not be consolidated. She provided the

subcommittee with lots of input from the Clerk. She does not plan to advocate against it. It's a big change, but it is now really clear and well done. She is not won over, because her court will get more en banc petitions, but has no objection. Judge Bybee added that this is a great compliment to the subcommittee.

While she did not feel strongly, she suggested adding a Committee Note about denying rehearing without a response where the lack of a need for rehearing is so clear. Judge Bybee emphasized that the rule provides that rehearing ordinarily won't be *granted* without requesting a response; "ordinarily" deals with situations where the need for a grant is obvious, such as an intra-circuit conflict.

[At this point, Judge Wesley joined the meeting and was welcomed. He had been delayed because he was hearing oral arguments.]

A lawyer member stated that she was not on the subcommittee and that the proposal looks very good. She had been bothered at the last meeting by the provision that panel rehearing is the "ordinary" means of reconsidering a panel decision, but the Committee Note takes care of that concern.

A judge member stated that his court allows combined petitions and has no objections to the proposal. Ms. Dwyer added that Clerk's office staff is also supportive.

After a discussion about the relative frequency of en banc proceedings in the various circuits, the Committee approved the proposal without objection.

The Reporter turned to a possible amendment to the table of page lengths in the appendix. This table should have been amended when the rules were amended to provide a length limit for responses, but the table was overlooked at the time. The subcommittee's proposed language is in the report. (Agenda book page 131). Competing language has been submitted as a separate suggestion by Dean Benjamin Spencer; his suggestion was designed to correct the prior oversight and does not make changes to reflect the proposed comprehensive revision of Rules 35 and 40.

Several members of the Committee indicated a preference for the language in the subcommittee report. Mr. Byron asked if the amendment to the table should go forward separately as a clarification. The Reporter thought not, because it would then have to be amended again to change the rule numbers in accordance with the proposed comprehensive revision of Rules 35 and 40.

The Reporter added that there was also a need for a conforming amendment to Rule 32(g) to accompany the comprehensive revision. Rule 32(g) contains cross-references to Rules 35 and 40 that need to be changed. A Committee member noted that the amendment language shared by the Reporter needed the word "or" added before the last listed rule.



With that change, the Committee approved the proposed amendments without objection.

#### **D. Amicus Disclosures—FRAP 29 (21-AP-C)**

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 133). She explained that in 2019 a bill was introduced in Congress that would institute a registration and disclosure system like the one that applies to lobbyists. It would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. The letters and article by Senator Whitehouse explain the rationale. Amicus briefs filed without meaningful disclosures can enable parties to evade the page limits on briefs and, if one or a small number of people with deep pockets fund multiple amicus briefs, can give the misleading impression of a broad consensus.

In October 2019, the AMICUS subcommittee was appointed. In February of 2021, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that this Committee had already established a subcommittee to do so.

There are important and complicated issues, some of which are within the purview of this Committee, and some of which are not. Public registration and fines are not within the purview of this Committee, but changes to the disclosure requirements of Rule 29 are. Current Rule 29 is based on a corresponding Supreme Court rule and requires disclosure of (i) whether a party's counsel authored an amicus brief; (ii) whether a party or a party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) whether a person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparation or submission of the brief.

Some may construe the second requirement narrowly to cover only the printing and filing of the amicus brief, although that is not the way it is typically understood. Parties may also be able to evade the second requirement by giving money (which is fungible) to an organization without earmarking it for a particular amicus brief. In addition, parties who are members of an organization submitting an amicus brief could take advantage of the third requirement's exception for members of the amicus organization.

There are also broader concerns about the influence of “dark money” on the amicus process. The subcommittee would like some exploration by the full committee of whether this is a concern it should address before moving forward and, if so, what steps are appropriate.

The subcommittee has sketched out some language addressing some of the issues that the rules could address. (Agenda book page 140-41). This is not a suggestion of language to adopt, but rather a first step illustrating how some issues could be addressed.

To deal with the narrow construction of the second requirement, the word “drafting” is added, making clear that disclosure is required of contributions made for writing the brief, not just printing and filing it.

To deal with possible evasion by parties, a new provision is added requiring greater disclosure of contributions by a party to an amicus and changing the existing exception for members of an amicus to not apply to members who are parties or counsel to parties.

The subcommittee has not drafted any language addressing the issue of nonparties funding multiple amici.

Judge Bybee stated that the subcommittee had done a lot of work and that the principal author of the memo was Danielle Spinelli. Noting the connection between our rule and the Supreme Court rule, he noted that coordination would be necessary.

Ms. Spinelli stated that the subcommittee is looking for guidance from the full Committee; it would be helpful to get the full Committee’s reaction to the underlying concerns. She noted that there are countervailing constitutional issues regarding the disclosure of the membership of an organization.

Judge Bybee stated that he was struck by the idea of requiring disclosures by those who file three or more amicus briefs; that’s not the kind of thing we do. Ms. Spinelli added that the subcommittee envisions rules for all amici, not just those who file a certain number of amicus briefs.

An academic member stated that lobbying is not the same as filing an amicus brief. Lobbying is done in private. An amicus filing is made in public and can be responded to. An amicus brief is more like a billboard outside the courthouse paid for by “Citizens for Goodness and Wonderfulness.” It is appropriate to guard against undue influence by the parties, and by those who claim to be independent of the parties but aren’t. The language in romanette (ii), which is designed to avoid the narrow interpretation of that provision, and in romanette (iv), which would remove the exception for parties and their counsel who are members of an amicus organization, could go forward separately from the new romanette (iii). Trying to determine who counts as a direct or indirect parent can be difficult with corporate parents, and its application to LLCs even harder.

Ms. Spinelli posed more precise questions for the Committee. Should the focus remain on contributions by parties? Should the subcommittee think about

contributions by nonparties so that, for example, the court would know that ten amicus briefs were all paid for by one person? Because amicus briefs are more of an issue for the Supreme Court than for the courts of appeals, we should be in communication with the Supreme Court; should this Committee bless such communication? Anything else we should consider?

A judge member stated that the premise of the article and bill is that an amicus give someone a leg up. He used to be in the state legislature and has been lobbied. Lobbying is different than filing an amicus brief. We should not accept the premise that they are the same and should be careful not to be drawn into debate on those terms.

Judge Bates stated that we should not expect more guidance from the Supreme Court. We should touch base with the Clerk of the Supreme Court before moving forward, and Judge Bates should be included in any such discussions. But the hope is that this Committee and the rule making process will thoroughly examine the matter. We obviously must consider the NAACP case and keep an eye on the pending SCOTUS case.

Ms. Spinelli then turned attention to the language sketched out to deal with parties, an area clearly within our purview. Perhaps members could send any ideas about that language via email, as well as any thoughts about a broader disclosure rule and competing concerns.

Judge Bybee asked where the 10% threshold came from. Ms. Spinelli responded that it was drawn from the corporate disclosure rule (Rule 26.1). A judge member noted that this is like the discussion of disclosure of educational programs attended by judges. The perception of fairness and independence is important. The Code of Conduct Committee spent a long time dealing with those disclosures. Judges are not likely to be affected, but perceptions matter.

A lawyer member emphasized the importance of the perception that parties may be getting around the disclosure rules. The tricky question involves nonparties. A court can look very bad, even if not influenced, because it can look like the court was hoodwinked.

Ms. Spinelli asked if the full Committee thought that the subcommittee should continue its work regarding parties, as sketched out in the agenda book. Two judge members urged that we not start from a presumption of improper influence; the question is transparency. A judge member stated that the language in the agenda book was a good start regarding parties. In response to a question from Judge Bybee, Ms. Spinelli stated that the subcommittee did not deal with recusal issues.

The Reporter asked if anyone thought that the subcommittee should not consider dealing with nonparties. An academic member stated that he was hesitant

to require disclosure for nonparties when not intended to fund the brief. He understands the concern about non-circumvention, but some donors may not have influence. Consider the difference between someone who provides 3% of the revenue to the Chamber of Commerce and someone who wholly owns an organization. A disclosure rule can create all kinds of complications dealing with LLCs and other types of structures. Ms. Spinelli added that the corporate disclosure rule is designed for recusal purposes and that's why it is focused on public corporations. It is not easy to block all methods of circumvention.

Judge Bybee stated that it was clear that the subcommittee would continue its work. Ms. Spinelli agreed that the subcommittee would move forward and welcome input as it does.

#### **E. IFP Standards—Form 4 (19-AP-C; 20-AP-D)**

Ms. Wright presented the report of the subcommittee. (Agenda book page 193). She noted that Sai had submitted a suggestion regarding the standards for granting IFP status and for revising Form 4. A staff attorney from the Ninth Circuit joined the subcommittee meeting and provided insight into how the IFP process works in practice. She will survey other circuits to get information from them about the standard used, how Form 4 is used, and what parts of it are helpful.

Judge Bybee added that it was a very productive subcommittee meeting and asked if there were any other comments. The Reporter called the Committee's attention to an additional relevant submission from Sai.

#### **F. Relation Forward of Notices of Appeal—Rule 4 (20-AP-A)**

Tom Byron presented the report of the subcommittee. He explained that in prior discussions of this issue, one category of cases stood out: cases where an order could have been certified for immediate appeal under Civil Rule 54(b) but was not, a notice of appeal is filed, sometime later final judgment is entered, no new notice of appeal is filed, and the old notice of appeal does not ripen so the appeal is lost.

The problem arises because, even after a party files a notice of appeal, the case goes forward in the district court notwithstanding the notice of appeal. Perhaps this is due to unawareness of the significance of the notice of appeal. Or perhaps there is some other reason the case proceeds.

The question for the subcommittee is whether there is any way to do something about these situations. It has not identified a clear way to solve the problem—a problem that seems to be partly of a party's own making by failing to follow up on what it should do.

Professor Lammon suggests that all notices of appeal ripen once final judgment is entered. The subcommittee rejects that approach because it would encourage premature notices of appeal and cause more problems than it solves.

The subcommittee considered formalizing the process recognized in the *Behrens* case (*Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996)) that permits a district court to proceed despite a notice of appeal by certifying that the appeal is frivolous. But this doesn't seem to be effective for the problem identified, that is, that the party filing the notice of appeal seems to be unaware of its significance. There isn't an obvious trigger to invoke the process; the problem was the failure to seek a Rule 54(b) certification.

The bottom line is the subcommittee couldn't come up with a good solution and therefore is not recommending any action. However, the subcommittee is not ready to take the matter off the agenda. The subcommittee and the Reporter will look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. The latter may reflect case specific outcomes.

In addition, the subcommittee will look more closely at another issue, one involving the denial of post-trial motions. The Reporter added that he will investigate the current rule's different treatment of post-trial motions in civil and criminal cases.

An academic member stated that splits within circuits, where some panels forgive and others don't, may be worse and more in need of a fix. He also noted that opposing parties can be blamed as well because they could raise the issue themselves. Perhaps they should forfeit the issue if they move to dismiss the appeal too late.

Ms. Spinelli stated that the subcommittee batted around several possible solutions, but none were satisfactory. Judge Bybee added that it may be muddled, that panels are making ad hoc decisions, and there may not be a good rule.

## **VI. Discussion of Matters Before Joint Subcommittees**

The Reporter provided a brief update on the status of two matters before joint subcommittees.

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey is on hold due to the pandemic. (Agenda book page 211).

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems and further research by the FJC does not seem

warranted at this point. (Agenda book page 213). However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it.

## **VII. Discussion of Recent Suggestions**

### **A. Amicus Briefs and Recusal—Rule 29 (20-AP-G)**

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 217). In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Morrison suggests that this Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption. The Reporter suggested that this matter be referred to the AMICUS subcommittee. Ms. Spinelli, the chair of that subcommittee, agreed.

Judge Bybee noted that an important source of information regarding recusal is financial disclosures by judges and that these disclosures are open to the public. To the extent that a judge recuses because of a personal connection to a law firm, the firm itself should know that connection.

An academic member stated that this seems to be more of an issue for the Judicial Conference than for this Committee. It's really a question of interpretation of the recusal statute. A judge member noted that this is really an issue at the en banc stage because cases are screened for recusal issues at the panel stage.

A lawyer member suggested that the standard may be outside the purview of this Committee. Mr. Byron had some recollection that this issue had been canvassed before, and Professor Struve noted that we can try to dig that up. Mr. Byron also mentioned a related issue of the process for amicus briefing after the grant of rehearing. Ms. Dwyer noted that the Clerk's Office clears conflicts before ever sending a case to a panel. An academic member said that the issue is important, that the greatest need is at the en banc stage, and that it should be referred to the subcommittee.

The matter was referred to the AMICUS subcommittee.

### **B. Adding Time After Service of Judgment (21-AP-A)**

The Reporter introduced the suggestion by Greg Patmythes that the rules explicitly provide for an extra three days after service of a judgment to file a motion that tolls the time to appeal under Rule 4(a)(4). He also suggests adding a provision

to Civil Rule 60 that would require Rule 60 motions to be made within 28 days to toll the time to appeal and deleting the 28-day provision from Appellate Rule 4(a)(4).

The Reporter recommended that this suggestion be removed from the agenda. Some time limits run from the date of service, but other time limits run from some other event. The extra three-day provision applies only to the former. The time to file motions that toll the time to appeal runs from the date of entry of the judgment, not the date of service. Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules, and there does not seem to be reason to do so. The provision in Rule 4(a)(4) for Rule 60 motions is not designed to encourage Rule 60 motions to be brought within 28 days of judgment, but to treat Rule 60 motions filed within 28 days of judgment like other post-judgment motions.

The Committee agreed unanimously to remove this suggestion from the agenda.

### **C. IFP Forms (21-AP-B)**

The Reporter introduced Sai's response to the IFP subcommittee's September 2020 report; the response has been docketed as a new suggestion. (Agenda book page 233). The Reporter suggested that it be referred to the IFP subcommittee, and this was done without objection.

## **VIII. Old Business**

The Reporter stated that in April of 2018 the Committee had decided to table consideration of possible changes to appendices but revisit the matter in three years. (Agenda book page 245). The concern was that appendices were too long and included much irrelevant information. The hope was that technology would solve the problem. He suggested that the Committee had three options at this point: 1) Re-form a subcommittee to address the issue; 2) Wait longer to return to the issue, perhaps on the theory that it is better addressed once a new post-pandemic normal is reached; or 3) Remove the issue from the agenda.

An academic member reported that the frustration that practicing lawyers have with appendices has been raised on Twitter. Mr. Byron stated that he had advocated change in this area in the past but been dissuaded by the prior Clerk's representative on the Committee. Ms. Dwyer stated that the circuits have struggled with this for years. Some judges want an electronic brief; others want paper. The practice in the Fifth Circuit may be best. There, the district court produces an enormous PDF that is placed on a site at the court of appeals; parties are required to cite to that location with hyperlinks. It requires lots of cooperation by district courts.

In response to a question by a judge member, Ms. Dwyer said that the PDF is searchable.

A judge member stated that he loves electronic briefs with hyperlinks. It's a lot easier to carry his iPad than 45 pounds of paper. He has bench memos prepared with hyperlinks to the record. Older judges resist, but it's a matter of time.

Mr. Byron raised a slightly different issue: procedures for designating and producing the appendix. Well before electronic filing, practice in the Fifth Circuit involved a literal box of papers with deferred designation of the appendix. In the Sixth Circuit, citation is directly to the district court electronic record. There is a disuniformity problem; there will be resistance to changing from one's own way of doing things until we can abandon designation and simply use the electronic record. A technological fix can let us abandon the old ways. He suggested revisiting the issue in another three years.

Ms. Dwyer added that upgrades to ECF are being discussed. The practical problem is wild over-designation. The designation task should not be given to the lowest paid person in the office.

A judge member stated that in the Eleventh Circuit there is a full electronic record on appeal. One problem is getting the district courts to scan everything; things are missing, such as trial exhibits. And the different approaches by judges is not only age-based. Two new judges want paper versions.

A judge member stated that the transition to electronic records has been seamless in the Sixth Circuit. Judges who want paper were given printers and told to print.

Mr. Byron suggested that this should be considered with CACM, IT, and district judges.

The Committee agreed to revisit the issue again in another three years.

## **IX. Review of Impact and Effectiveness of Recent Rule Changes**

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it is still happening. We will get a list from Mr. Byron of which courts continue to do so and figure out a course of action.

## **X. New Business**

No member of the Committee presented any new business.



## **XI. Adjournment**

Judge Bybee thanked the participants, stating that it was a long and productive day.

The next meeting will be held on October 7, 2021. The hope is that it will be in person in Washington D.C.

The Committee adjourned at 4:25 p.m.

Draft

# TAB 4

# TAB 4A

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE  
APPELLATE RULES

DENNIS R. DOW  
BANKRUPTCY RULES

ROBERT M. DOW, JR.  
CIVIL RULES

RAYMOND M. KETHLEDGE  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Honorable John D. Bates, Chair  
Standing 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 24, 2021

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**I. Introduction**

The Advisory Committee on Bankruptcy Rules met by videoconference on April 8, 2021. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to rule and form amendments that were published for comment last August. They consist of amendments to (1) Parts I and II of the Bankruptcy Rules that are proposed as part of the rules restyling project; (2) thirteen rules and one Official Form that would implement the Small Business Reorganization Act of 2019 (“SBRA”); and (3) four additional rules. The Advisory Committee also voted to seek publication for comment of (1) amendments to Parts III, IV, V, and VI of the Bankruptcy Rules—the next installment of the restyling project; (2) new Rule 9038 (Bankruptcy Rules Emergency); (3) amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security

Interest in the Debtor’s Principal Residence); (4) five new Official Forms proposed to implement the Rule 3002.1 amendments; and (5) amendments to three existing Official Forms.

Part II of this report presents those action items. They are organized as follows:

**A. Items for Final Approval**

Rules and form published for comment in August 2020—

- Restyled Parts I and II;
- Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, and 3019 (in response to SBRA);
- Rule 3002(c)(6);
- Rule 5005;
- Rule 7004;
- Rule 8023; and
- Official Form 122B (in response to SBRA).

**B. Items for Publication**

- Restyled Parts III, IV, V, and VI;
- Rule 3002.1;
- Official Form 101;
- Official Forms 309E1 and 309E2; and
- New Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.

A discussion of Rule 9038, which is proposed for publication, is included elsewhere in the agenda book, along with a memorandum from Professors Capra and Struve.

Part III of this report presents four information items. The first concerns Interim Rule 4001(c), which the Standing Committee has already approved subject to action being taken by the Small Business Administration. The second information item discusses the Advisory Committee’s approval of a Director’s Form to implement a provision of the Consolidated Appropriations Act of 2021. The third and fourth items concern the Advisory Committee’s ongoing consideration of (1) turnover procedures in response to the Supreme Court’s recent decision in *City of Chicago v. Fulton* and (2) the use of electronic signatures by debtors and others who are not registered users of CM/ECF.

## II. Action Items

### A. Items for Final Approval

**The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for public comment in August 2020 and are discussed below.** Bankruptcy Appendix A includes the rules and form that are in this group.

**Action Item 1. Restyled Parts I and II.** Extensive comments were submitted on the restyled rules from the National Bankruptcy Conference. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. Comments and changes since publication are noted on the restyled rules in Appendix A.

An additional comment was submitted that noted the failure to restyle Rule 2002(n). That provision cannot be restyled because it was enacted by Congress.

The Advisory Committee seeks final approval of the restyled rules, but suggests that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

**Action Item 2. SBRA Rules.** The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA form amendments.

The following rules were published:

- **Rule 1007** (Lists, Schedules, Statements, and Other Documents; Time Limits),
- **Rule 1020** (Small Business Chapter 11 Reorganization Case),
- **Rule 2009** (Trustees for Estates When Joint Administration Ordered),
- **Rule 2012** (Substitution of Trustee or Successor Trustee; Accounting),
- **Rule 2015** (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- **Rule 3010** (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- **Rule 3011** (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- **Rule 3014** (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),

- **Rule 3016** (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- **Rule 3017.1** (Court Consideration of Disclosure Statement in a Small Business Case),
- **new Rule 3017.2** (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- **Rule 3018** (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- **Rule 3019** (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

No comments were submitted on the SBRA rules in response to publication, and the Advisory Committee gave final approval to the rules as published.

It should be noted that one of the interim SBRA rules, Rule 1020, was amended—also on an interim basis—in response to the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which took effect on March 27, 2020. The CARES Act modified the definition of “debtor” in § 1182(1) of the Bankruptcy Code for determining eligibility to proceed under subchapter V of chapter 11. The CARES Act also amended § 103(i) to provide that subchapter V of chapter 11 applies to a “debtor (as defined in section 1182(1))” who elects such treatment, rather than a “small business debtor” who so elects. These changes necessitated amending Interim Rule 1020 to add references to “a debtor as defined in § 1182(1) of the Code.”

Under the CARES Act, the definition of “debtor” in § 1182(1) was to revert to its prior version one year after the effective date of the CARES Act, that is, on March 27, 2021. For that reason, the pre-CARES Act version of Interim Rule 1020 was published for comment. Congress acted in March of this year to extend the sunset date in the CARES Act to March 27, 2022. Nevertheless, the published version of Rule 1020 is still the appropriate one to be finally approved because by the time it goes into effect—December 1, 2022—the CARES Act definition will likely have expired.

**Action Item 3. Rule 3002(c)(6) (Filing Proof of Claim or Interest).** The amendments would make uniform the standard for seeking bar date extensions by both domestic and foreign creditors. In both situations, the court could grant an extension if it found that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim. There were no comments on the proposed amendments, and the Advisory Committee approved them as published.

**Action Item 4. Rule 5005 (Filing and Transmittal of Papers).** The amendments would allow papers required to be transmitted to the United States trustee to be sent electronically and would eliminate the requirement for filing a verified statement for papers transmitted other than electronically. The only comment submitted in response to publication was one that noted an error in the redlining of the published version, but it recognized that the Committee Note clarified the intended language. With that error corrected, the Advisory Committee approved the amendments.

**Action Item 5. Rule 7004 (Process; Service of Summons, Complaint).** The amendments add a new subdivision (*i*) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. No comments were submitted in response to publication of the proposed amendments. The Advisory Committee deleted one comma from the text of proposed Rule 7004(*i*) and made one modification to the Committee Note, changing the word “Agent” to “Agent for Receiving Service of Process,” before approving the amendments.

**Action Item 6. Rule 8023 (Voluntary Dismissal).** Rule 8023 was proposed for amendment to conform to pending amendments to Fed. R. App. P. 42(b). The amendments are intended to clarify that a court order is required for any action other than a simple voluntary dismissal. No comments were submitted in response to publication of the proposed amendments, and the Advisory Committee approved them as published.

**Action Item 7. Official Form 122B (Chapter 11 Statement of Your Current Monthly Income).** The Advisory Committee promulgated new and amended Official Forms in response to the enactment of the Small Business Reorganization Act, which took effect on February 19, 2020, the effective date of the Act. Unlike the interim SBRA rules, the forms were officially issued under the Advisory Committee’s delegated authority to make conforming and technical amendments to Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. Nevertheless, the Advisory Committee asked the Standing Committee to publish them for comment last August, along with the SBRA rule amendments, in order to ensure that the public had a thorough opportunity to review them.

In addition to the nine previously amended forms, Official Form 122B was published in order to correct an instruction at the beginning of the form. It currently begins, “You must file this form if you are an individual and are filing for bankruptcy under Chapter 11.” That statement is incorrect for individuals filing under subchapter V of chapter 11. Therefore, the proposed amendment states, “You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 ([other than under subchapter V](#)).”

No comments were submitted on the SBRA forms in response to publication, and the Advisory Committee voted to give final approval to Official Form 122B as published and to make no changes to the existing SBRA forms.<sup>1</sup>

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<sup>1</sup> As discussed in Action Item 2, the 2020 CARES Act temporarily amended the definition of “debtor” for purposes of eligibility to seek relief under subchapter V of chapter 11. To reflect this statutory change, the Advisory Committee used its delegated authority to amend Official Forms 101 and 201. When the temporary definition expires—now scheduled for March 27, 2022—the Advisory Committee will amend Forms 101 and 201 to revert to the pre-CARES Act versions, which were the versions that were published for comment.



## **B. Items for Publication**

**The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2021.** The rules and forms in this group appear in Bankruptcy Appendix B.

**Action Item 8. Restyled Parts III, IV, V, and VI.** The Advisory Committee seeks publication of the restyled versions of the rules in Parts III, IV, V and VI of the Federal Rules of Bankruptcy Procedure, which reflect many hours of work by the style consultants, the reporters, and the Restyling Subcommittee. The Advisory Committee expects to present the final three parts of the restyled Bankruptcy Rules for publication next year.

**Action Item 9. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence).** In response to suggestions submitted by the National Association of Chapter Thirteen Trustees (18-BK-G) and the American Bankruptcy Institute’s Commission on Consumer Bankruptcy (18-BK-H), the Advisory Committee is proposing significant amendments to Rule 3002.1. The amendments are intended to encourage a greater degree of compliance with the rule’s provisions and to provide a more straight-forward and familiar procedure for determining the status of a mortgage claim at the end of a chapter 13 case. The amended rule would also provide for a new midcase assessment of the mortgage claim’s status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. Stylistic changes are made throughout the rule.

Subdivision (b) would be amended to add provisions about the effective date of late payment-change notices and to provide more detailed provisions about notice of payment changes for home equity lines of credit (“HELOCs”). Subdivision (b)(2) would provide that late notices of a payment increase do not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease. Under proposed subdivision (b)(3), a HELOC claimant would only need to file annual payment-change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month was for more than \$10. This provision would also ensure at least 21 days’ notice before a payment change took effect.

Proposed subdivision (f) is new. It would provide the procedure for a midcase assessment of the status of the mortgage, which would allow the debtor to be informed of any deficiencies in payment while there was still time in the chapter 13 case to become current before the case was closed.

As under the existing rule, there is an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure that would result in a binding order, and time periods for the trustee and claim holder to act would be lengthened.

Subdivision (i) would be amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule.

**Action Item 10. Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).** The Advisory Committee received suggestions from two different bankruptcy judges suggesting that consumer debtors are confused by Form 101, Part 1, line 4, which asks the debtor to list “any business names and Employer Identification Numbers you have used in the last 8 years.” Both judges reported that consumer debtors are listing the names of limited liability companies or corporations through which the debtors have conducted business in the past 8 years, not realizing that the question seeks only names that the debtor individually has used during that period. Because the debtors list those LLC and corporate names, those names appear as names of additional debtors on the notice of bankruptcy on the applicable version of Form 309, even though those LLCs and corporations have not filed for bankruptcy protection.

The proposed amendment to Official Form 101 eliminates the portion of line 4 that asks for any business names the debtor has used in the last 8 years, and instead asks for additional similar information in Question 2, which is consistent with the treatment of that information in Official Forms 105, 201, and 205. There is also new language in the margin of Official Form 101, Part 1, Question 2, directing the debtor NOT to insert the names of LLCs, corporations, or partnerships that are not filing for bankruptcy.

**Action Item 11. Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)).** Bankruptcy Judge Timothy W. Dore of the W.D. Wash. suggested that the language in line 7 of Official Form 309E1 (line 8 in Official Form 309E2) is not clear about when the deadline is for objecting to discharge, as opposed to seeking to have a debt excepted from discharge. The Advisory Committee recommends revisions to those lines to clarify the information provided. The Advisory Committee also decided to change the line that says “the court will send you notice of that date later” to add the words “or its designee” after the words “the court” because often the court itself does not send this notice.

**Action Item 12. New Official Forms 410C13-1N (Trustee’s Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee’s Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee’s Motion to Determine the Status of the Mortgage Claim).** The proposed amendments to Rule 3002.1, which are discussed at Agenda Item 9, call for the use of new Official Forms. Subdivisions (f) and (g) of the amended rule require the notice, motion, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms. The Advisory Committee therefore proposes new forms for this purpose.

The first form—Official Form 410C13-1N—is to be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of payments

to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form—Official Form 410C13-1R. *See* Rule 3002.1(f)(2). The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The third and fourth forms—Official Forms 410C13-10C and 410C13-10NC—implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final form—Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

### **III. Information Items**

**Information Item 1. Interim Rule 4001(c) (Obtaining Credit).** The Consolidated Appropriations Act of 2021 (“CAA”) includes a provision temporarily amending § 364 of the Bankruptcy Code to provide for certain loans under the Small Business Act and to require that the bankruptcy court hold a hearing on such a loan within seven days after the filing and service of a motion to obtain such a loan. The CAA also states that the court may grant final relief at such a hearing “notwithstanding the Federal Rules of Bankruptcy Procedure.” This provision of the CAA, which will sunset on December 27, 2022, is to take effect on the date when the Administrator of the Small Business Administration submits to the Director of the Executive Office for United States Trustees a written determination that certain debtors in possession or trustees would be eligible for the specified loans. If that determination were submitted, amendments to Rule 4001(c)(2) (dealing with hearings on motions to obtain credit) would be necessary to reflect the new CAA directions.

Because of the uncertain timing of the effective date and the limited duration of the CAA amendments if they go into effect, and because there would be insufficient time to approve a rule amendment under the normal Rules Enabling Act process prior to the amendments becoming effective, the Advisory Committee recommended that the Standing Committee approve Interim Bankruptcy Rule 4001(c) for possible distribution to the courts if and when the amendments become effective, with a sunset date of December 27, 2022. However, because the CAA amendments may never go into effect, the Advisory Committee also recommended that the Standing Committee wait to forward its recommendation to the Judicial Conference only after (and

if) the SBA takes the steps that would make the rule necessary. The Standing Committee unanimously approved both recommendations by an email vote that closed on February 10, 2021.

Given the tight timeline involved, if the SBA Administrator does act, the Standing Committee can ask the Executive Committee to act on an expedited basis on behalf of the Judicial Conference to authorize the distribution of the Interim Rule to the courts for local adoption. This would be similar to the process the Executive and Rules Committees followed between September and December 2019 to authorize the distribution of interim bankruptcy rules needed to implement the Small Business Reorganization Act of 2019.

**Information Item 2. Director’s Form 4100S (Supplemental Proof of Claim for CARES Forbearance Claim).** The CARES Act, which was enacted on March 27, 2020, authorizes “a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency [to] request forbearance [which must be granted] on the Federally backed mortgage loan, regardless of delinquency status.” A similar provision applies to borrowers with a federally backed multifamily mortgage. At the end of the forbearance period, the borrower must repay the deferred amounts. How that obligation should be dealt with in an ongoing chapter 13 case has presented difficulties.

The Consolidated Appropriations Act of 2021 contains provisions that address the treatment of CARES forbearance claims in chapter 13 cases. It amends § 501 of the Bankruptcy Code to add a new subsection (f), which allows an eligible creditor to file a supplemental proof of claim for a CARES forbearance claim in a chapter 13 case. “CARES forbearance claim” means “a supplemental claim for the amount of a Federally backed mortgage loan or a Federally backed multifamily mortgage loan that was not received by an eligible creditor during the forbearance period of a loan granted forbearance under section 4022 or 4023 of the CARES Act.”

The proof of claim for such a supplemental claim must be filed within 120 days from the end of the forbearance period. And the new § 501(d)(2)(B) specifies information that must be included in a CARES forbearance proof of claim if the debtor and creditor have agreed to a modification or deferral of the underlying mortgage loan obligation in connection with a forbearance.

By an email vote that concluded on February 4, 2021, the Advisory Committee approved a new Director’s form to implement the CARES forbearance claim provisions. Director’s forms are issued under Bankruptcy Rule 9009(b) and do not go through the Rules Enabling Act process. Instead, the AO seeks the Advisory Committee’s review and recommendation of such forms before posting them on [uscourts.gov](https://uscourts.gov). Director’s forms are available for use by the courts and the public, but are not required. As such, they can be revised, if necessary, by the user. The Forms Subcommittee recommended that Form 4100S be adopted as a Director’s form, rather than an Official Form, because of this flexibility and also because this Code change is only in effect until December 27, 2021, one year after the enactment of the CAA.

**Information Item 3. Turnover procedures.** On January 14, 2021, the Supreme Court decided in *City of Chicago v. Fulton*, 141 S. Ct. 585, that a creditor’s continued retention of estate

property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings “can be quite slow” because they must be pursued by an adversary proceeding. She stated, however, that “[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors’ requests for turnover under § 542(a), especially where debtors’ vehicles are concerned.”

Acting on Justice Sotomayor’s comment, 45 law professors have submitted a suggestion (21-BK-B) for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding. They offered specific language for the amendment of several rules. The National Bankruptcy Conference has submitted a suggestion (21-BK-J) that is generally supportive of the law professors’ suggestion.

In her concurring opinion, Justice Sotomayor addressed the importance to a chapter 13 debtor of promptly regaining possession of a seized car so that the debtor can travel to work and continue to earn money to fund his or her plan. “Bankruptcy courts,” she commented, “are not powerless to facilitate the return of debtors’ vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under § 542(a).” But because such relief currently requires bringing an adversary proceeding, which on average lasts over 100 days, Justice Sotomayor raised the possibility of a statutory or rule change to facilitate prompt action. Although some courts had tried to resolve turnover actions promptly, she concluded with the following suggestion:

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors’ vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for § 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

141 S. Ct. at 594.

The law professors’ suggestion follows up and expands on Justice Sotomayor’s invitation for rulemaking to expedite the turnover of property essential for a chapter 13 debtor. As the suggestion explains, “Although the pressing policy issues in consumer chapter 13s highlighted by *Fulton* are the impetus for the proposal, we suggest an expansion beyond chapter 13 to allow turnover actions by motion in all circumstances. Where there is no dispute, there is no reason a party holding estate property should be able to hide behind an adversary proceeding to delay doing the party’s statutory duty that sections 521(a)(4), 542, or 543 require.” Under their proposal, then, turnover relief under the three listed sections would be sought by motion in all chapters and for all types of property.

The Consumer Subcommittee has begun consideration of the law professors' suggestion. The initial issue it is exploring is whether any change in turnover procedure should be limited to the type of situation that gave rise to Justice Sotomayor's concern—the return of essential property to a chapter 13 debtor—or whether it should apply across the board, as suggested by the law professors. Because some bankruptcy courts have already made decisions to allow turnover by motion in certain situations, the Subcommittee has begun gathering information about the limits imposed in those local rules and procedures.

**Information Item 4. Electronic signatures.** Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management (“CACM”), submitted a suggestion (20-BK-E) based on a question her committee received from a bankruptcy judge regarding whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig pointed out that recent amendments to Rule 5005(a)(2) provide that a “filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature,” but that the rule is silent about electronic signatures of persons without a CM/ECF account. She said that her committee believes that bankruptcy courts are hesitant to allow such signatures “without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes, particularly for petitions, lists, schedules and statements, amendments, pleadings, affidavits, or other documents that must contain original signatures, require verification under Fed. R. Bankr. P. 1008, or require an unsworn declaration under penalty of perjury, pursuant to 28 U.S.C. § 1746.” Judge Fleissig asked the Advisory Committee to consider the issue raised by the judge, as well as whether security standards should be required for electronic signatures that would eliminate the need for the retention of wet signatures.

The questions raised by the CACM suggestion are ones that the Advisory Committee has previously considered. In 2013 the Advisory Committee published an amendment to Rule 5005(a) to govern electronic signatures. As proposed, this national rule would have permitted the filing of a scanned signature page of a document bearing the signature of an individual who was not a registered user of the CM/ECF system. That scanned signature would have been given the same force and effect as an original signature, and retention of the original document with the wet signature would not have been required. Following publication, the Advisory Committee decided not to proceed further with the amendment, largely because of opposition from the Department of Justice. The DOJ raised concerns that eliminating the requirement to retain the original document would make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

At the fall 2020 meeting, the Advisory Committee voted to pursue the CACM suggestion, and the matter was referred to the Technology Subcommittee. Committee members noted that there have been advances in electronic-signature technology since 2013 and that the position of the Department of Justice may have changed in the interim.

Molly Johnson and Ken Lee of the Federal Judicial Center are assisting the Subcommittee in doing research about existing e-signature judicial practices and in obtaining input from other organizations. Also participating in the work of the Subcommittee is a member of the subgroup

of the COVID-19 Judiciary Task Force that is focusing on using virtual technology for court proceedings and other meetings with detainees. The question of electronic signatures has come up in that context as well, and she has offered to share her knowledge with the Subcommittee. The Advisory Committee's DOJ representative, David Hubbert, has alerted the Department of the Advisory Committee's renewed consideration of the issue of electronic signatures, and he hopes to be able provide some initial input from the Department and the FBI this summer.

Although the CACM suggestion was directed at practices under the Bankruptcy Rules, the issues being considered are relevant as well to the other sets of rules. At Judge Bates's suggestion, the reporter will be conferring with the reporters for the other advisory committees as the consideration of this suggestion proceeds.

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

For Final Approval



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

**1000 Series**

ORIGINAL	REVISION
<p><b>Rule 1001. Scope of Rules and Forms; Short Title</b></p>	<p><b>Rule 1001. Scope; Title; Citations; References to a Specific Form</b></p>
<p>The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.</p>	<p>(a) <b>In General.</b> These rules, together with the bankruptcy forms, govern the procedure in cases under the Bankruptcy Code, Title 11 of the United States Code. They must be construed, administered, and employed by both the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.</p> <p>(b) <b>Title.</b> These rules should be referred to as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms.</p> <p>(c) <b>Citations.</b> In these rules, the Bankruptcy Code is cited with a section sign and number (§ 101). A rule is cited with “Rule” followed by the rule number (Rule 1001(a)).</p> <p>(d) <b>References to a Specific Form.</b> A reference to a “Form” followed by a number is a reference to an Official Bankruptcy Form.</p>

**Committee Note**

The Bankruptcy Rules are the fifth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence took effect in 2011. The restyled Bankruptcy Rules apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, Civil and Evidence Rules.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure, at page x (Feb. 2005) (available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article909.pdf> and <https://www.michbar.org/file/barjournal/article/documents/pdf4article921.pdf>); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 *Scribes J. Legal Writing* 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make

the restyled rules easier to read and understand even when the words are not changed.

**Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words.** The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words. The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

**Rule Numbers.** The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

**No Substantive Change.** The style changes to the rules are intended to make no changes in substantive meaning. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. An example in the Bankruptcy Rules would be "meeting of creditors."

**Legislative Rules.** In those cases in which Congress enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 361) and Rule 7004(h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), the Committee has not restyled the rule.

### Changes Made After Publication and Comment

- Committee note has been added.

#### Summary of Public Comment on Restyled Rules Generally

- **Jean Publicee (BK-2020-0002-0003)** – Stated that all rules should be reviewed for their ability to be understood and used by the general public. No change was made in response to this comment.
- **National Bankruptcy Conference (BK-2020-0002-0006)** – Comments on the restyled rules generally and the responses to those comments follow:

1. **No Substantive Change.** The NBC suggested that the Restyled Rules include a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" to make clear that no substantive change was intended in the restyling process and the restyled rules must be interpreted consistently with the current rules.

**Response:** The Bankruptcy Rules are the last of the five sets of federal rules to be restyled. In the prior restyling projects, the applicable Advisory Committee has emphasized that the restyling is not intended to make any substantive change in two ways. One was the Advisory committee note to the restyled rules. For example, in the Note to Rule 1 of the Federal Rules of Civil Procedure, the Advisory Committee stated

“The style changes to the rules are intended to make no changes in substantive meaning.” In our committee note we expressly state the following:

“No Substantive Change. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule.”

(This language was identical to that used in the committee note for the restyled Federal Rules of Evidence.) The Advisory Committee has expanded this note to insert a new sentence before the current one that reads exactly like that used for the civil procedure rules: “The style changes to the rules are intended to make no changes in substantive meaning.”

Second, every restyled rule has its own committee note stating that “the language of rule \_\_\_ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.” We did not include a committee note following every rule in the version of the restyled Bankruptcy Rules as they were published (because we included side-by-side versions on the existing rules), but when they are sent to the Standing Committee, we intend to do so. It will read as follows:

“The language of Rule \_\_\_ has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”

In connection with the restyling of the Federal Rules of Civil Procedure, Professor Ed Hartnett argued that these expressions of intent in the committee notes were not binding on courts, and discussed whether the restyled rules should have included “a rule of construction in the text of the rules themselves.” Edward A. Hartnett, “*Against (Mere) Restyling*,” 82 NOTRE DAME L. REV. 155 (2006). He said that the Advisory Committee on Civil Rules could have included a provision in Rule 1 that stated that “[t]hese rules must be construed to retain the same meaning after the amendments adopted on December 1, 2007 [the date of the restyled amendments], as they did before those amendments.” *Id.* at 168. However, he noted that the Advisory Committee rejected including such a rule of construction because it would “make it impossible for anyone to rely on the text of any of the restyled rules. In every instance in which someone relied on the text of the rule, it would be open for others to argue that the text of the rule should be ignored in favor of its prior meaning.” *Id.* Of course, if courts rely on the committee notes, the same problem is created; the plain meaning of the restyled rules are always subject to challenge based on the meaning of the prior version of the rules. As Professor Hartnett said,

“The more the courts rely on the purpose of maintaining prior meaning, the less the restyled rules will achieve their goal of making the rules clear and easily understood. The flip side is that the more that courts rely on the plain language of the restyled rule, the more the restyled rules will achieve their goal of making the rules clear and easily understood. Ironically, then, the best hope for the successful implementation of clear, easily understood restyled rules is if lawyers and judges ignore the Advisory Committee Note repeated after each restyled rule.”

*Id.* at 169-70.

The Advisory Committee has chosen to follow the pattern that was developed in the prior restyled rules and include committee notes after each rule, but not include a rule of construction or any other method of

providing that the rules do not change the substance of the prior version of the rules.

2. **Capitalization.** The NBC objected to the choice of the style consultants to capitalize the words “title,” “chapter,” and “subchapter.” This choice is inconsistent with how those terms are used in the Code (without capitalization).

**Response:** The position of the Advisory Committee has been that the choices of the style consultants should prevail on matters of pure style. This is a matter of pure style. Therefore, no change was made to the capitalization choices of the style consultants.

3. **Bullet Points.** The NBC objected to the use of bullet points in the rules rather than lettered designations. Use of bullet points makes it “difficult and cumbersome for courts and parties to try to correctly cite any given bullet point.”

**Response:** Bullet points have been used in other restylings. See, e.g. Civil Rule 8(c)(1). The Advisory Committee is comfortable that bullet points are not used in a way that would be likely to require citation to individual bullet points (as opposed to the section in which they appear). They are usually used to list the recipients of notice or service. The style consultants feel strongly that their use is consistent with modern trends in making language comprehensible, and as a stylistic matter it rests with them.

4. **Court’s Designee.** The NBC noted that some rules that previously referred to “the clerk, or some other person as the court may direct” were changed to refer to “the clerk or the court’s designee” and that others were not. They objected to the phrase “the court’s designee” as less clear than “some other person as the court may direct.”

**Response:** The rules should treat the phrase consistently in its restyling process. In only two places in all the rules through Part V (Rule 2002(f) and Rule 2002(n)) was the phrase not changed to “the court’s designee.” The Advisory Committee could not modify the phrase in either of these places, because those provisions were enacted by Congress. The Advisory Committee does not believe the phrase is substantively different from “some other person as the court may direct.” It made no change in response to this comment.

ORIGINAL	REVISION
PART I—COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF	<b>PART I. COMMENCING A BANKRUPTCY CASE; THE PETITION, THE ORDER FOR RELIEF, AND RELATED MATTERS</b>
<b>Rule 1002. Commencement of Case</b>	<b>Rule 1002. Commencing a Bankruptcy Case</b>
(a) PETITION. A petition commencing a case under the Code shall be filed with the clerk.	<b>(a) In General.</b> A bankruptcy case is commenced by filing a petition with the clerk.
(b) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the petition filed pursuant to subdivision (a) of this rule.	<b>(b) Copy to the United States Trustee.</b> The clerk must promptly send a copy of the petition to the United States trustee.

**Committee Note**

The language of Rule 1002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Title to Part I was changed from “Commencing a Bankruptcy Case; The Petition and Order for Relief” to “Commencing a Bankruptcy Case; The Petition, The Order for Relief, and Related Matters.”
- Committee note has been added.

**Summary of Public Comment**

• **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC objected to the modification of the title of Part I. The prior version is “Commencement of the Case; Proceedings Relating to Petition and Order for Relief.” The style consultants changed it to “Commencing a Bankruptcy Case; The Petition and Order for Relief.” The NBC says that Part I includes rules about schedules, filing fee, dismissal and change of venue, and that is not captured by the new title.

**Response:** The Advisory Committee changed the title to Part I to read “Commencing a Bankruptcy Case; The Petition, The Order for Relief, and Related Matters.” That would cover the matters the NBC believes are omitted from the current title.

ORIGINAL	REVISION
<p><b>Rule 1003. Involuntary Petition</b></p>	<p><b>Rule 1003. Involuntary Petition: Transferred Claims; Joining Other Creditors; Additional Time to Join</b></p>
<p>(a) TRANSFEROR OR TRANSFEREE OF CLAIM. A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.</p>	<p>(a) <b>Transferred Claims.</b> An entity that has transferred or acquired a claim for the purpose of commencing an involuntary case under Chapter 7 or Chapter 11 is not a qualified petitioner. A petitioner that has transferred or acquired a claim must attach to the petition and to any copy:</p> <ol style="list-style-type: none"> <li>(1) all documents evidencing the transfer, whether it was unconditional, for security, or otherwise; and</li> <li>(2) a signed statement that:                     <ol style="list-style-type: none"> <li>(A) affirms that the claim was not transferred for the purpose of commencing the case; and</li> <li>(B) sets forth the consideration for the transfer and its terms.</li> </ol> </li> </ol>
<p>(b) JOINDER OF PETITIONERS AFTER FILING. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.</p>	<p>(b) <b>Joining Other Creditors After Filing.</b> If an involuntary petition is filed by fewer than 3 creditors and the debtor’s answer alleges the existence of 12 or more creditors as provided in § 303(b), the debtor must attach to the answer:</p> <ol style="list-style-type: none"> <li>(1) the names and addresses of all creditors; and</li> <li>(2) a brief statement of the nature and amount of each creditor’s claim.</li> </ol> <p>(c) <b>Additional Time to Join.</b> If there appear to be 12 or more creditors, the court must allow a reasonable time for other creditors to join the petition before holding a hearing on it.</p>

**Committee Note**

The language of Rule 1003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC made a stylistic suggestion to remove the word “that” before the semi-colon so that the lead-in to the subsections would read “a signed statement” and the subparts begin with “affirming” and “setting” respectively.

***Response:*** This is a purely stylistic matter, and the Advisory Committee defers to the style consultants on matters of pure style.



ORIGINAL	REVISION
<p><b>Rule 1004. Involuntary Petition Against a Partnership</b></p>	<p><b>Rule 1004. Involuntary Petition Against a Partnership</b></p>
<p>After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall promptly send to or serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.</p>	<p>A petitioner who files an involuntary petition against a partnership under § 303(b)(3) must promptly send the petition to—or serve a copy on—each general partner who is not a petitioner. The clerk must promptly issue a summons for service on any general partner who is not a petitioner. Rule 1010 governs the form and service of the summons.</p>

**Committee Note**

The language of Rule 1004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 1004.1. Petition for an Infant or Incompetent Person</b></p>	<p><b>Rule 1004.1. Voluntary Petition on Behalf of an Infant or Incompetent Person</b></p>
<p>If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.</p>	<p>(a) <b>Represented Infant or Incompetent Person.</b> If an infant or an incompetent person has a representative—such as a general guardian, committee, conservator, or similar fiduciary—the representative may file a voluntary petition on behalf of the infant or incompetent person.</p> <p>(b) <b>Unrepresented Infant or Incompetent Person.</b> If an infant or an incompetent person does not have a representative:</p> <ol style="list-style-type: none"> <li>(1) a next friend or guardian ad litem may file the petition; and</li> <li>(2) the court must appoint a guardian ad litem or issue any other order needed to protect the interests of the infant debtor or incompetent debtor.</li> </ol>

**Committee Note**

The language of Rule 1004.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 1004.2. Petition in Chapter 15 Cases</b>	<b>Rule 1004.2. Petition in a Chapter 15 Case</b>
(a) DESIGNATING CENTER OF MAIN INTERESTS. A petition for recognition of a foreign proceeding under chapter 15 of the Code shall state the country where the debtor has its center of main interests. The petition shall also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending.	(a) <b>Designating the Center of Main Interests.</b> A petition under Chapter 15 for recognition of a foreign proceeding must: <ol style="list-style-type: none"> <li>(1) designate the country where the debtor has its center of main interests; and</li> <li>(2) identify each country in which a foreign proceeding is pending against, by, or regarding the debtor.</li> </ol>
(b) CHALLENGING DESIGNATION. The United States trustee or a party in interest may file a motion for a determination that the debtor’s center of main interests is other than as stated in the petition for recognition commencing the chapter 15 case. Unless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition. The motion shall be transmitted to the United States trustee and served on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor was a party as of the time the petition was filed, and such other entities as the court may direct.	(b) <b>Challenging the Designation.</b> The United States trustee or a party in interest may, by motion, challenge the designation. If the motion is filed by a party in interest, a copy must be sent to the United States trustee. Unless the court orders otherwise, the motion must be filed at least 7 days before the date set for the hearing on the petition. The motion must be served on: <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• all persons or bodies authorized to administer the debtor’s foreign proceedings;</li> <li>• all entities against whom provisional relief is sought under § 1519;</li> <li>• all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and</li> <li>• any other entity as the court orders.</li> </ul>

**Committee Note**

The language of Rule 1004.2 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

- In Rule 1004.2(b), fourth bullet, the words “pending United States litigation” were changed to “litigation pending in the United States” and the words “the debtor is a party when the petition is filed” were changed to “the debtor was a party when the petition was filed.”

#### **Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC suggested changing “when the petition is filed” in Rule 1004.2(b), fourth bullet, to “when the petition was filed” to conform to Rules 1007(a)(4)(B)(ii) and 2002(q)(1).

***Response:*** Comment accepted.

ORIGINAL	REVISION
<p><b>Rule 1005. Caption of Petition</b></p>	<p><b>Rule 1005. Caption of a Petition; Title of the Case</b></p>
<p>The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the following information about the debtor: name, employer identification number, last four digits of the social-security number or individual debtor’s taxpayer-identification number, any other federal taxpayer-identification number, and all other names used within eight years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.</p>	<p><b>(a) Caption and Title; Required Information.</b> A petition’s caption must contain the name of the court, the title of the case, and the case number (if known).The title must include the following information about the debtor:</p> <ol style="list-style-type: none"> <li>(1) name;</li> <li>(2) employer-identification number;</li> <li>(3) the last 4 digits of the social-security number or individual taxpayer-identification number;</li> <li>(4) any other federal taxpayer-identification number; and</li> <li>(5) all other names the debtor has used within 8 years before the petition was filed.</li> </ol> <p><b>(b) Petition Not Filed by Debtor.</b> A petition not filed by the debtor must include all names that the petitioner knows have been used by the debtor.</p>

**Committee Note**

The language of Rule 1005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rules 1005, the words “docket number” were changed to “case number (if known).”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC suggested changing the words “docket number” to “case number (if known).” They note that the words “docket number” might be interpreted to refer to individual docket entries rather than the number associated with the entire case, and that Official Form 101 uses the term “case number.”

***Response:*** Comment accepted.

ORIGINAL	REVISION
<b>Rule 1006. Filing Fee</b>	<b>Rule 1006. Filing Fee</b>
<p>(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule. For the purpose of this rule, “filing fee” means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)–(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.</p>	<p>(a) <b>In General.</b> Unless (b) or (c) applies, every petition must be accompanied by the filing fee. In this rule “filing fee” means:</p> <ol style="list-style-type: none"> <li>(1) the filing fee required by 28 U.S.C. § 1930(a)(1)–(5); and</li> <li>(2) any other fee that the Judicial Conference of the United States requires under 28 U.S.C. § 1930(b) to be paid upon filing.</li> </ol>
<p>(b) PAYMENT OF FILING FEE IN INSTALLMENTS.</p> <p>(1) Application to Pay Filing Fee in Installments. A voluntary petition by an individual shall be accepted for filing, regardless of whether any portion of the filing fee is paid, if accompanied by the debtor’s signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments.</p> <p>(2) Action on Application. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.</p> <p>(3) Postponement of Attorney’s Fees. All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney or any other</p>	<p>(b) <b>Paying by Installment.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>Application to Pay by Installment.</i></b> The clerk must accept for filing an individual’s voluntary petition, regardless of whether any part of the filing fee is paid, if it is accompanied by a completed and signed application to pay in installments (Form 103A).</li> <li>(2) <b><i>Court Decision on Installments.</i></b> Before the meeting of creditors, the court may order payment of the entire filing fee or may order the debtor to pay it in installments, designating the number, amount, and payment dates. The number of payments must not exceed 4, and all payments must be made within 120 days after the petition is filed. The court may, for cause, extend the time to pay an installment, but the last one must be paid within 180 days after the petition is filed.</li> <li>(3) <b><i>Postponing Other Payments.</i></b> Until the filing fee has been paid in full, the debtor or Chapter 13 trustee must not make any further payment to an attorney or any other person who provides services to the debtor in connection with the case.</li> </ol>

ORIGINAL	REVISION
person who renders services to the debtor in connection with the case.	
(c) WAIVER OF FILING FEE. A voluntary chapter 7 petition filed by an individual shall be accepted for filing if accompanied by the debtor’s application requesting a waiver under 28 U.S.C. § 1930(f), prepared as prescribed by the appropriate Official Form.	<b>(c) Waiving the Filing Fee.</b> The clerk must accept for filing an individual’s voluntary Chapter 7 petition if it is accompanied by a completed and signed application to waive the filing fee (Form 103B).

**Committee Note**

The language of Rule 1006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 1006(a), immediately after the words “accompanied by,” the words “the filing fee. In this rule ‘filing fee’ means” were inserted.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC suggested changing the words “the filing fee” to “any part of the fees required by (a)” to avoid suggesting that the “filing fee” does not include both the statutory fee under 28 U.S.C. § 1930 and the additional AP fees.

**Response:** The ambiguity is created because the restyling process has eliminated the definition of “filing fee” that used to be in Rule 1006(a). Because that term is used in Rule 1006(b), it is necessary to put it back in (a) to avoid having to use the phrase “the fees required by (a)” throughout the rest of the rule.



ORIGINAL	REVISION
<p><b>Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits</b></p>	<p><b>Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File</b></p>
<p>(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.</p> <p>(1) Voluntary Case. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.</p> <p>(2) Involuntary Case. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms.</p> <p>(3) Equity Security Holders. In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 14 days after entry of the order for relief a list of the debtor’s equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.</p> <p>(4) Chapter 15 Case. In addition to the documents required under § 1515</p>	<p>(a) <b>Lists of Names and Addresses.</b></p> <p>(1) <b>Voluntary Case.</b> In a voluntary case, the debtor must file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H of the Official Bankruptcy Forms. Unless it is a governmental unit, a corporate debtor must:</p> <p>(A) include a corporate-ownership statement containing the information described in Rule 7007.1; and</p> <p>(B) promptly file a supplemental statement if changed circumstances make the original statement inaccurate.</p> <p>(2) <b>Involuntary Case.</b> Within 7 days after the order for relief has been entered in an involuntary case, the debtor must file a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H of the Official Bankruptcy Forms.</p> <p>(3) <b>Chapter 11—List of Equity Security Holders.</b> Unless the court orders otherwise, a Chapter 11 debtor must, within 14 days after the order for relief is entered, file a list of the debtor’s equity security holders by class. The list must show the number and type of interests registered in each holder’s name, along with the holder’s last known address or place of business.</p> <p>(4) <b>Chapter 15—Information Required from a Foreign Representative.</b> If a foreign representative files a petition under Chapter 15 for recognition of a foreign proceeding, the representative</p>

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<p>of the Code, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition:</p> <p>(A) a corporate ownership statement containing the information described in Rule 7007.1; and (B) unless the court orders otherwise, a list containing the names and addresses of all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code.</p> <p>(5) Extension of Time. Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under § 705 or appointed under § 1102 of the Code, or other party as the court may direct.</p>	<p>must—in addition to the documents required by § 1515—include with the petition:</p> <p>(A) a corporate-ownership statement containing the information described in Rule 7007.1; and</p> <p>(B) unless the court orders otherwise, a list containing the names and addresses of:</p> <p>(i) all persons or bodies authorized to administer the debtor’s foreign proceedings;</p> <p>(ii) all entities against whom provisional relief is sought under § 1519; and</p> <p>(iii) all parties to litigation pending in the United States in which the debtor was a party when the petition was filed.</p> <p><b>(5) <i>Extending the Time to File.</i></b> On motion and for cause, the court may extend the time to file any list required by this Rule 1007(a). Notice of the motion must be given to:</p> <ul style="list-style-type: none"> <li>• the United States trustee;</li> <li>• any trustee;</li> <li>• any committee elected under § 705 or appointed under § 1102; and</li> <li>• any other party as the court orders.</li> </ul>
<p>(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.</p> <p>(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed</p>	<p><b>(b) Schedules, Statements, and Other Documents.</b></p> <p><b>(1) <i>In General.</i></b> Except in a Chapter 9 case or when the court orders otherwise, the debtor must file—prepared as prescribed by the appropriate Official Form, if any—</p>

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<p>by the appropriate Official Forms, if any:</p> <ul style="list-style-type: none"> <li>(A) schedules of assets and liabilities;</li> <li>(B) a schedule of current income and expenditures;</li> <li>(C) a schedule of executory contracts and unexpired leases;</li> <li>(D) a statement of financial affairs;</li> <li>(E) copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social security number or individual taxpayer-identification number; and</li> <li>(F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code.</li> </ul> <p>(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.</p> <p>(3) Unless the United States trustee has determined that the credit counseling requirement of § 109(h) does not apply in the district, an individual debtor must file a statement of compliance with the credit counseling requirement, prepared as prescribed by the appropriate Official Form which must include one of the following:</p>	<ul style="list-style-type: none"> <li>(A) a schedule of assets and liabilities;</li> <li>(B) a schedule of current income and expenditures;</li> <li>(C) a schedule of executory contracts and unexpired leases;</li> <li>(D) a statement of financial affairs;</li> <li>(E) copies of all payment advices or other evidence of payment that the debtor received from any employer within 60 days before the petition was filed—with all but the last 4 digits of the debtor's social-security number or individual taxpayer-identification number deleted; and</li> <li>(F) a record of the debtor's interest, if any, in an account or program of the type specified in § 521(c).</li> </ul> <p>(2) <b>Statement of Intention.</b> In a Chapter 7 case, an individual debtor must:</p> <ul style="list-style-type: none"> <li>(A) file the statement of intention required by § 521(a) (Form 108); and</li> <li>(B) before or upon filing, serve a copy on the trustee and the creditors named in the statement.</li> </ul> <p>(3) <b>Credit-Counseling Statement.</b> Unless the United States trustee has determined that the requirement to file a credit-counseling statement under § 109(h) does not apply in the district, an individual debtor must file a statement of compliance (included in Form 101). The debtor must include one of the following:</p> <ul style="list-style-type: none"> <li>(A) a certificate and any debt-repayment plan required by § 521(b);</li> </ul>

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<p>(A) an attached certificate and debt repayment plan, if any, required by § 521(b);</p> <p>(B) a statement that the debtor has received the credit counseling briefing required by § 109(h)(1) but does not have the certificate required by § 521(b);</p> <p>(C) a certification under § 109(h)(3); or</p> <p>(D) a request for a determination by the court under § 109(h)(4).</p> <p>(4) Unless § 707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form.</p> <p>(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.</p> <p>(6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with § 1325(b)(3), prepared as prescribed by the appropriate Official Form.</p>	<p>(B) a statement that the debtor has received the credit-counseling briefing required by § 109(h)(1), but does not have a § 521(b) certificate;</p> <p>(C) a certification under § 109(h)(3); or</p> <p>(D) a request for a court determination under § 109(h)(4).</p> <p>(4) <b><i>Current Monthly Income—Chapter 7.</i></b> Unless § 707(b)(2)(D) applies, an individual debtor in a Chapter 7 case must:</p> <p>(A) file a statement of current monthly income (Form 122A-1); and</p> <p>(B) if that income exceeds the median family income for the debtor’s state and household size, file the Chapter 7 means-test calculation (Form 122A-2).</p> <p>(5) <b><i>Current Monthly Income—Chapter 11.</i></b> An individual debtor in a Chapter 11 case must file a statement of current monthly income (Form 122B).</p> <p>(6) <b><i>Current Monthly Income—Chapter 13.</i></b> A debtor in a Chapter 13 case must:</p> <p>(A) file a statement of current monthly income (Form 122C-1); and</p> <p>(B) if that income exceeds the median family income for the debtor’s state and household size, file the Chapter 13 calculation of disposable income (Form 122C-2).</p> <p>(7) <b><i>Personal Financial-Management Course.</i></b> Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition, an individual debtor in a</p>

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<p>(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:</p> <p style="padding-left: 40px;">(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and</p> <p style="padding-left: 40px;">(B) An individual debtor in a chapter 11 case shall file the statement if § 1141(d)(3) applies.</p> <p>(8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1), the debtor shall file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B).</p>	<p>Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a statement that such a course has been completed (Form 423).</p> <p><b>(8) <i>Limitation on Homestead Exemption.</i></b> This Rule 1007(b)(8) applies if an individual debtor in a Chapter 11, 12, or 13 case claims an exemption under § 522(b)(3)(A) in property of the type described in § 522(p)(1) and the property value exceeds the amount specified in § 522(q)(1). The debtor must file a statement about any pending proceeding in which the debtor may be found:</p> <p style="padding-left: 40px;">(A) guilty of the type of felony described in § 522(q)(1)(A); or</p> <p style="padding-left: 40px;">(B) liable for the type of debt described in § 522(q)(1)(B).</p>
<p>(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days after the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who</p>	<p><b>(c) Time to File.</b></p> <p><b>(1) <i>Voluntary Case—Various Documents.</i></b> Unless (d), (e), (f), or (h) provides otherwise, the debtor in a voluntary case must file the documents required by (b)(1), (b)(4), (b)(5), and (b)(6) with the petition or within 14 days after it is filed.</p> <p><b>(2) <i>Involuntary Case—Various Documents.</i></b> In an involuntary case, the debtor must file the documents required by (b)(1) within 14 days after the order for relief is entered.</p> <p><b>(3) <i>Credit-Counseling Documents.</i></b> In a voluntary case, the documents required by (b)(3)(A), (C), or (D) must be filed</p>

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<p>has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.</p>	<p>with the petition. Unless the court orders otherwise, a debtor who has filed a statement under (b)(3)(B) must file the documents required by (b)(3)(A) within 14 days after the order for relief is entered.</p> <p>(4) <b><i>Financial-Management Course.</i></b> Unless the court extends the time to file, an individual debtor must file the statement required by (b)(7) as follows:</p> <p>(A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and</p> <p>(B) in a Chapter 11 or Chapter 13 case, before the last payment is made under the plan or before a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b).</p> <p>(5) <b><i>Limitation on Homestead Exemption.</i></b> The debtor must file the statement required by (b)(8) no earlier than the date of the last payment made under the plan, or the date a motion for a discharge is filed under § 1141(d)(5)(B), 1228(b), or 1328(b).</p> <p>(6) <b><i>Documents in a Converted Case.</i></b> Unless the court orders otherwise, a document filed before a case is converted to another chapter is considered filed in the converted case.</p> <p>(7) <b><i>Extending the Time to File.</i></b> Except as § 1116(3) provides otherwise, the court, on motion and for cause, may extend the time to file a document under this rule. The movant must give notice of the motion to:</p> <ul style="list-style-type: none"> <li>• the United States trustee;</li> <li>• any committee elected under § 705 or appointed under § 1102; and</li> </ul>

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	<ul style="list-style-type: none"> <li>• any trustee, examiner, and other party as the court directs.</li> </ul> <p>If the motion is granted, notice must be given to the United States trustee and to any committee, trustee, and other party as the court orders.</p>
<p>(d) LIST OF 20 LARGEST CREDITORS IN CHAPTER 9 MUNICIPALITY CASE OR CHAPTER 11 REORGANIZATION CASE. In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code.</p>	<p><b>(d) List of the 20 Largest Unsecured Creditors in a Chapter 9 or Chapter 11 Case.</b> In addition to the lists required by (a), a debtor in a Chapter 9 case or in a voluntary Chapter 11 case must file with the petition a list containing the names, addresses, and claims of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form (Form 104 or 204). In an involuntary Chapter 11 case, the debtor must file the list within 2 days after the order for relief is entered under § 303(h).</p>
<p>(e) LIST IN CHAPTER 9 MUNICIPALITY CASES. The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.</p>	<p><b>(e) Chapter 9 Lists.</b> In a Chapter 9 case, the court must set the time for the debtor to file a list required by (a). If a proposed plan requires the assessments on real estate to be revised so that the proportion of special assessments or special taxes for some property will be different from the proportion in effect when the petition is filed, the debtor must also file a list that shows—for each adversely affected property—the name and address of each known holder of title, both legal and equitable. On motion and for cause, the court may modify the requirements of this Rule 1007(e) and those of (a).</p>

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<p>(f) STATEMENT OF SOCIAL SECURITY NUMBER. An individual debtor shall submit a verified statement that sets out the debtor’s social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.</p>	<p><b>(f) Social-Security Number.</b> In a voluntary case, an individual debtor must submit with the petition a statement that gives the debtor’s social-security number or states that the debtor does not have one (Form 121). In an involuntary case, the debtor must submit the statement within 14 days after the order for relief is entered.</p>
<p>(g) PARTNERSHIP AND PARTNERS. The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.</p>	<p><b>(g) Partnership Case.</b> The general partners of a debtor partnership must file for the partnership the list required by (a) and the documents required by (b)(1)(A)–(D). The court may order any general partner to file a statement of personal assets and liabilities and may set the deadline for doing so.</p>
<p>(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor’s knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer’s debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance</p>	<p><b>(h) Interests in Property Acquired or Arising After a Petition Is Filed.</b> After the petition is filed, in a Chapter 7, 11, 12, or 13 case, if the debtor acquires—or becomes entitled to acquire—an interest in property described in § 541(a)(5), the debtor must file a supplemental schedule and include any claimed exemption. Unless the court allows additional time, the debtor must file the schedule within 14 days after learning about the property interest. This duty continues even after the case is closed, except for property acquired after a plan is confirmed in a Chapter 11 case or a discharge is granted in a Chapter 12 or 13 case.</p>



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<p>with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.</p>	
<p>(i) DISCLOSURE OF LIST OF SECURITY HOLDERS. After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.</p>	<p><b>(i) Security Holders Known to Others.</b> After notice and a hearing and for cause, the court may direct an entity other than the debtor or trustee to:</p> <ol style="list-style-type: none"> <li>(1) disclose any list of the debtor’s security holders in its possession or under its control by:                     <ol style="list-style-type: none"> <li>(A) producing the list or a copy of it;</li> <li>(B) allowing inspection or copying; or</li> <li>(C) making any other disclosure; and</li> </ol> </li> <li>(2) indicate the name, address, and security held by each listed holder.</li> </ol>
<p>(j) IMPOUNDING OF LISTS. On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.</p>	<p><b>(j) Impounding Lists.</b> On motion of a party in interest and for cause, the court may impound any list filed under this rule and may refuse inspection. But the court may permit a party in interest to inspect or use an impounded list on terms prescribed by the court.</p>
<p>(k) PREPARATION OF LIST, SCHEDULES, OR STATEMENTS ON DEFAULT OF DEBTOR. If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these</p>	<p><b>(k) Debtor’s Failure to File a Required Document.</b> If a debtor fails to properly prepare and file a list, schedule, or statement (other than a statement of intention) as required by this rule, the court may order:</p>

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papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.	(1) that the trustee, a petitioning creditor, a committee, or other party do so within the time set by the court; and (2) that the cost incurred be reimbursed as an administrative expense.
(l) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule.	<b>(l) Copies to the United States Trustee.</b> The clerk must promptly send to the United States trustee a copy of every list, schedule, or statement filed under (a)(1), (a)(2), (b), (d), or (h).
(m) INFANTS AND INCOMPETENT PERSONS. If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).	<b>(m) Infant or Incompetent Person.</b> If a debtor knows that a person named in a list of creditors or in a schedule is an infant or is incompetent, the debtor must include the name, address, and legal relationship of any person on whom process would be served in an adversary proceeding against that person under Rule 7004(b)(2).

**Committee Note**

The language of Rule 1007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 1007(a)(4)(B), the order of (ii) and (iii) were switched. In addition, in what is now Rule 1007(a)(4)(B)(iii), the words “pending United States litigation” were changed to “litigation pending in the United States.”
- In Rule 1007(d), a comma was added between the words “excluding insiders” and “as prescribed.”
- In Rule 1007(i)(2), the words “each of them” were changed to “each listed holder.”
- In Rule 1007(k)(1), the words “to do so” were changed to “do so.”

### Summary of Public Comment

• **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC made several suggestions for this Rule. First, they noted that the order of subparts (a)(4)(B)(ii) and (iii) are inconsistent with the order for the very similar lists in Rule 1004.2(b) and Rule 2002(q)(1) and suggest reversing the two subparts. Second, in (c)(1) they find the phrase “after it is filed” to be ambiguous and think it should say “after the petition is filed.” Third, they suggested adding a comma in (d). In (i)(2) they suggested replacing “each of them” with “each listed holder.” And they pointed out a typo in (k)(1).

**Response:** The first suggestion is a good one. The rules should list the entities in the same order, and the change was made. The second suggestion was rejected, because the word “it” can refer only to the most recently-mentioned noun, which in (c)(1) is “the petition.” The third point is valid. The fourth point is accepted; “each listed holder” is an improvement. The typo in (k)(1) has been corrected.

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<b>Rule 1008. Verification of Petitions and Accompanying Papers</b>	<b>Rule 1008. Requirement to Verify Petitions and Accompanying Documents</b>
All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.	A petition, list, schedule, statement, and any amendment must be verified or must contain an unsworn declaration under 28 U.S.C. § 1746.

#### Committee Note

The language of Rule 1008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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#### Changes Made After Publication and Comment

- Committee note has been added.

#### Summary of Public Comment

- No comments were submitted.

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<p><b>Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements</b></p>	<p><b>Rule 1009. Amending a Voluntary Petition, List, Schedule, or Statement</b></p>
<p>(a) GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.</p>	<p>(a) <b>In General.</b></p> <p>(1) <i>By a Debtor.</i> A debtor may amend a voluntary petition, list, schedule, or statement at any time before the case is closed. The debtor must give notice of the amendment to the trustee and any affected entity.</p> <p>(2) <i>By a Party in Interest.</i> On motion of a party in interest and after notice and a hearing, the court may order a voluntary petition, list, schedule, or statement to be amended. The clerk must give notice of the amendment to entities that the court designates.</p>
<p>(b) STATEMENT OF INTENTION. The statement of intention may be amended by the debtor at any time before the expiration of the period provided in § 521(a) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected there-by.</p>	<p>(b) <b>Amending a Statement of Intention.</b> A debtor may amend a statement of intention at any time before the time provided in § 521(a)(2) expires. The debtor must give notice of the amendment to the trustee and any affected entity.</p>
<p>(c) STATEMENT OF SOCIAL SECURITY NUMBER. If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).</p>	<p>(c) <b>Incorrect Social-Security Number.</b> If a debtor learns that a social-security number shown on the statement submitted under Rule 1007(f) is incorrect, the debtor must:</p> <p>(1) promptly submit an amended statement with the correct number (Form 121); and</p> <p>(2) give notice of the amendment to all entities required to be listed under Rule 1007(a)(1) or (a)(2).</p>
<p>(d) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall promptly transmit to the United States trustee a copy of every amendment filed</p>	<p>(d) <b>Copy to the United States Trustee.</b> The clerk must promptly send a copy of every amendment filed under this rule to the United States trustee.</p>

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or submitted under subdivision (a), (b), or (c) of this rule.	

**Committee Note**

The language of Rule 1009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 1010. Service of Involuntary Petition and Summons</b></p>	<p><b>Rule 1010. Serving an Involuntary Petition and Summons</b></p>
<p>(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS. On the filing of an involuntary petition, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party’s last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) F.R.Civ.P. apply when service is made or attempted under this rule.</p>	<p><b>(a) In General.</b> After an involuntary petition has been filed, the clerk must promptly issue a summons for service on the debtor. The summons must be served with a copy of the petition in the manner that Rule 7004(a) and (b) provide for service of a summons and complaint. If service cannot be so made, the court may order service by mail to the debtor’s last known address, and by at least one publication as the court orders. Service may be made anywhere. Rule 7004(e) and Fed. R. Civ. P. 4(l) govern service under this rule.</p>
<p>(b) CORPORATE OWNERSHIP STATEMENT. Each petitioner that is a corporation shall file with the involuntary petition a corporate ownership statement containing the information described in Rule 7007.1.</p>	<p><b>(b) Corporate-Ownership Statement.</b> A corporation that files an involuntary petition must file and serve with the petition a corporate-ownership statement containing the information described in Rule 7007.1.</p>

**Committee Note**

The language of Rule 1010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 1010(a), the words “under this rule” were inserted at the end of the last sentence.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC suggested that the second sentence in (a) begin with “The summons must be served on the debtor” rather than just “The summons must be served.” They also suggested that the last sentence, which currently says that “Rule 7004(e) and Fed. R. Civ. P. 4(l) govern service,” be expanded by saying “under this rule.”

**Response:** The first sentence of (a) requires the clerk to “promptly issue a summons for service on the debtor.” The Advisory Committee believes it is clear that the second sentence is referring to the summons described in the first sentence, which is for service on the debtor. Therefore, no change is necessary. Adding “under this rule” to the last sentence is consistent with the original rule, and was accepted.



ORIGINAL	REVISION
<p><b>Rule 1011. Responsive Pleading or Motion in Involuntary Cases</b></p>	<p><b>Rule 1011. Responsive Pleading in an Involuntary Case; Effect of a Motion</b></p>
<p>(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.</p>	<p>(a) <b>Who May Contest a Petition.</b> A debtor may contest an involuntary petition filed against it. In a partnership case under Rule 1004, a nonpetitioning general partner—or a person who is alleged to be a general partner but denies the allegation—may contest the petition.</p>
<p>(b) DEFENSES AND OBJECTIONS; WHEN PRESENTED. Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 21 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.</p>	<p>(b) <b>Defenses and Objections; Time to File.</b> A defense or objection to the petition must be presented as prescribed by Fed. R. Civ. P. 12. It must be filed and served within 21 days after the summons is served. But if service is made by publication on a party or partner who does not reside in—or cannot be found in—the state where the court sits, the court must set the time to file and serve the answer.</p>
<p>(c) EFFECT OF MOTION. Service of a motion under Rule 12(b) F.R.Civ.P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F.R.Civ.P.</p>	<p>(c) <b>Effect of a Motion.</b> Serving a motion under Fed. R. Civ. P. 12(b) extends the time to file and serve an answer as Fed. R. Civ. P. 12(a) permits.</p>
<p>(d) CLAIMS AGAINST PETITIONERS. A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.</p>	<p>(d) <b>Debtor’s Claim Against a Petitioning Creditor.</b> A debtor’s answer must not assert a claim against a petitioning creditor except to defeat the petition.</p>
<p>(e) OTHER PLEADINGS. No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service.</p>	<p>(e) <b>Limit on Pleadings.</b> No pleading other than an answer to the petition is allowed, but the court may order a reply to an answer and set the time for filing and service.</p>
<p>(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition is a</p>	<p>(f) <b>Corporate-Ownership Statement.</b> A corporation that responds to the petition must file a corporate-ownership statement</p>

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corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.	containing the information described in Rule 7007.1. The corporation must do so with its first appearance, pleading, motion, response, or other first request to the court.

#### Committee Note

The language of Rule 1011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

#### Changes Made After Publication and Comment

- Committee note has been added.

#### Summary of Public Comment

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 1012. Responsive Pleading in Cross-Border Cases</b>	<b>Rule 1012. Contesting a Petition in a Chapter 15 Case</b>
(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.	<b>(a) Who May Contest the Petition.</b> A debtor or a party in interest may contest a Chapter 15 petition for recognition of a foreign proceeding.
(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.	<b>(b) Time to File a Response.</b> Unless the court sets a different time, a response to the petition must be filed at least 7 days before the date set for a hearing on the petition.
(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.	<b>(c) Corporate-Ownership Statement.</b> A corporation that responds to the petition must file a corporate-ownership statement containing the information described in Rule 7007.1. The corporation must do so with its first appearance, pleading, motion, response, or other first request to the court.

**Committee Note**

The language of Rule 1012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 1013. Hearing and Disposition of a Petition in an Involuntary Case</b>	<b>Rule 1013. Contested Petition in an Involuntary Case; Default</b>
(a) CONTESTED PETITION. The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order.	(a) <b>Hearing and Disposition.</b> When a petition in an involuntary case is contested, the court must: <ol style="list-style-type: none"> <li>(1) rule on the issues presented at the earliest practicable time; and</li> <li>(2) promptly issue an order for relief, dismiss the petition, or issue any other appropriate order.</li> </ol>
(b) DEFAULT. If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief requested in the petition.	(b) <b>Default.</b> If the petition is not contested within the time allowed by Rule 1011, the court must issue the order for relief on the next day or as soon as practicable.
[(c) ORDER FOR RELIEF]	

**Committee Note**

The language of Rule 1013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 1014. Dismissal and Change of Venue</b></p>	<p><b>Rule 1014. Transferring a Case to Another District; Dismissing a Case Improperly Filed</b></p>
<p>(a) DISMISSAL AND TRANSFER OF CASES.</p> <p>(1) Cases Filed in Proper District. If a petition is filed in the proper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.</p> <p>(2) Cases Filed in Improper District. If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.</p>	<p>(a) <b>Dismissal or Transfer.</b></p> <p>(1) <i>Petitions Filed in the Proper District.</i> If a petition is filed in the proper district, the court may transfer the case to another district in the interest of justice or for the parties' convenience. The court may do so:</p> <p>(A) on its own or on timely motion of a party in interest; and</p> <p>(B) only after a hearing on notice to the petitioner, United States trustee, and other entities as the court orders.</p> <p>(2) <i>Petitions Filed in an Improper District.</i> If a petition is filed in an improper district, the court may dismiss the case or may transfer it to another district on the same grounds and under the same procedures as stated in (1).</p>
<p>(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS. If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, the court in the district in which the first-filed petition is pending may determine, in the interest of justice or</p>	<p>(b) <b>Petitions Involving the Same or Related Debtors Filed in Different Districts.</b></p> <p>(1) <i>Scope.</i> This Rule 1014(b) applies if petitions commencing cases or seeking recognition under Chapter 15 are filed in different districts by, regarding, or against:</p> <p>(A) the same debtor;</p> <p>(B) a partnership and one or more of its general partners;</p> <p>(C) two or more general partners; or</p> <p>(D) a debtor and an affiliate.</p>

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<p>for the convenience of the parties, the district or districts in which any of the cases should proceed. The court may so determine on motion and after a hearing, with notice to the following entities in the affected cases: the United States trustee, entities entitled to notice under Rule 2002(a), and other entities as the court directs. The court may order the parties to the later-filed cases not to proceed further until it makes the determination.</p>	<p>(2) <b><i>Court Action.</i></b> The court in the district where the first petition is filed may determine the district or districts in which the cases should proceed in the interest of justice or for the parties’ convenience. The court may do so on timely motion and after a hearing on notice to:</p> <ul style="list-style-type: none"> <li>• the United States trustee;</li> <li>• entities entitled to notice under Rule 2002(a); and</li> <li>• other entities as the court orders.</li> </ul> <p>(3) <b><i>Later-Filed Petitions.</i></b> The court in the district where the first petition is filed may order the parties to the later-filed cases not to proceed further until the motion is decided.</p>

**Committee Note**

The language of Rule 1014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 1014(b)(2), the words “in which” were replaced with “where” in the first sentence.
- In Rule 1014(b)(3), the words “court may order the parties in a case commenced by a petition” were replaced with “court in the district where the first petition is filed may order the parties to the later-filed cases.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** -- The NBC questioned the language of (b)(3) which states that “The court may order the parties in a case commenced by a later-filed petition not to proceed further until the motion is decided.” They noted that “the motion” is not mentioned in (b)(3), and suggested that the words “a motion under (b)(2)” be substituted.

***Response:*** The only motion mentioned in Rule 1014 is the motion in (b)(2). Therefore there is no need for the cross-reference. The section has been rewritten by the style consultants to make it clearer.

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<p><b>Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court</b></p>	<p><b>Rule 1015. Consolidating or Jointly Administering Cases Pending in the Same District</b></p>
<p>(a) CASES INVOLVING SAME DEBTOR. If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.</p>	<p>(a) <b>Consolidating Cases Involving the Same Debtor.</b> The court may consolidate two or more cases regarding or brought by or against the same debtor that are pending in its district.</p>
<p>(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).</p>	<p>(b) <b>Jointly Administering Cases Involving Related Debtors; Exemptions of Spouses; Protective Orders to Avoid Conflicts of Interest.</b></p> <p>(1) <b><i>In General.</i></b> The court may order joint administration of the estates in a joint case or in two or more cases pending in the court if they are brought by or against:</p> <ul style="list-style-type: none"> <li>(A) spouses;</li> <li>(B) a partnership and one or more of its general partners;</li> <li>(C) two or more general partners; or</li> <li>(D) a debtor and an affiliate.</li> </ul> <p>(2) <b><i>Potential Conflicts of Interest.</i></b> Before issuing a joint-administration order, the court must consider how to protect the creditors of different estates against potential conflicts of interest.</p> <p>(3) <b><i>Exemptions in Cases Involving Spouses.</i></b> If spouses have filed separate petitions, with one electing exemptions under § 522(b)(2) and the other under § 522(b)(3), and the court orders joint administration, that order must:</p> <ul style="list-style-type: none"> <li>(A) set a reasonable time for the debtors to elect the same exemptions; and</li> </ul>



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	(B) advise the debtors that if they fail to do so, they will be considered to have elected exemptions under § 522(b)(2).
(c) EXPEDITING AND PROTECTIVE ORDERS. When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.	<b>(c) Protective Orders to Avoid Unnecessary Costs and Delay.</b> When cases are consolidated or jointly administered, the court may issue orders to avoid unnecessary costs and delay while still protecting the parties' rights under the Code.

**Committee Note**

The language of Rule 1015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 1016. Death or Incompetency of Debtor</b></p> <p>Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer’s debt adjustment, or individual’s debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.</p>	<p><b>Rule 1016. Death or Incompetency of a Debtor</b></p> <p>(a) <b>Chapter 7 Case.</b> In a Chapter 7 case, the debtor’s death or incompetency does not abate the case. The case continues, as far as possible, as though the death or incompetency had not occurred.</p> <p>(b) <b>Chapter 11, 12, or 13 Case.</b> Upon the debtor’s death or incompetency in a Chapter 11, 12, or 13 case, the court may dismiss the case or may continue it if further administration is possible and is in the parties’ best interests. If the court chooses to continue, it must do so, as far as possible, as though the death or incompetency had not occurred.</p>

**Committee Note**

The language of Rule 1016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC stated that they believe the revised final sentence is a substantive change from the original rule. The last sentence of the Rule states that “If the court chooses to continue [a Chapter 11, 12, or 13 case upon the debtor’s death or incompetency], it must do so, as far as possible, as though the death or incompetency had not occurred.” The original rule said that “if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” The NBC reads the words “it must do so” as changing the substance of the rule from permissive to mandatory.

***Response:*** The Advisory Committee believes the NBC misreads the restyled rule. The restyled rule clearly states that upon death or incompetency “the court **may** dismiss the case or **may** continue it if further administration is possible and is in the parties’ best interests.” (Emphasis supplied.) The mandatory language applies only to the manner in which the case proceeds once the court has chosen to do so. The last sentence of the restyled rule begins “If the court **chooses** to continue ....” (Emphasis supplied). The Advisory Committee believes that is the meaning of the original rule and there is no substantive change. No change was made in response to this comment.

ORIGINAL	REVISION
<p><b>Rule 1017. Dismissal or Conversion of Case; Suspension</b></p>	<p><b>Rule 1017. Dismissing a Case; Suspending Proceedings; Converting a Case to Another Chapter</b></p>
<p>(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002. For the purpose of the notice, the debtor shall file a list of creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it.</p>	<p>(a) <b>Dismissing a Case.</b> Except as provided in § 707(a)(3), 707(b), 1208(b), or 1307(b), or in Rule 1017(b), (c), or (e), the court must conduct a hearing on notice under Rule 2002 before dismissing a case on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties. For the purpose of the notice, a debtor who has not already done so must, before the court’s deadline, file a list of creditors and their addresses. If the debtor fails to timely file the list, the court may order the debtor or another entity to do so.</p>
<p>(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.</p> <p>(1) If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.</p> <p>(2) If the case is dismissed or closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.</p>	<p>(b) <b>Dismissing a Case for Failure to Pay an Installment Toward the Filing Fee.</b> If the debtor fails to pay any installment toward the filing fee, the court may dismiss the case after a hearing on notice to the debtor and trustee. If the court dismisses or closes the case without full payment of the filing fee, previous installment payments must be distributed as if full payment had been made.</p>
<p>(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United</p>	<p>(c) <b>Dismissing a Voluntary Chapter 7 or Chapter 13 Case for Failure to File a Document on Time.</b> On motion of the United States trustee, the court may dismiss a voluntary Chapter 7 case under § 707(a)(3), or a Chapter 13 case under § 1307(c)(9), for a failure to timely file the information required by § 521(a)(1). But the court may do so only after a hearing on</p>

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<p>States trustee on the debtor, the trustee, and any other entities as the court directs.</p>	<p>notice served by the United States trustee on the debtor, trustee, and any other entity as the court orders.</p>
<p>(d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before a hearing on notice as provided in Rule 2002(a).</p>	<p><b>(d) Dismissing a Case or Suspending Proceedings Under § 305.</b> The court may dismiss a case or suspend proceedings under § 305 only after a hearing on notice under Rule 2002(a).</p>
<p>(e) DISMISSAL OF AN INDIVIDUAL DEBTOR’S CHAPTER 7 CASE, OR CONVERSION TO A CASE UNDER CHAPTER 11 OR 13, FOR ABUSE. The court may dismiss or, with the debtor’s consent, convert an individual debtor’s case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs.</p> <p>(1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. The party filing the motion shall set forth in the motion all matters to be considered at the hearing. In addition, a motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.</p> <p>(2) If the hearing is set on the court’s own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing.</p>	<p><b>(e) Dismissing an Individual Debtor’s Chapter 7 Case for Abuse; Converting the Case to Chapter 11 or 13.</b></p> <p>(1) <b><i>In General.</i></b> On motion under § 707(b), the court may dismiss an individual debtor’s Chapter 7 case for abuse or, with the debtor’s consent, convert it to Chapter 11 or 13. The court may do so only after a hearing on notice to:</p> <ul style="list-style-type: none"> <li>• the debtor,</li> <li>• the trustee,</li> <li>• the United States trustee, and</li> <li>• any other entity as the court orders.</li> </ul> <p>(2) <b><i>Time to File.</i></b> Except as § 704(b)(2) provides otherwise, a motion to dismiss a case for abuse under § 707(b) or (c) must be filed within 60 days after the first date set for the meeting of creditors under § 341(a). On request made within the 60-day period, the court may, for cause, extend the time to file. The motion must:</p> <p>(A) set forth all matters to be considered at the hearing; and</p> <p>(B) if made under § 707(b)(1) and (3), state with particularity the circumstances alleged to constitute abuse.</p>

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	<p>(3) <b><i>Hearing on the Court’s Own Motion.</i></b> If the hearing is set on the court’s own motion, the clerk must serve notice on the debtor within 60 days after the first date set for the meeting of creditors under § 341(a). The notice must set forth all matters to be considered at the hearing.</p>
<p>(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.</p> <p>(1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).</p> <p>(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.</p> <p>(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.</p>	<p>(f) <b>Procedures for Dismissing, Suspending, or Converting a Case.</b></p> <p>(1) <b><i>In General.</i></b> Rule 9014 governs a proceeding to dismiss or suspend a case or to convert it to another chapter—except under § 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).</p> <p>(2) <b><i>Cases Requiring a Motion.</i></b> Dismissing or converting a case under § 706(a), 1112(a), 1208(b), or 1307(b) requires a motion filed and served as required by Rule 9013.</p> <p>(3) <b><i>Conversion Date in a Chapter 12 or 13 Case.</i></b> If the debtor files a conversion notice under § 1208(a) or § 1307(a), the case will be converted without court order, and the filing date of the notice becomes the conversion date in applying § 348(c) or Rule 1019. The clerk must promptly send a copy of the notice to the United States trustee.</p>

**Committee Note**

The language of Rule 1017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

- In Rule 1017(a), the words “dismissing a case for any reason” were replaced with “dismissing a case on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC believes that replacing the language in the original rule in (a), “on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties,” with the phrase “for any reason” is a substantive change.

***Response:*** The Advisory Committee was not certain whether there was a substantive difference, but in order to avoid any issue, it concluded that use of the original language was preferable.

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<p><b>Rule 1018. Contested Involuntary Petitions; Contested Petitions Commencing Chapter 15 Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings</b></p>	<p><b>Rule 1018. Contesting a Petition in an Involuntary or Chapter 15 Case; Vacating an Order for Relief; Applying Part VII Rules</b></p>
<p>Unless the court otherwise directs and except as otherwise prescribed in Part I of these rules, the following rules in Part VII apply to all proceedings contesting an involuntary petition or a chapter 15 petition for recognition, and to all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings contesting an involuntary petition or a chapter 15 petition for recognition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.</p>	<p><b>(a) Applying Part VII Rules.</b> Unless the court orders or a Part I rule provides otherwise, Rules 7005, 7008–10, 7015–16, 7024–26, 7028–37, 7052, 7054, 7056, and 7062—together with any other Part VII rules as the court may direct—apply to the following:</p> <ol style="list-style-type: none"> <li>(1) a proceeding contesting either an involuntary petition or a Chapter 15 petition for recognition; and</li> <li>(2) a proceeding to vacate an order for relief.</li> </ol> <p><b>(b) References to “Adversary Proceedings.”</b> Any reference to “adversary proceedings” in the rules listed in (a) is a reference to the proceedings listed in (a)(1)–(2).</p> <p><b>(c) “Complaint” Means “Petition.”</b> For the proceedings described in (a), a reference to the “complaint” in the Federal Rules of Civil Procedure must be read as a reference to the petition.</p>

**Committee Note**

The language of Rule 1018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.



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<p><b>Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer’s Debt Adjustment Case, or Chapter 13 Individual’s Debt Adjustment Case to a Chapter 7 Liquidation Case</b></p>	<p><b>Rule 1019. Converting or Reconverting a Chapter 11, 12, or 13 Case to Chapter 7</b></p>
<p>When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:</p> <p>(1) Filing of Lists, Inventories, Schedules, Statements.</p> <p>(A) Lists, inventories, schedules, and statements of financial affairs theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7.</p> <p>(B) If a statement of intention is required, it shall be filed within 30 days after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an extension of time for cause only on written motion filed, or oral request made during a hearing, before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.</p>	<p>(a) <b>Papers Previously Filed; New Filing Dates; Statement of Intention.</b></p> <p>(1) <i>Papers Previously Filed.</i> Unless the court orders otherwise, when a Chapter 11, 12, or 13 case is converted or reconverted to Chapter 7, the lists, inventories, schedules, and statements of financial affairs previously filed are considered filed in the Chapter 7 case. If they have not been previously filed, the debtor must comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the same date as the order directing that the case continue under Chapter 7.</p> <p>(2) <i>Statement of Intention.</i> A statement of intention, if required, must be filed within 30 days after the conversion order is entered or before the first date set for the meeting of creditors, whichever is earlier. The court may, for cause, extend the time to file only on motion filed—or on oral request made during a hearing—before the time has expired. Notice of an extension must be given to the United States trustee and to any committee, trustee, or other party as the court orders.</p>
<p>(2) New Filing Periods.</p> <p>(A) A new time period for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002,</p>	<p>(b) <b>New Period to File a § 707(b) or (c) Motion, a Proof of Claim, an Objection to a Discharge, or a Complaint to Determine Dischargeability.</b></p> <p>(1) <i>When a New Period Begins.</i> When a case is converted to Chapter 7, a new</p>

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<p>4004, or 4007, but a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.</p> <p>(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:</p> <p>(i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or</p> <p>(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.</p>	<p>Period begins under Rule 1017, 3002, 4004, or 4007 for filing:</p> <p>(A) a motion under § 707(b) or (c);</p> <p>(B) a proof of claim;</p> <p>(C) a complaint objecting to a discharge; or</p> <p>(D) a complaint to determine whether a specific debt may be discharged.</p> <p><b>(2) <i>When a New Period Does Not Begin.</i></b> No new period to file begins when a case is reconverted to Chapter 7 after a previous conversion to Chapter 11, 12, or 13 if the time to file in the original Chapter 7 case has expired.</p> <p><b>(3) <i>New Period to Object to a Claimed Exemption.</i></b> When a case is converted to Chapter 7, a new period begins under Rule 4003(b) to object to a claimed exemption unless:</p> <p>(A) more than 1 year has elapsed since the court issued the first order confirming a plan under Chapter 11, 12, or 13, or</p> <p>(B) the case was previously pending in Chapter 7 and time has expired to object to a claimed exemption in the original Chapter 7 case.</p>
<p><b>(3) Claims Filed Before Conversion.</b> All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case.</p>	<p><b>(c) Proof of Claim Filed Before Conversion.</b> A proof of claim filed by a creditor before conversion is considered filed in the Chapter 7 case.</p>
<p><b>(4) Turnover of Records and Property.</b> After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and</p>	<p><b>(d) Turning Over Records and Property.</b> Unless the court orders otherwise, after a trustee in the Chapter 7 case qualifies or assumes duties, the debtor in possession—or the previously acting trustee in the Chapter 11, 12, or 13 case—must promptly turn over to the Chapter 7 trustee all</p>

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<p>property of the estate in the possession or control of the debtor in possession or trustee.</p>	<p>Records and property of the estate that are in its possession or control.</p>
<p>(5) Filing Final Report and Schedule of Postpetition Debts.</p> <p>(A) Conversion of Chapter 11 or Chapter 12 Case. Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:</p> <p>(i) not later than 14 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and</p> <p>(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;</p> <p>(B) Conversion of Chapter 13 Case. Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,</p> <p>(i) the debtor, not later than 14 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and</p> <p>(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;</p> <p>(C) Conversion After Confirmation of a Plan. Unless the court</p>	<p>(e) <b>Final Report and Account; Schedule of Unpaid Postpetition Debts.</b></p> <p>(1) <b><i>In a Chapter 11 or Chapter 12 Case.</i></b> Unless the court orders otherwise, when a Chapter 11 or 12 case is converted to Chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion must:</p> <p>(A) within 14 days after conversion, file a schedule of unpaid debts incurred after the petition was filed but before conversion and include the name and address of each claim holder; and</p> <p>(B) within 30 days after conversion, file and send to the United States trustee a final report and account.</p> <p>(2) <b><i>In a Chapter 13 Case.</i></b> Unless the court orders otherwise, when a Chapter 13 case is converted to Chapter 7:</p> <p>(A) within 14 days after conversion, the debtor must file a schedule of unpaid debts incurred after the petition was filed but before conversion and include the name and address of each claim holder; and</p> <p>(B) within 30 days after conversion, the trustee must file and send to the United States trustee a final report and account.</p> <p>(3) <b><i>Converting a Case to Chapter 7 After a Plan Has Been Confirmed.</i></b> Unless the court orders otherwise, if a case under Chapter 11, 12, or 13 is converted to a case under Chapter 7</p>

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<p>orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:</p> <p>(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;</p> <p>(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and</p> <p>(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.</p> <p>(D) Transmission to United States Trustee. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).</p>	<p>After a plan is confirmed, the debtor must file:</p> <p>(A) a schedule of property that was acquired after the petition was filed but before conversion and was not listed in the final report and account, except when a Chapter 13 case is converted to Chapter 7 and § 348(f)(2) does not apply;</p> <p>(B) a schedule of unpaid debts that were incurred after confirmation but before conversion and were not listed in the final report and account; and</p> <p>(C) a schedule of executory contracts and unexpired leases that were entered into or assumed after the petition was filed but before conversion.</p> <p><b>(4) Copy to the United States Trustee.</b> The clerk must promptly send to the United States trustee a copy of any schedule filed under this Rule 1019(e).</p>
<p>(6) Postpetition Claims; Preconversion Administrative Expenses; Notice. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)–(d) and 3002. Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the</p>	<p><b>(f) Postpetition Claims; Preconversion Administrative Expenses.</b></p> <p><b>(1) Request to Pay an Administrative Expense; Time to File.</b> A request to pay an administrative expense incurred before conversion is timely filed under § 503(a) if it is filed before conversion or within a time set by the court. Such a request by a governmental unit is timely if it is filed:</p> <p>(A) before conversion; or</p> <p>(B) within 180 days after conversion or within a time set by the court, whichever is later.</p> <p><b>(2) Proof of Claim Against the Debtor or the Estate.</b> A proof of claim under § 348(d) against either the debtor or</p>

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<p>time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d).</p>	<p>the estate may be filed as specified in Rules 3001(a)–(d) and 3002.</p> <p><i>(3) Giving Notice of Certain Time Limits.</i> After the filing of a schedule of debts incurred after the case was commenced but before conversion, the clerk, or the court’s designee, must notify the entities listed on the schedule of:</p> <p>(A) the time to request payment of an administrative expense; and</p> <p>(B) the time to file a proof of claim under § 348(d), unless a notice of insufficient assets to pay a dividend has been mailed under Rule 2002(e).</p>

**Committee Note**

The language of Rule 1019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 1019(f)(1), the words “A request” were replaced with “Such a request.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC raised three issues. First, in (c), they suggested that removing the word “actually” before filed may work a substantive change, because some claims are deemed filed. Second, they objected to describing a trustee or debtor in possession in (d) as “it”. Third, in (f)(1), they suggested adding the word “such” before “a request by a governmental unit.”

**Response:** Although the word “actually” is in the existing rule, the Advisory Committee does not think it has any substantive purpose. Claims that are deemed filed are not filed by a creditor, and (c) applies only to claims filed by a creditor. To expand it to deemed claims would be a substantive change. In clause (d), the Advisory Committee does not believe there is any confusion about what is meant by “its” and no change should be made. In clause (f)(1), the suggestion was accepted.

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<p><b>Rule 1020. Small Business Chapter 11 Reorganization Case</b></p>	<p><b>Rule 1020. Designating a Chapter 11 Debtor as a Small Business Debtor</b></p>
<p>(a) SMALL BUSINESS DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor’s statement under this subdivision, unless and until the court enters an order finding that the debtor’s statement is incorrect.</p>	<p>(a) <b>In General.</b> In a voluntary Chapter 11 case, the debtor must state in the petition whether the debtor is a small business debtor. In an involuntary case, the debtor must do so in a statement filed within 14 days after the order for relief is entered. Unless (c) provides otherwise, the case must proceed in accordance with the debtor’s statement, unless and until the court issues an order finding that the debtor’s statement is incorrect.</p>
<p>(b) OBJECTING TO DESIGNATION. Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor’s statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.</p>	<p>(b) <b>Objecting to the Designation.</b> Unless (c) provides otherwise, the United States trustee or a party in interest may object to the debtor’s designation. The objection must be filed within 30 days after the conclusion of the meeting of creditors held under § 341(a) or within 30 days after an amendment to the designation is filed, whichever is later.</p>
<p>(c) APPOINTMENT OF COMMITTEE OF UNSECURED CREDITORS. If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this</p>	<p>(c) <b>When a Committee of Unsecured Creditors Has Been Appointed.</b></p> <p>(1) <b><i>Determining Whether the Committee Is Active and Representative.</i></b> If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case may proceed as a small business case only if, and from the time when, the court determines that:</p> <p>(A) the committee is not sufficiently active and representative in</p>

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<p>subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.</p>	<p>providing effective oversight of the debtor; and</p> <p>(B) the debtor satisfies all other requirements for a small business debtor.</p> <p><b>(2) <i>Motion for a Court Determination.</i></b>                      Within a reasonable time after the committee has become insufficiently active or representative, the United States trustee or a party in interest may move for a determination by the court. The debtor may do so at any time.</p>
<p>(d) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor’s attorney; the United States trustee; the trustee; any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.</p>	<p><b>(d) Procedure; Service.</b> An objection or request under this rule is governed by Rule 9014 and must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the debtor’s attorney;</li> <li>• the United States trustee;</li> <li>• the trustee;</li> <li>• any committee appointed under § 1102 or its authorized agent, or, if no unsecured creditors’ committee has been appointed, the creditors on the list filed under Rule 1007(d); and</li> <li>• any other entity as the court orders.</li> </ul>

**Committee Note**

The language of Rule 1020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- The title to Rule 1020 was changed from “Designating a Chapter 11 Case as a Small Business Case” to “Designating a Chapter 11 Debtor as a Small Business Debtor.”

- In Rule 1020(a) (third sentence) and Rule 1020(b) (first sentence), the word “applies” was replaced with “provides otherwise.”

#### **Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC had several comments on this restyled Rule. First, they suggested changing the title to “Designating a Chapter 11 Debtor as a Small Business Debtor.” It currently refers to designating a Chapter 11 case as a small business case. Second, in (b) and (c) they objected to replacing “except as provided in subdivision (c)” to “unless (c) applies.” They believe this creates an ambiguity because it implies that the U.S. trustee or party in interest may not file an objection to the debtor’s statement if (c) applies, and suggest replacing the phrase “unless (c) applies” with “except as provided in (c)”.

**Response:** The Advisory Committee changed the title of the rule, but notes that this rule has been completely rewritten and retitled in the wake of the Small Business Reorganization Act. The revised rule was published for comment in 2020, so this version will be modified before the restyled rules become effective. The Advisory Committee also changed “unless (c) applies” to “unless (c) provides otherwise.”



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<p><b>Rule 1021. Health Care Business Case</b></p>	<p><b>Rule 1021. Designating a Chapter 7, 9, or 11 Case as a Health Care Business Case</b></p>
<p>(a) HEALTH CARE BUSINESS DESIGNATION. Unless the court orders otherwise, if a petition in a case under chapter 7, chapter 9, or chapter 11 states that the debtor is a health care business, the case shall proceed as a case in which the debtor is a health care business.</p>	<p>(a) <b>In General.</b> If a petition in a Chapter 7, 9, or 11 case designates the debtor as a health care business, the case must proceed in accordance with the designation unless the court orders otherwise.</p>
<p>(b) MOTION. The United States trustee or a party in interest may file a motion to determine whether the debtor is a health care business. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs. The motion shall be governed by Rule 9014.</p>	<p>(b) <b>Seeking a Court Determination.</b> The United States trustee or a party in interest may move the court to determine whether the debtor is a health care business. Proceedings on the motion are governed by Rule 9014. If the motion is filed by a party in interest, a copy must be sent to the United States trustee. The motion must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• any committee elected under § 705 or appointed under § 1102, or its authorized agent;</li> <li>• in a Chapter 9 or Chapter 11 case in which an unsecured creditors’ committee has not been appointed under § 1102, the creditors on the list filed under Rule 1007(d); and</li> <li>• any other entity as the court orders.</li> </ul>

**Committee Note**

The language of Rule 1021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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

**2000 Series**

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PART II— OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS	<b>PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS AND APPOINTMENTS; FINAL REPORT; COMPENSATION</b>
<b>Rule 2001. Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case</b>	<b>Rule 2001. Appointing an Interim Trustee Before the Order for Relief in an Involuntary Chapter 7 Case</b>
(a) APPOINTMENT. At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may order the appointment of an interim trustee under § 303(g) of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.	(a) <b>Appointing an Interim Trustee.</b> After an involuntary Chapter 7 case commences but before an order for relief, the court may, on a party in interest’s motion, order the United States trustee to appoint an interim trustee under § 303(g). The motion must set forth the need for the appointment and may be granted only after a hearing on notice to: <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the petitioning creditors;</li> <li>• the United States trustee; and</li> <li>• other parties in interest as the court orders.</li> </ul>
(b) BOND OF MOVANT. An interim trustee may not be appointed under this rule unless the movant furnishes a bond in an amount approved by the court, conditioned to indemnify the debtor for costs, attorney’s fee, expenses, and damages allowable under § 303(i) of the Code.	(b) <b>Bond Required.</b> An interim trustee may be appointed only if the movant furnishes a bond, in an amount that the court approves, to indemnify the debtor for any costs, attorney’s fees, expenses, and damages allowable under § 303(i).
(c) ORDER OF APPOINTMENT. The order directing the appointment of an interim trustee shall state the reason the appointment is necessary and shall specify the trustee’s duties.	(c) <b>The Order’s Content.</b> The court’s order must state the reason the appointment is needed and specify the trustee’s duties.
(d) TURNOVER AND REPORT. Following qualification of the trustee selected under § 702 of the Code, the	(d) <b>The Interim Trustee’s Final Report.</b> Unless the court orders otherwise, after

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interim trustee, unless otherwise ordered, shall (1) forthwith deliver to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account.	qualification of a trustee selected under § 702, the interim trustee must: <ol style="list-style-type: none"> <li>(1) promptly deliver to the trustee all the records and property of the estate that are in the interim trustee’s possession or under its control; and</li> <li>(2) within 30 days after the trustee qualifies, file a final report and account.</li> </ol>

**Committee Note**

The language of Rule 2001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment on Restyled Rules Generally**

- **Jean Publicee (BK-2020-0002-0003)** – Stated that all rules should be reviewed for their ability to be understood and used by the general public. No change was made in response to this comment.
- **National Bankruptcy Conference (BK-2020-0002-0006)** – Comments on the restyled rules generally and the responses to those comments follow:

1. **No Substantive Change.** The NBC suggested that the Restyled Rules include a “specific rule of interpretation” or be accompanied by “a declarative statement in the Supreme Court order adopting the new rules” to make clear that no substantive change was intended in the restyling process and the restyled rules must be interpreted consistently with the current rules.

**Response:** The Bankruptcy Rules are the last of the five sets of federal rules to be restyled. In the prior restyling projects, the applicable Advisory Committee has emphasized that the restyling is not intended to make any substantive change in two ways. One was the committee note to the restyled rules. For example, in the Note to Rule 1 of the Federal Rules of Civil Procedure, the Advisory Committee stated “The style changes to the rules are intended to make no changes in substantive meaning.” In our committee note we expressly state the following:

“No Substantive Change. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule.”

(This language was identical to that used in the committee note for the restyled Federal Rules of Evidence.) The Advisory Committee has expanded this note to insert a new sentence before the current one that reads exactly like that used for the civil procedure rules: “The style changes to the rules are intended to make no changes in substantive meaning.”

Second, every restyled rule has its own committee note stating that “the language of rule \_\_\_ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.” We did not include a committee note following every rule in the version of the restyled Bankruptcy Rules as they were published (because we included side-by-side versions on the existing rules), but when they are sent to the Standing Committee we intend to do so. It will read as follows:

“The language of Rule \_\_\_ has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”

In connection with the restyling of the Federal Rules of Civil Procedure, Professor Ed Hartnett argued that these expressions of intent in the committee notes were not binding on courts, and discussed whether the restyled rules should have included “a rule of construction in the text of the rules themselves.” Edward A. Hartnett, “*Against (Mere) Restyling*,” 82 NOTRE DAME L. REV. 155 (2006). He said that the Advisory Committee on Civil Rules could have included a provision in Rule 1 that stated that “[t]hese rules must be construed to retain the same meaning after the amendments adopted on December 1, 2007 [the date of the restyling amendments], as they did before those amendments.” *Id.* at 168. However, he noted that the Advisory Committee rejected including such a rule of construction because it would “make it impossible for anyone to rely on the text of any of the restyled rules. In every instance in which someone relied on the text of the rule, it would be open for others to argue that the text of the rule should be ignored in favor of its prior meaning.” *Id.* Of course, if courts rely on the committee notes, the same problem is created; the plain meaning of the restyled rules are always subject to challenge based on the meaning of the prior version of the rules. As Professor Hartnett said,

“The more the courts rely on the purpose of maintaining prior meaning, the less the restyled rules will achieve their goal of making the rules clear and easily understood. The flip side is that the more that courts rely on the plain language of the restyled rule, the more the restyled rules will achieve their goal of making the rules clear and easily understood. Ironically, then, the best hope for the successful implementation of clear, easily understood restyled rules is if lawyers and judges ignore the Advisory Committee Note repeated after each restyled rule.”

*Id.* at 169-70.

The Advisory Committee has chosen to follow the pattern that was developed in the prior restyled rules and include committee notes after each rule, but not include a rule of construction or any other method of providing that the rules do not change the substance of the prior version

of the rules.

2. **Capitalization.** The NBC objected to the choice of the style consultants to capitalize the words “title,” “chapter,” and “subchapter.” This choice is inconsistent with how those terms are used in the Code (without capitalization).

**Response:** The position of the Advisory Committee has been that the choices of the style consultants should prevail on matters of pure style. This is a matter of pure style. Therefore, no change was made to the capitalization choices of the style consultants.

3. **Bullet Points.** The NBC objected to the use of bullet points in the rules rather than lettered designations. Use of bullet points makes it “difficult and cumbersome for courts and parties to try to correctly cite any given bullet point.”

**Response:** Bullet points have been used in other restylings. See, e.g. Civil Rule 8(c)(1). The Advisory Committee is comfortable that bullet points are not used in a way that would be likely to require citation to individual bullet points (as opposed to the section in which they appear). They are usually used to list the recipients of notice or service. The style consultants feel strongly that their use is consistent with modern trends in making language comprehensible, and as a stylistic matter it rests with them.

4. **Court’s Designee.** The NBC noted that some rules that previously referred to “the clerk, or some other person as the court may direct” were changed to refer to “the clerk or the court’s designee” and that others were not. They objected to the phrase “the court’s designee” as less clear than “some other person as the court may direct.”

**Response:** The rules should treat the phrase consistently in its restyling process. In only two places in all the rules through Part V (Rule 2002(f) and Rule 2002(n)) was the phrase not changed to “the court’s designee.” The Advisory Committee could not modify the phrase in either of these places, because those provisions were enacted by Congress. The Advisory Committee does not believe the phrase is substantively different from “some other person as the court may direct.” It made no change in response to this comment.

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<p><b>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</b></p>	<p><b>Rule 2002. Notices</b></p>
<p>(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (l), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days’ notice by mail of:</p> <p>(1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor’s employer identification number, social security number, and any other federal taxpayer identification number;</p> <p>(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;</p> <p>(3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent;</p> <p>(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) or is on dismissal of the case for</p>	<p>(a) <b>21-Day Notices to the Debtor, Trustee, Creditors, and Indenture Trustees.</b> Except as (h), (i), (j), (p), and (q) provide otherwise, the clerk or the court’s designee must give the debtor, the trustee, all creditors, and all indenture trustees at least 21 days’ notice by mail of:</p> <p>(1) the meeting of creditors under § 341 or § 1104(b), which notice—unless the court orders otherwise—must include the debtor’s:</p> <p>(A) employer-identification number;</p> <p>(B) social-security number; and</p> <p>(C) any other federal taxpayer-identification number;</p> <p>(2) a proposal to use, sell, or lease property of the estate other than in the ordinary course of business—unless the court, for cause, shortens the time or orders another method of giving notice;</p> <p>(3) a hearing to approve a compromise or settlement other than an agreement under Rule 4001(d)—unless the court, for cause, orders that notice not be sent;</p> <p>(4) a hearing on a motion to dismiss a Chapter 7, 11, or 12 case or to convert it to another chapter—unless the hearing is under § 707(a)(3) or § 707(b) or is on a motion to dismiss the case for failure to pay the filing fee;</p>



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<p>failure to pay the filing fee;</p> <p>(5) the time fixed to accept or reject a proposed modification of a plan;</p> <p>(6) a hearing on any entity’s request for compensation or reimbursement of expenses if the request exceeds \$1,000;</p> <p>(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c);</p> <p>(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and</p> <p>(9) the time fixed for filing objections to confirmation of a chapter 13 plan.</p>	<p>(5) the time to accept or reject a proposed modification to a plan;</p> <p>(6) a hearing on a request for compensation or for reimbursement of expenses, if the request exceeds \$1,000;</p> <p>(7) the time to file proofs of claims under Rule 3003(c);</p> <p>(8) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 12 plan; and</p> <p>(9) the time to object to confirming a Chapter 13 plan.</p>
<p>(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days’ notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement or, under § 1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; (2) for filing objections and the hearing to consider confirmation of a chapter 9 or chapter 11 plan; and (3) for the hearing to consider confirmation of a chapter 13 plan.</p>	<p><b>(b) 28-Day Notices to the Debtor, Trustee, Creditors, and Indenture Trustees.</b> Except as (l) provides otherwise, the clerk or the court’s designee must give the debtor, trustee, all creditors, and all indenture trustees at least 28 days’ notice by mail of:</p> <p>(1) the time to file objections and the time of a hearing to:</p> <p>(A) consider approving a disclosure statement; or</p> <p>(B) determine under § 1125(f) whether a plan includes adequate information to make a separate disclosure statement unnecessary;</p> <p>(2) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 9 or 11 plan; and</p> <p>(3) the time of a hearing to consider whether to confirm a Chapter 13 plan.</p>

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<p>(c) CONTENT OF NOTICE.</p> <p>(1) <i>Proposed Use, Sale, or Lease of Property.</i> Subject to Rule 6004, the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property. The notice of a proposed sale or lease of personally identifiable information under § 363(b)(1) of the Code shall state whether the sale is consistent with any policy prohibiting the transfer of the information.</p> <p>(2) <i>Notice of Hearing on Compensation.</i> The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(6) of this rule shall identify the applicant and the amounts requested.</p> <p>(3) <i>Notice of Hearing on Confirmation When Plan Provides for an Injunction.</i> If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall:</p> <p>(A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;</p> <p>(B) describe briefly the nature of the injunction; and</p> <p>(C) identify the entities that would be subject to the injunction.</p>	<p>(c) <b>Content of Notice.</b></p> <p>(1) <b><i>Proposed Use, Sale, or Lease of Property.</i></b> Subject to Rule 6004, a notice of a proposed use, sale, or lease of property under (a)(2) must include:</p> <p>(A) the time and place of any public sale;</p> <p>(B) the terms and conditions of any private sale; and</p> <p>(C) the time to file objections.</p> <p>The notice suffices if it generally describes the property. In a notice of a proposed sale or lease of personally identifiable information under § 363(b)(1), the notice must state whether the sale is consistent with any policy that prohibits transferring the information.</p> <p>(2) <b><i>Hearing on an Application for Compensation or Reimbursement.</i></b> A notice under (a)(6) of a hearing on a request for compensation or for reimbursement of expenses must identify the applicant and the amounts requested.</p> <p>(3) <b><i>Hearing on Confirming a Plan That Proposes an Injunction.</i></b> If a plan proposes an injunction against conduct not otherwise enjoined under the Code, the notice under (b)(2) must:</p> <p>(A) state in conspicuous language (bold, italic, or underlined text) that the plan proposes an injunction;</p> <p>(B) describe briefly the nature of the injunction; and</p> <p>(C) identify the entities that would be subject to the injunction.</p>
<p>(d) NOTICE TO EQUITY SECURITY HOLDERS. In a chapter 11</p>	<p>(d) <b>Notice to Equity Security Holders in a Chapter 11 Case.</b> Unless the court orders</p>

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<p>reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in the manner and form directed by the court give notice to all equity security holders of (1) the order for relief; (2) any meeting of equity security holders held pursuant to § 341 of the Code; (3) the hearing on the proposed sale of all or substantially all of the debtor’s assets; (4) the hearing on the dismissal or conversion of a case to another chapter; (5) the time fixed for filing objections to and the hearing to consider approval of a disclosure statement; (6) the time fixed for filing objections to and the hearing to consider confirmation of a plan; and (7) the time fixed to accept or reject a proposed modification of a plan.</p>	<p>otherwise, in a Chapter 11 case, the clerk or the court’s designee must give notice as the court orders to the equity security holders of:</p> <ol style="list-style-type: none"> <li>(1) the order for relief;</li> <li>(2) a meeting of equity security holders under § 341;</li> <li>(3) a hearing on a proposed sale of all, or substantially all, the debtor’s assets;</li> <li>(4) a hearing on a motion to dismiss a case or convert it to another chapter;</li> <li>(5) the time to file objections to—and the time of the hearing to consider whether to approve—a disclosure statement;</li> <li>(6) the time to file objections to—and the time of the hearing to consider whether to confirm—a Chapter 11 plan; and</li> <li>(7) the time to accept or reject a proposal to modify a plan.</li> </ol>
<p>(e) NOTICE OF NO DIVIDEND. In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.</p>	<p><b>(e) Notice of No Dividend in a Chapter 7 Case.</b> In a Chapter 7 case, if it appears from the schedules that there are no assets from which to pay a dividend, the notice of the meeting of creditors may state:</p> <ol style="list-style-type: none"> <li>(1) that fact;</li> <li>(2) that filing proofs of claim is unnecessary; and</li> <li>(3) that further notice of the time to file proofs of claim will be given if enough assets become available to pay a dividend.</li> </ol>
<p>(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</p>	<p><b>(f) Other Notices.</b></p> <p><b>(1) <i>Various Notices to the Debtor, Creditors, and Indenture Trustees.</i></b> Except as (l) provides otherwise, the clerk, or some other person as the</p>

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<p>notice by mail of:</p> <ul style="list-style-type: none"> <li>(1) the order for relief;</li> <li>(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;</li> <li>(3) the time allowed for filing claims pursuant to Rule 3002;</li> <li>(4) the time fixed for filing a complaint objecting to the debtor’s discharge pursuant to § 727 of the Code as provided in Rule 4004;</li> <li>(5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007;</li> <li>(6) the waiver, denial, or revocation of a discharge as provided in Rule 4006;</li> <li>(7) entry of an order confirming a chapter 9, 11, or 12 plan;</li> <li>(8) a summary of the trustee’s final report in a chapter 7 case if the net proceeds realized exceed \$1,500;</li> <li>(9) a notice under Rule 5008 regarding the presumption of abuse;</li> <li>(10) a statement under § 704(b)(1) as to whether the debtor’s case would be presumed to be an abuse under § 707(b); and</li> <li>(11) the time to request a delay in the entry of the discharge under §§ 1141(d)(5)(C), 1228(f), and 1328(h). Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).</li> </ul>	<p>court may direct, must give the debtor, creditors, and indenture trustees notice by mail of:</p> <ul style="list-style-type: none"> <li>(A) the order for relief;</li> <li>(B) a case’s dismissal or conversion to another chapter;</li> <li>(C) a suspension of proceedings under § 305;</li> <li>(D) the time to file a proof of claim under Rule 3002;</li> <li>(E) the time to file a complaint to object to the debtor’s discharge under § 727, as Rule 4004 provides;</li> <li>(F) the time to file a complaint to determine whether a debt is dischargeable under § 523, as Rule 4007 provides;</li> <li>(G) a waiver, denial, or revocation of a discharge, as Rule 4006 provides;</li> <li>(H) entry of an order confirming a plan in a Chapter 9, 11, or 12 case;</li> <li>(I) a summary of the trustee’s final report in a Chapter 7 case if the net proceeds realized exceed \$1,500;</li> <li>(J) a notice under Rule 5008 regarding the presumption of abuse;</li> <li>(K) a statement under § 704(b)(1) about whether the debtor’s case would be presumed to be an abuse under § 707(b); and</li> <li>(L) the time to request a delay in granting the discharge under §§ 1141(d)(5)(C), 1228(f), or 1328(h).</li> </ul> <p><b>(2) Notice of the Time to Accept or Reject a Plan.</b> Notice of the time to accept or reject a plan under</p>

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	<p>Rule 3017(c) must be given in accordance with Rule 3017(d).</p>
<p>(g) ADDRESSING NOTICES.</p> <p>(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision—</p> <p>(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and</p> <p>(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.</p> <p>(2) Except as provided in § 342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of equity security holders.</p> <p>(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative</p>	<p>(g) <b>Addressing Notices.</b></p> <p>(1) <b><i>In General.</i></b> A notice mailed to a creditor, indenture trustee, or equity security holder must be addressed as the entity or its authorized agent provided in its last request filed in the case. The request may be:</p> <p>(A) a proof of claim filed by a creditor or an indenture trustee designating a mailing address (unless a notice of no dividend has been given under (e) and a later notice of a possible dividend under Rule 3002(c)(5) has not been given); or</p> <p>(B) a proof of interest filed by an equity security holder designating a mailing address.</p> <p>(2) <b><i>When No Request Has Been Filed.</i></b> Except as § 342(f) provides otherwise, if a creditor or indenture trustee has not filed a request under (1) or Rule 5003(e), the notice must be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request, the notice must be mailed to the address shown on the list of equity security holders.</p> <p>(3) <b><i>Notices to Representatives of an Infant or Incompetent Person.</i></b> If a list or schedule filed under Rule 1007 includes a name and address of an infant’s or an incompetent person’s representative, and a person other than that representative files a request or proof of claim designating a different name and mailing address, then unless the court orders otherwise, the notice</p>

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<p>files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.</p> <p>(4) Notwithstanding Rule 2002(g)(1)–(3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider’s failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law.</p> <p>(5) A creditor may treat a notice as not having been brought to the creditor’s attention under § 342(g)(1) only if, prior to issuance of the notice, the creditor has filed a statement that designates the name and address of the person or organizational subdivision of the creditor responsible for receiving notices under the Code, and that describes the procedures established by the creditor to cause such notices to be delivered to the designated person or subdivision.</p>	<p>must be mailed to both persons at their designated addresses.</p> <p>(4) <b><i>Using an Address Agreed to Between an Entity and a Notice Provider.</i></b> Notwithstanding (g)(1)–(3), when the court orders that a notice provider give a notice, the provider may do so in the manner agreed to between the provider and an entity, and at the address or addresses the entity supplies. An address supplied by the entity is conclusively presumed to be a proper address for the notice. But a failure to use a supplied address does not invalidate a notice that is otherwise effective under applicable law.</p> <p>(5) <b><i>When a Notice Is Not Brought to a Creditor’s Attention.</i></b> A creditor may treat a notice as not having been brought to the creditor’s attention under § 342(g)(1) only if, before the notice was issued, the creditor has filed a statement:</p> <p>(A) designating the name and address of the person or organizational subdivision responsible for receiving notices; and</p> <p>(B) describing the creditor’s procedures for delivering notices to the designated person or organizational subdivision.</p>
<p>(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed</p>	<p>(h) <b>Notice to Creditors That Have Filed Proofs of Claim in a Chapter 7 Case.</b></p> <p>(1) <b><i>In General.</i></b> In a Chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341,</p>

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<p>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 an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.</p>	<p>the court may order that all notices required by (a) be mailed only to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• indenture trustees;</li> <li>• creditors with claims for which proofs of claim have been filed; and</li> <li>• creditors that have received an extension of time under Rule 3002(c)(1) or (2) to file proofs of claim.</li> </ul> <p>(2) <b><i>When a Notice of Insufficient Assets Has Been Given.</i></b> If notice of insufficient assets to pay a dividend has been given to creditors under (e), after 90 days following the mailing of a notice of the time to file proofs of claim under Rule 3002(c)(5), the court may order that notices be mailed only to those entities listed in (1).</p>
<p>(i) <b>NOTICES TO COMMITTEES.</b> Copies of all notices required to be mailed pursuant to this rule shall be mailed to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed under § 1114 shall receive copies of all notices required by</p>	<p>(i) <b>Notice to a Committee.</b></p> <p>(1) <b><i>In General.</i></b> Any notice required to be mailed under this Rule 2002 must also be mailed to a committee elected under § 705 or appointed under § 1102, or to its authorized agent.</p> <p>(2) <b><i>Limiting Notices.</i></b> The court may order that a notice required by (a)(2), (3), or (6) be:</p> <p>(A) sent to the United States trustee; and</p> <p>(B) mailed only to:</p> <p>(i) the committees elected under § 705 or appointed under § 1102, or to their authorized agents; and</p>

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<p>subdivisions (a)(1), (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.</p>	<p>(ii) those creditors and equity security holders who file—and serve on the trustee or debtor in possession—a request that all notices be mailed to them.</p> <p><b>(3) Copy to a Committee.</b> A notice required under (a)(1), (a)(5), (b), (f)(1)(B)–(C), or (f)(1)(H)—and any other notice as the court orders—must be sent to a committee appointed under § 1114.</p>
<p>(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case, to the Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.</p>	<p><b>(j) Notice to the United States.</b> A notice required to be mailed to all creditors under this Rule 2002 must also be mailed:</p> <p>(1) in a Chapter 11 case in which the Securities and Exchange Commission has filed either a notice of appearance or a request to receive notices, to the SEC at any place it designates;</p> <p>(2) in a commodity-broker case, to the Commodity Futures Trading Commission at Washington, D.C.;</p> <p>(3) in a Chapter 11 case, to the Internal Revenue Service at the address in the register maintained under Rule 5003(e) for the district where the case is pending;</p> <p>(4) in a case for which the papers indicate that a debt (other than for taxes) is owed to the United States, to the United States attorney for the district where the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or</p> <p>(5) in a case for which the papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.</p>



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<p>(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), (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. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et. seq.</p>	<p><b>(k) Notice to the United States Trustee.</b></p> <p><b>(1) <i>In General.</i></b> Except in a Chapter 9 case or unless the United States trustee requests otherwise, the clerk or the court’s designee must send to the United States trustee notice of:</p> <p>(A) all matters described in (a)(2)–(4), (a)(8), (b), (f)(1)(A)–(C), (f)(1)(E), (f)(1)(G)–(I), and (q);</p> <p>(B) all hearings on applications for compensation or for reimbursement of expenses; and</p> <p>(C) any other matter if the United States trustee requests it or the court orders it.</p> <p><b>(2) <i>Time to Send.</i></b> The notice must be sent within the time (a) or (b) prescribes.</p> <p><b>(3) <i>Exception Under the Securities Investor Protection Act.</i></b> In a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq., these rules do not require any document to be sent to the United States trustee.</p>
<p>(l) NOTICE BY PUBLICATION. The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice.</p>	<p><b>(l) Notice by Publication.</b> The court may order notice by publication if notice by mail is impracticable or if it is desirable to supplement the notice.</p>
<p>(m) ORDERS DESIGNATING MATTER OF NOTICES. The court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.</p>	<p><b>(m) Orders Concerning Notices.</b> Except as these rules provide otherwise, the court may designate the matters about which, the entity to whom, and the form and manner in which a notice must be sent.</p>
<p>(n) CAPTION. The caption of every notice given under this rule shall comply</p>	<p><b>(n) Notice of an Order for Relief in a Consumer Case.</b> In a voluntary case</p>

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<p>with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.</p>	<p>commenced under the Code by an individual debtor whose debts are primarily consumer debts, the clerk, or some other person as the court may direct, shall give the trustee and all creditors notice by mail of the order for relief not more than 20 days after the entry of such order.</p>
<p>(o) NOTICE OF ORDER FOR RELIEF IN CONSUMER CASE. In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by mail of the order for relief within 21 days from the date thereof.</p>	<p>(o) <b>Caption.</b> The caption of a notice given under this Rule 2002 must conform to Rule 1005. The caption of a debtor’s notice to a creditor must also include the information that § 342(c) requires.</p>
<p>(p) NOTICE TO A CREDITOR WITH A FOREIGN ADDRESS.</p> <p>(1) If, at the request of the United States trustee or a party in interest, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.</p> <p>(2) Unless the court for cause orders otherwise, a creditor with a foreign address to which notices under this rule are mailed shall be given at least 30 days’ notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).</p> <p>(3) Unless the court for cause orders otherwise, the mailing address of a creditor with a foreign address shall be</p>	<p>(p) <b>Notice to a Creditor with Foreign Address.</b></p> <p>(1) <i>When Notice by Mail Does Not Suffice.</i> At the request of the United States trustee or a party in interest, or on its own, the court may find that a notice mailed to a creditor with a foreign address within the time these rules prescribe would not give the creditor reasonable notice. The court may then order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be extended.</p> <p>(2) <i>Notice of the Time to File a Proof of Claim.</i> Unless the court, for cause, orders otherwise, a creditor with a foreign address must be given at least 30 days’ notice of the time to file a proof of claim under Rule 3002(c) or Rule 3003(c).</p> <p>(3) <i>Determining a Foreign Address.</i> Unless the court, for cause, orders otherwise, the mailing address of a</p>

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<p>determined under Rule 2002(g).</p>	<p>creditor with a foreign address must be determined under (g).</p>
<p>(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT’S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.</p> <p>(1) <i>Notice of Petition for Recognition.</i> After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days’ notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.</p> <p>(2) <i>Notice of Court’s Intention to Communicate with Foreign Courts and Foreign Representatives.</i> The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being</p>	<p>(q) <b>Notice of a Petition for Recognition of a Foreign Proceeding; Notice of Intent to Communicate with a Foreign Court or Foreign Representative.</b></p> <p>(1) <b><i>Timing of the Notice; Who Must Receive It.</i></b> After a petition for recognition of a foreign proceeding is filed, the court must promptly hold a hearing on it. The clerk or the court’s designee must promptly give at least 21 days’ notice by mail of the hearing to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• all persons or bodies authorized to administer the debtor’s foreign proceedings;</li> <li>• all entities against whom provisional relief is being sought under § 1519;</li> <li>• all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and</li> <li>• any other entities as the court orders.</li> </ul> <p>If the court consolidates the hearing on the petition with a hearing on a request for provisional relief, the court may set a shorter notice period.</p> <p>(2) <b><i>Contents of the Notice.</i></b> The notice must:</p> <p>(A) state whether the petition seeks recognition as a foreign main proceeding or a foreign nonmain proceeding; and</p>

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<p>sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court’s intention to communicate with a foreign court or foreign representative.</p>	<p>(B) include a copy of the petition and any other document the court specifies.</p> <p><b>(3) <i>Communicating with a Foreign Court or Foreign Representative.</i></b> If the court intends to communicate with a foreign court or foreign representative, the clerk or the court’s designee must give notice by mail of the court’s intention to all those listed in (q)(1).</p>

**Committee Note**

The language of most provisions in Rule 2002 have been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. In (f) the phrase “or some other person as the court may direct” has not been restyled because it was enacted by Congress, P.L. 98-91, 97 Stat. 607, § 2 (1983). Rule 2002(n) has not been restyled because it was also enacted by Congress, P.L. 98-353, 98 Stat. 357, § 114 (1984). That subsection was erroneously redesignated as subdivision (o) in 2008, and amended to modify its time period from 20 to 21 days in 2009. Because the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides no authority to modify statutory language, the subdivision is now returned to the language used by Congress.

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**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 2002(a)(4), the word “to” was inserted before “convert.”
- In Rule 2002(a)(5), the words “proposal to modify a plan” were replaced with “proposed modification to a plan.”
- In Rule 2002(c)(3)(C), the word “it” was replaced with “the injunction.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006)** – The NBC made several points about this rule.

First, in (a)(4) they suggested inserting the word “to” before “convert” to be parallel to the phrase “to dismiss” in the first line.

Second, they think the word “proposal” in (a)(5) should be “motion.”

Third, they objected to the use of the word “it” in (c)(3)(C) (referring to the injunction).

Fourth, in (g)(1) they suggested modifying “the request” in the second sentence with the word “qualifying.”

Fifth, in (g)(2) they suggested changing “Except as § 342(f) provides otherwise” to “Except as otherwise provided in § 342(f)” as more readable.

Sixth, they made a comment on (h)(1) (which their letter erroneously says is (h)(2)). They believe that replacing “creditors that hold claims for which proofs of claim have been filed” in the original rule with “creditors with claims for which proofs of claim have been filed” in the fourth bullet point is potentially a substantive change because an assignee may hold a claim but not be a creditor with a claim.

Seventh, they questioned the reordering of (n) and (o).

Eighth, they noted an inconsistency between Rules 1004.2(b) and Restyled Rules 1007(a)(4)(B)(ii) and 2002(q)(1) in tense and suggested using the past tense.

*Response:* The first suggestion was incorporated. As to their second point, motions are not “accepted” or “rejected.” The original language is “the time fixed to accept or reject a proposed modification of a plan.” The Advisory Committee decided to return to the original language—it is the modification that is being accepted or rejected. The third comment was accepted. As to the fourth comment, “the request” referred to in the second sentence is clearly the “last request” mentioned in the immediately preceding line of the rule. There is no ambiguity about which request is intended to be described. As to the fifth comment, the style consultants have consistently changed phrases like “except as otherwise provided in § \_\_\_” to the active voice (“Except as § \_\_\_ provides otherwise.”) There is no reason to single out this one phrase and treat it differently. On the sixth point, the Code defines a creditor in § 101(10) as an “entity that has a claim.” Holding a claim is the same as having a claim, and having a claim is the same as being a “creditor with” a claim. No change was made. As to the seventh point, Rule 2002(n) was enacted by Congress and should never have been redesignated as Rule 2002(o), which is why it was returned to its statutory location. The change requested in the eighth comment was made in Restyled Rule 1004.2(b).

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<p><b>Rule 2003. Meeting of Creditors or Equity Security Holders</b></p>	<p><b>Rule 2003. Meeting of Creditors or Equity Security Holders</b></p>
<p>(a) DATE AND PLACE. Except as otherwise provided in § 341(e) of the Code, in a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 35 days after the order for relief. In a chapter 13 individual’s debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 21 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.</p>	<p>(a) <b>Date and Place of the Meeting.</b></p> <p>(1) <b><i>Date.</i></b> Unless § 341(e) applies, the United States trustee must call a meeting of creditors to be held:</p> <p>(A) in a Chapter 7 or 11 case, no fewer than 21 days and no more than 40 days after the order for relief;</p> <p>(B) in a Chapter 12 case, no fewer than 21 days and no more than 35 days after the order for relief; or</p> <p>(C) in a Chapter 13 case, no fewer than 21 days and no more than 50 days after the order for relief.</p> <p>(2) <b><i>Effect of a Motion or an Appeal.</i></b> The United States trustee may set a later date for the meeting if there is a motion to vacate the order for relief, an appeal from such an order, or a motion to dismiss the case.</p> <p>(3) <b><i>Place; Possible Change in the Meeting Date.</i></b> The meeting may be held at a regular place for holding court. Or the United States trustee may designate any other place in the district that is convenient for the parties in interest. If the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief.</p>
<p>(b) ORDER OF MEETING.</p> <p>(1) Meeting of Creditors. The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may</p>	<p>(b) <b>Conducting the Meeting; Agenda; Who May Vote.</b></p> <p>(1) <b><i>At a Meeting of Creditors.</i></b></p> <p>(A) <b><i>Generally.</i></b> The United States trustee must preside at the meeting of creditors. The meeting must include an examination of the</p>

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<p>include the election of a creditors' committee and, if the case is not under subchapter V of chapter 7, the election of a trustee. The presiding officer shall have the authority to administer oaths.</p> <p>(2) Meeting of Equity Security Holders. If the United States trustee convenes a meeting of equity security holders pursuant to § 341(b) of the Code, the United States trustee shall fix a date for the meeting and shall preside.</p> <p>(3) Right To Vote. In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. A creditor of a partnership may file a proof of claim or writing evidencing a right to vote for the trustee for the estate of the general partner notwithstanding that a trustee for the estate of the partnership has previously qualified. In the event of an objection to the amount or allowability of a claim for the purpose of voting, unless the court orders otherwise, the United States trustee shall tabulate the votes for each alternative presented by the dispute and, if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court.</p>	<p>debtor under oath. The presiding officer has the authority to administer oaths.</p> <p>(B) <i>Chapter 7 Cases.</i> In a Chapter 7 case, the meeting may include the election of a creditors' committee; and if the case is not under Subchapter V, the meeting may include electing a trustee.</p> <p>(2) <b><i>At a Meeting of Equity Security Holders.</i></b> If the United States trustee convenes a meeting of equity security holders under § 341(b), the United States trustee must set a date for the meeting and preside over it.</p> <p>(3) <b><i>Who Has a Right to Vote; Objecting to the Right to Vote.</i></b></p> <p>(A) <i>In a Chapter 7 Case.</i> A creditor in a Chapter 7 case may vote if, at or before the meeting:</p> <ul style="list-style-type: none"> <li>(i) the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote under § 702(a);</li> <li>(ii) the proof of claim is not insufficient on its face; and</li> <li>(iii) no objection is made to the claim.</li> </ul> <p>(B) <i>In a Partnership Case.</i> A creditor in a partnership case may file a proof of claim or a writing evidencing a right to vote for a trustee for the general partner's estate even if a trustee for the partnership's estate has previously qualified.</p> <p>(C) <i>Objecting to the Amount or Allowability of a Claim for Voting Purposes.</i> Unless the court orders otherwise, if there is an objection to the amount or allowability of a claim for voting purposes, the United States trustee</p>

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	<p>must tabulate the votes for each alternative presented by the dispute. If resolving the dispute is necessary to determine the election’s result, the United States trustee must report to the court the tabulations for each alternative.</p>
<p>(c) RECORD OF MEETING. Any examination under oath at the meeting of creditors held pursuant to § 341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and provide a copy or transcript of such recording at the entity’s expense.</p>	<p><b>(c) Recording the Proceedings.</b> At the meeting of creditors under § 341(a), the United States trustee must:</p> <ol style="list-style-type: none"> <li>(1) record verbatim—using electronic sound-recording equipment or other means of recording—all examinations under oath;</li> <li>(2) preserve the recording and make it available for public access for 2 years after the meeting concludes; and</li> <li>(3) upon request, certify and provide a copy or transcript of the recording to any entity at that entity’s expense.</li> </ol>
<p>(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE.</p> <p>(1) Report of Undisputed Election. In a chapter 7 case, if the election of a trustee or a member of a creditors’ committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.</p> <p>(2) Disputed Election. If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the</p>	<p><b>(d) Reporting Election Results in a Chapter 7 Case.</b></p> <p><b>(1) Undisputed Election.</b> In a Chapter 7 case, if the election of a trustee or a member of a creditors’ committee is undisputed, the United States trustee must promptly file a report of the election. The report must include the name and address of the person or entity elected and a statement that the election was undisputed.</p> <p><b>(2) Disputed Election.</b></p> <p>(A) <i>United States Trustee’s Report.</i> If the election is disputed, the United States trustee must:</p> <ol style="list-style-type: none"> <li>(i) promptly file a report informing the court of the nature of the dispute and listing the name and address of any candidate elected</li> </ol>



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<p>report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. Unless a motion for the resolution of the dispute is filed no later than 14 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.</p>	<p>under any alternative presented by the dispute; and</p> <p>(ii) no later than the date on which the report is filed, mail a copy to any party in interest that has requested one.</p> <p>(B) <i>Interim Trustee.</i> Until the court resolves the dispute, the interim trustee continues in office. Unless a motion to resolve the dispute is filed within 14 days after the report is filed, the interim trustee serves as trustee in the case.</p>
<p>(e) <b>ADJOURNMENT.</b> The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.</p>	<p><b>(e) Adjournment.</b> The presiding official may adjourn the meeting from time to time by announcing at the meeting the date and time to reconvene. The presiding official must promptly file a statement showing the adjournment and the date and time to reconvene.</p>
<p>(f) <b>SPECIAL MEETINGS.</b> The United States trustee may call a special meeting of creditors on request of a party in interest or on the United States trustee’s own initiative.</p>	<p><b>(f) Special Meetings of Creditors.</b> The United States trustee may call a special meeting of creditors or may do so on request of a party in interest.</p>
<p>(g) <b>FINAL MEETING.</b> If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed \$1,500, the clerk shall mail a summary of the trustee’s final account to the creditors with a notice of the meeting, together with a statement of the amount of the claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.</p>	<p><b>(g) Final Meeting of Creditors.</b> If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed \$1,500, the clerk must give notice of the meeting to the creditors. The notice must include a summary of the trustee’s final account and a statement of the amount of the claims allowed. The trustee must attend the meeting and, if requested, report on the administration of the estate.</p>

**Committee Note**

The language of Rule 2003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology

consistent throughout the rules. These changes are intended to be stylistic only.

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### Changes Made After Publication and Comment

- Committee note has been added.
- In Rule 2003(d)(2)(B), the phrase “must continue” was changed to “continues,” and the phrase “must serve” was changed to “serves.”

### Summary of Public Comment

- **National Bankruptcy Conference (BK-2020-0002-0006):** The first comment of NBC was an objection to beginning the second sentence in (a)(3) with “Or.” They suggested instead that the Rule include a vertical list. Second, they suggested changing the phrase “under Subchapter V” in (b)(1)(B) to “under subchapter V of chapter 7” to make it clear that the Rule is not referring to the new Subchapter V of Chapter 11. Third, in (b)(3)(A)(ii) they noted that it fails to mention the alternative to a proof of claim, a “writing” referenced in (b)(3)(A)(i), and that that reference should be added. Fourth, in (d)(2)(B), they suggested changing the two references to “must” to “will.”

**Response:** As to the first comment, that is a matter of style and we defer to the style consultants on matters of style. The problem with creating a vertical list is that there would be hanging text after the (A) and (B), and as a matter of style we never have text after numbered paragraphs (only after bullet points). This textual matter is not appropriate for bullet points. Therefore, we made no change in response to this comment. As to the second point, the paragraph in which this phrase appears is titled “Chapter 7 Cases.” There cannot possibly be confusion about whether the reference is to Subchapter V in Chapter 11. We made no change. On the third point, indeed (b)(3)(A)(ii) does not mention the “writing” described in (b)(3)(A)(i), but the existing rule does not either. The current language is “unless objection is made to the claim or the proof of claim is insufficient on its face.” Their suggestion would be a substantive change. Fourth, the original language of Rule 2003(d) states: “Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. Unless a motion for the resolution of the dispute is filed no later than 14 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.” We have consistently changed the word “shall” to “must” in the rules, which is why the style consultants used that word in this rule. However, the style consultants have suggested changing the language to “continues in office” and “serves as trustee” without any “must” or “will.” This should meet the concern.

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<b>Rule 2004. Examination</b>	<b>Rule 2004. Examinations</b>
(a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.	<b>(a) In General.</b> On motion of a party in interest, the court may order the examination of any entity.
(b) SCOPE OF EXAMINATION. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge. In a family farmer’s debt adjustment case under chapter 12, an individual’s debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.	<b>(b) Scope of the Examination.</b> (1) <b><i>In General.</i></b> The examination of an entity under this Rule 2004, or of a debtor under § 343, may relate only to: (A) the debtor’s acts, conduct, or property; (B) the debtor’s liabilities and financial condition; (C) any matter that may affect the administration of the debtor’s estate; or (D) the debtor’s right to a discharge. (2) <b><i>Other Topics in Certain Cases.</i></b> In a Chapter 12 or 13 case, or in a Chapter 11 case that is not a railroad reorganization, the examination may also relate to: (A) the operation of any business and the desirability of its continuing; (B) the source of any money or property the debtor acquired or will acquire for the purpose of consummating a plan and the consideration given or offered; and (C) any other matter relevant to the case or to formulating a plan.
(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as	<b>(c) Compelling Attendance and the Production of Documents.</b> Regardless of the district where the examination will be conducted, an entity may be compelled under Rule 9016 to attend and produce documents. An attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be

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<p>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 if the attorney is admitted to practice in that court or in the court in which the case is pending.</p>	<p>held if the attorney is admitted to practice in that court or in the court where the case is pending.</p>
<p>(d) TIME AND PLACE OF EXAMINATION OF DEBTOR. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.</p>	<p><b>(d) Time and Place to Examine the Debtor.</b> The court may, for cause and on terms it may impose, order the debtor to be examined under this Rule 2004 at any designated time and place, in or outside the district.</p>
<p>(e) MILEAGE. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day’s attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor’s residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.</p>	<p><b>(e) Witness Fees and Mileage.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>For a Nondebtor Witness.</i></b> An entity, except the debtor, may be required to attend as a witness only if the lawful mileage and witness fee for 1 day’s attendance are first tendered.</li> <li>(2) <b><i>For a Debtor Witness.</i></b> A debtor who is required to appear for examination more than 100 miles from the debtor’s residence must be tendered a mileage fee . The fee need cover only the distance exceeding 100 miles from the nearer of where the debtor resides:             <ol style="list-style-type: none"> <li>(A) when the first petition was filed;</li> <li>or</li> <li>(B) when the examination takes place.</li> </ol> </li> </ol>

**Committee Note**

The language of Rule 2004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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### Changes Made After Publication and Comment

- Committee note has been added.
- Rule 2004(e)(2) was rewritten. As published, it read: “A debtor witness must be tendered a mileage fee if required to appear for examination more than 100 miles from the debtor’s residence. The fee need cover only the distance exceeding 100 miles from debtor’s residence at the time of the examination or when the first petition was filed, whichever residence is nearer.” The rewritten rule creates subparagraphs and reads as follows: “A debtor who is required to appear for examination more than 100 miles from the debtor’s residence must be tendered a mileage fee. The fee need cover only the distance exceeding 100 miles from the nearer of where the debtor resides: (A) when the first petition was filed; or (B) when the examination takes place.”

### Summary of Public Comment

- **National Bankruptcy Conference (BK-2020-0002-0006):** The NBC suggested in (b)(1)(D) adding “any matter that may affect” before “the debtor’s right to a discharge,” both because they think that substantively reflects the current rule and for parallelism. They also suggested in (e)(2) rewording the first sentence for clarity.

**Response:** The first suggestion would change the substance of the existing rule. The phrase “any matter which may affect” in the current rule modifies only “the administration of the debtor’s estate,” not “the debtor’s right to a discharge.” No change was made. In response to their second suggestion, we have redrafted (e)(2) to make it clearer and more parallel to (e)(1).

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<p><b>Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination</b></p>	<p><b>Rule 2005. Apprehending and Removing a Debtor for Examination</b></p>
<p>(a) ORDER TO COMPEL ATTENDANCE FOR EXAMINATION. On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor’s residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor’s obedience to all orders made in reference thereto.</p>	<p>(a) <b>Compelling the Debtor’s Attendance.</b></p> <p>(1) <i>Order to Apprehend the Debtor.</i> On motion of a party in interest, supported by an affidavit, the court may order a marshal or other official authorized by law to bring the debtor before the court without unnecessary delay. The affidavit must allege that:</p> <p>(A) the examination is necessary to properly administer the estate, and there is reasonable cause to believe that the debtor is about to leave or has left the debtor’s residence or principal place of business to avoid the examination;</p> <p>(B) the debtor has evaded service of a subpoena or an order to attend the examination; or</p> <p>(C) the debtor has willfully disobeyed a duly served subpoena or order to attend the examination.</p> <p>(2) <i>Ordering an Immediate Examination.</i> If, after hearing, the court finds the allegations to be true, it must:</p> <p>(A) order the immediate examination of the debtor; and</p> <p>(B) if necessary, set conditions for further examination and for the debtor’s obedience to any further order regarding it.</p>
<p>(b) REMOVAL. Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the</p>	<p>(b) <b>Removing a Debtor to Another District for Examination.</b></p> <p>(1) <i>In General.</i> When an order is issued under (a)(1) and the debtor is found in another district, the debtor may be</p>

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<p>following rules:</p> <p>(1) If the debtor is taken into custody under the order at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.</p> <p>(2) If the debtor is taken into custody under the order at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall order removal, and the person in custody shall be released on conditions ensuring prompt appearance before the court that issued the order to compel the attendance.</p>	<p>taken into custody and removed as provided in (2) and (3).</p> <p>(2) <b><i>Within 100 Miles.</i></b> A debtor who is taken into custody less than 100 miles from where the order was issued must be brought promptly before the court that issued the order.</p> <p>(3) <b><i>At 100 Miles or More.</i></b> A debtor who is taken into custody 100 miles or more from where the order was issued must be brought without unnecessary delay for a hearing before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the judge finds that the person in custody is the debtor and is subject to an order under (a)(1), or if the person waives a hearing, the judge must order removal, and must release the person in custody on conditions ensuring prompt appearance before the court that issued the order compelling attendance.</p>
<p>(c) <b>CONDITIONS OF RELEASE.</b> In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U.S.C., § 3146(a) and (b).</p>	<p>(4) <b><i>Conditions of Release.</i></b> 18 U.S.C. § 3146(a) and (b) govern the court’s determination of what conditions will reasonably assure attendance and obedience under this Rule 2005.</p>

**Committee Note**

The language of Rule 2005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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### Changes Made After Publication and Comment

- Committee note has been added.
- In Rule 2005(a)(1)(A), the words “an examination” were replaced with “the examination.”

### Summary of Public Comment

• **National Bankruptcy Conference (BK-2020-0002-0006):** The NBC objected to the use of the term “affidavit” in (a)(1), given that 28 U.S.C. § 1746 allows a declaration to be used in lieu of an affidavit. They suggest using the phrase “affidavit or declaration.” They recognized that the existing rule uses only “affidavit” but believe this is not a substantive change. The NBC also objected to the word “the” before “examination” in (a)(1)(B), suggesting it implies that the debtor has to have attempted to evade service for the examination sought under Rule 2005 rather than a prior examination. Finally, the NBC objected to the use of “it” in (a)(2)(B) rather than “such examination.”

**Response:** Although it would undoubtedly be helpful to alert those reading the rule that the Judicial Code permits use of a declaration in lieu of an affidavit, the original rule uses only the term affidavit, and we cannot modify that term without making a substantive change. As to the second comment, Rule 2005(a) is providing for an order to compel attendance only if the debtor has evaded service of a subpoena or an order to attend this particular examination, or has willfully disobeyed a duly served subpoena or order to attend this particular examination (not any examination in the past). We changed the word “an” to “the” in (a)(1)(A) to be consistent. The use of “it” in (a)(2)(B) is consistent with the style consultants’ usage in other sections, and here the antecedent (“further examination”) is in the same section, so there is no confusion about what “it” means.



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<p><b>Rule 2006. Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases</b></p>	<p><b>Rule 2006. Soliciting and Voting Proxies in a Chapter 7 Case</b></p>
<p>(a) APPLICABILITY. This rule applies only in a liquidation case pending under chapter 7 of the Code.</p>	<p>(a) <b>Applicability.</b> This Rule 2006 applies only in a Chapter 7 case.</p>
<p>(b) DEFINITIONS.</p> <p>(1) Proxy. A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner’s attorney in fact in connection with the administration of the estate.</p> <p>(2) Solicitation of Proxy. The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.</p>	<p>(b) <b>Definitions.</b></p> <p>(1) <b>Proxy.</b> A “proxy” is a written power of attorney that authorizes an entity to vote the claim or otherwise act as the holder’s attorney-in-fact in connection with the administration of the estate.</p> <p>(2) <b>Soliciting a Proxy.</b> “Soliciting a proxy” means any communication by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of a Chapter 7 petition filed by or against the debtor. But such a communication is not considered soliciting a proxy if it comes from an attorney to a claim owner who is a regular client or who has requested the attorney’s representation.</p>
<p>(c) AUTHORIZED SOLICITATION.</p> <p>(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over \$500 or the 100 creditors having the largest claims had at least seven days’ notice in writing and of which meeting written minutes were kept and are available</p>	<p>(c) <b>Who May Solicit a Proxy.</b> A proxy may be solicited only in writing and only by:</p> <p>(1) a creditor that, on the date the petition was filed, held an allowable unsecured claim against the estate;</p> <p>(2) a committee elected under § 705;</p> <p>(3) a committee elected by creditors that hold a majority of claims in number and in total amount and that:</p> <p>(A) have claims that are not contingent or unliquidated;</p> <p>(B) are not disqualified from voting under § 702(a); and</p> <p>(C) were present or represented at a creditors’ meeting of which:</p>

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<p>reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.</p> <p>(2) A proxy may be solicited only in writing.</p>	<p>(i) all creditors with claims over \$500 or the 100 creditors with the largest claims had at least 7 days’ written notice; and</p> <p>(ii) written minutes are available that report the voting creditors’ names and the amounts of their claims; or</p> <p>(4) a bona fide trade or credit association, which may solicit only creditors who, on the petition date:</p> <p>(A) were its members or subscribers in good standing; and</p> <p>(B) held allowable unsecured claims.</p>
<p>(d) SOLICITATION NOT AUTHORIZED. This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.</p>	<p><b>(d) When Soliciting a Proxy Is Not Permitted.</b> This Rule 2006 does not permit soliciting a proxy:</p> <p>(1) for any interest except that of a general creditor;</p> <p>(2) by the interim trustee; or</p> <p>(3) by or on behalf of:</p> <p>(A) a custodian;</p> <p>(B) any entity not qualified to vote under § 702(a);</p> <p>(C) an attorney-at-law; or</p> <p>(D) a transferee holding a claim for collection purposes only.</p>
<p>(e) DATA REQUIRED FROM HOLDERS OF MULTIPLE PROXIES. At any time before the voting commences at any meeting of creditors pursuant to § 341(a) of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and transmit to the United States trustee a verified list of the proxies to be voted and a verified</p>	<p><b>(e) Duties of Holders of Multiple Proxies.</b> Before voting begins at any meeting of creditors under § 341(a)—or at any other time the court orders—a holder of 2 or more proxies must file and send to the United States trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances regarding each proxy’s execution and delivery. The statement must include:</p>

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<p>statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including:</p> <p>(1) a copy of the solicitation;</p> <p>(2) identification of the solicitor, the forwarder, if the forwarder is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;</p> <p>(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;</p> <p>(4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other entity for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxyholder’s law firm,</p>	<p>(1) a copy of the solicitation;</p> <p>(2) an identification of the solicitor, the forwarder (if the forwarder is neither the solicitor nor the claim owner), and the proxyholder—including their connections with the debtor and with each other—together with:</p> <p>(A) if the solicitor, forwarder, or proxyholder is an association, a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were, on the petition date, members or subscribers in good standing with allowable unsecured claims; and</p> <p>(B) if the solicitor, forwarder, or proxyholder is a committee of creditors, a list stating:</p> <p>(i) the date and place the committee was organized;</p> <p>(ii) that the committee was organized under (c)(2) or (c)(3);</p> <p>(iii) the committee’s members;</p> <p>(iv) the amounts of their claims;</p> <p>(v) when the claims were acquired;</p> <p>(vi) the amounts paid for the claims; and</p> <p>(vii) the extent to which the committee members’ claims are secured or entitled to priority;</p> <p>(3) a statement that the proxyholder has neither paid nor promised any consideration for the proxy;</p> <p>(4) a statement addressing whether there is any agreement—and, if so, giving its</p>

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<p>which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;</p> <p>(5) if the proxy was solicited by an entity other than the proxyholder, or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other entity for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any entity other than a member or regular associate of the solicitor’s or forwarder’s law firm which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;</p> <p>(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on the member’s claim.</p>	<p>particulars—between the proxyholder and any other entity to pay any consideration related to voting the proxy or to share with any entity (except a member or regular associate of the proxyholder’s law firm) compensation that may be allowed to:</p> <p>(A) the trustee or any entity for services rendered in the case; or</p> <p>(B) any person employed by the estate;</p> <p>(5) if the proxy was solicited by an entity other than the proxyholder—or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the claim owner—a statement signed and verified by the solicitor or forwarder:</p> <p>(A) confirming that no consideration has been paid or promised for the proxy;</p> <p>(B) addressing whether there is any agreement—and, if so, giving its particulars—between the solicitor or forwarder and any other entity to pay any consideration related to voting the proxy or to share with any entity (except a member or regular associate of the solicitor’s or forwarder’s law firm) compensation that may be allowed to:</p> <p>(i) the trustee or any entity for services rendered in the case; or</p> <p>(ii) any person employed by the estate; and</p> <p>(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member disclosing the amount and source of any consideration paid or to</p>

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	<p>be paid to the member in connection with the case, except a dividend on the member’s claim.</p>
<p>(f) ENFORCEMENT OF RESTRICTIONS ON SOLICITATION. On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other appropriate action.</p>	<p>(f) <b>Enforcing Restrictions on Soliciting Proxies.</b> On motion of a party in interest or on its own, the court may determine whether there has been a failure to comply with this Rule 2006 or any other impropriety related to soliciting or voting a proxy. After notice and a hearing, the court may:</p> <ol style="list-style-type: none"> <li>(1) reject a proxy for cause;</li> <li>(2) vacate an order entered because a proxy was voted that should have been rejected; or</li> <li>(3) take other appropriate action.</li> </ol>

**Committee Note**

The language of Rule 2006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 2006(e)(2)(B)(ii), the words “(c)(1)(B) or (C)” were changed to “(c)(2) or (3).”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** The NBC noted that in (e)(2)(B)(ii) the cross-references do not correspond to the references made in the restyled versions of the rules.

**Response:** Corrections made.

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<p><b>Rule 2007. Review of Appointment of Creditors’ Committee Organized Before Commencement of the Case</b></p>	<p><b>Rule 2007. Reviewing the Appointment of a Creditors’ Committee Organized Before a Chapter 9 or 11 Case Is Commenced</b></p>
<p>(a) MOTION TO REVIEW APPOINTMENT. If a committee appointed by the United States trustee pursuant to § 1102(a) of the Code consists of the members of a committee organized by creditors before the commencement of a chapter 9 or chapter 11 case, on motion of a party in interest and after a hearing on notice to the United States trustee and other entities as the court may direct, the court may determine whether the appointment of the committee satisfies the requirements of § 1102(b)(1) of the Code.</p>	<p>(a) <b>Motion to Review the Appointment.</b> If, in a Chapter 9 or 11 case, a committee appointed by the United States trustee under § 1102(a) consists of the members of a committee organized by creditors before the case commenced, the court may determine whether the committee’s appointment satisfies the requirements of § 1102(b)(1). The court may do so on a party in interest’s motion and after a hearing on notice to the United States trustee and other entities as the court orders.</p>
<p>(b) SELECTION OF MEMBERS OF COMMITTEE. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:</p> <p>(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over \$1,000 or the 100 unsecured creditors having the largest claims had at least seven days’ notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;</p> <p>(2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the</p>	<p>(b) <b>Determining Whether the Committee Was Fairly Chosen.</b> The court may find that the committee was fairly chosen if:</p> <p>(1) it was selected by a majority in number and amount of claims of unsecured creditors who are entitled to vote under § 702(a) and who were present or represented at a meeting of which:</p> <p>(A) all creditors with unsecured claims of over \$1,000 or the 100 unsecured creditors with the largest claims had at least 7 days’ written notice; and</p> <p>(B) written minutes are available for inspection reporting the voting creditors’ names and the amounts of their claims;</p> <p>(2) all proxies voted at the meeting were solicited under Rule 2006;</p> <p>(3) the lists and statements required by Rule 2006(e) have been sent to the United States trustee; and</p>

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<p>lists and statements required by subdivision (e) thereof have been transmitted to the United States trustee; and</p> <p>(3) the organization of the committee was in all other respects fair and proper.</p>	<p>(4) the committee’s organization was in all other respects fair and proper.</p>
<p>(c) FAILURE TO COMPLY WITH REQUIREMENTS FOR APPOINTMENT. After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.</p>	<p>(c) <b>Failure to Comply with Appointment Requirements.</b> If, after a hearing on notice under (a), the court finds that a committee appointment fails to satisfy the requirements of § 1102(b)(1), it:</p> <p>(1) must order the United States trustee to vacate the appointment; and</p> <p>(2) may order other appropriate action.</p>

**Committee Note**

The language of Rule 2007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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<p><b>Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case</b></p>	<p><b>Rule 2007.1. Appointing a Trustee or Examiner in a Chapter 11 Case</b></p>
<p>(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner under § 1104(a) or § 1104(c) of the Code shall be made in accordance with Rule 9014.</p>	<p>(a) <b>In General.</b> In a Chapter 11 case, a motion to appoint a trustee or examiner under § 1104(a) or (c) must be made in accordance with Rule 9014.</p>
<p>(b) ELECTION OF TRUSTEE.</p> <p>(1) <i>Request for an Election.</i> A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.</p> <p>(2) <i>Manner of Election and Notice.</i> An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.</p> <p>(3) <i>Report of Election and Resolution of Disputes.</i></p> <p>(A) <i>Report of Undisputed Election.</i> If no dispute arises out of the</p>	<p>(b) <b>Requesting the United States Trustee to Convene a Meeting of Creditors to Elect a Trustee.</b></p> <p>(1) <b><i>In General.</i></b> A request to the United States trustee to convene a meeting of creditors to elect a trustee must be filed and sent to the United States trustee in accordance with Rule 5005 and within the time prescribed by § 1104(b). Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved under (c) below must serve as trustee.</p> <p>(2) <b><i>Notice and Manner of Conducting the Election.</i></b> A trustee’s election under § 1104(b) must be conducted as Rules 2003(b)(3) and 2006 provide, and notice of the meeting of creditors must be given as Rule 2002 provides. The United States trustee must preside at the meeting. A proxy to vote in the election may be solicited only by a creditors’ committee appointed under § 1102 or by another party entitled to solicit a proxy under Rule 2006.</p> <p>(3) <b><i>Reporting Election Results; Resolving Disputes.</i></b></p> <p>(A) <i>Undisputed Election.</i> If the election is undisputed, the United States trustee must promptly file a report certifying the election, including</p>



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<p>election, the United States trustee shall promptly file a report certifying the election, including the name and address of the person elected and a statement that the election is undisputed. The report shall be accompanied by a verified statement of the person elected setting forth that person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.</p> <p style="text-align: center;">(B) <i>Dispute Arising Out of an Election.</i> If a dispute arises out of an election, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code.</p>	<p>the name and address of the person elected and a statement that the election is undisputed. The report must be accompanied by a verified statement of the person elected setting forth that person’s connections with:</p> <ul style="list-style-type: none"> <li>(i) the debtor;</li> <li>(ii) creditors;</li> <li>(iii) any other party in interest;</li> <li>(iv) their respective attorneys and accountants;</li> <li>(v) the United States trustee; or</li> <li>(vi) any person employed in the United States trustee’s office.</li> </ul> <p>(B) <i>Disputed Election.</i> If the election is disputed, the United States trustee must promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report must be accompanied by a verified statement by each such candidate, setting forth the candidate’s connections with any entity listed in (A). No later than the date on which the report of the disputed election is filed, the United States trustee must mail a copy of the report and each verified statement to:</p> <ul style="list-style-type: none"> <li>(i) any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report; and</li> </ul>

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	(ii) any committee appointed under § 1102.
<p>(c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant’s knowledge, all the person’s connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, or persons employed in the office of the United States trustee. The application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.</p>	<p>(c) <b>Approving an Appointment.</b> On application of the United States trustee, the court may approve a trustee’s or examiner’s appointment under § 1104(d). The application must:</p> <ol style="list-style-type: none"> <li>(1) name the person appointed and state, to the best of the applicant’s knowledge, all that person’s connections with any entity listed in (b)(3)(A);</li> <li>(2) state the names of the parties in interest with whom the United States trustee consulted about the appointment; and</li> <li>(3) be accompanied by a verified statement of the person appointed setting forth that person’s connections with any entity listed in (b)(3)(A).</li> </ol>

**Committee Note**

The language of Rule 2007.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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<p><b>Rule 2007.2. Appointment of Patient Care Ombudsman in a Health Care Business Case</b></p>	<p><b>Rule 2007.2. Appointing a Patient-Care Ombudsman in a Health Care Business Case</b></p>
<p>(a) ORDER TO APPOINT PATIENT CARE OMBUDSMAN. In a chapter 7, chapter 9, or chapter 11 case in which the debtor is a health care business, the court shall order the appointment of a patient care ombudsman under § 333 of the Code, unless the court, on motion of the United States trustee or a party in interest filed no later than 21 days after the commencement of the case or within another time fixed by the court, finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients.</p>	<p>(a) <b>In General.</b> In a Chapter 7, 9, or 11 case in which the debtor is a health care business, the court must order the appointment of a patient-care ombudsman under § 333— unless the court, on motion of the United States trustee or a party in interest, finds that appointing a patient-care ombudsman in that case is not necessary to protect patients. The motion must be filed within 21 days after the case was commenced or at another time set by the court.</p>
<p>(b) MOTION FOR ORDER TO APPOINT OMBUDSMAN. If the court has found that the appointment of an ombudsman is not necessary, or has terminated the appointment, the court, on motion of the United States trustee or a party in interest, may order the appointment at a later time if it finds that the appointment has become necessary to protect patients.</p>	<p>(b) <b>Deferred Appointment.</b> If the court has found that appointing an ombudsman is unnecessary, or has terminated the appointment, the court may, on motion of the United States trustee or a party in interest, order an appointment later if it finds that an appointment has become necessary to protect patients.</p>
<p>(c) NOTICE OF APPOINTMENT. If a patient care ombudsman is appointed under § 333, the United States trustee shall promptly file a notice of the appointment, including the name and address of the person appointed. Unless the person appointed is a State Long-Term Care Ombudsman, the notice shall be accompanied by a verified statement of the person appointed setting forth the person’s connections with the debtor, creditors, patients, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office</p>	<p>(c) <b>Giving Notice.</b> When a patient-care ombudsman is appointed under § 333, the United States trustee must promptly file a notice of the appointment, including the name and address of the person appointed. Unless that person is a State Long-Term-Care Ombudsman, the notice must be accompanied by a verified statement of the person appointed setting forth that person’s connections with:</p> <ol style="list-style-type: none"> <li>(1) the debtor;</li> <li>(2) creditors;</li> <li>(3) patients;</li> </ol>

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of the United States trustee.	(4) any other party in interest; (5) their respective attorneys and accountants; (6) the United States trustee; or (7) any person employed in the United States trustee’s office.
(d) TERMINATION OF APPOINTMENT. On motion of the United States trustee or a party in interest, the court may terminate the appointment of a patient care ombudsman if the court finds that the appointment is not necessary to protect patients.	<b>(d) Terminating an Appointment.</b> On motion of the United States trustee or a party in interest, the court may terminate a patient-care ombudsman’s appointment that it finds to be unnecessary to protect patients.
(e) MOTION. A motion under this rule shall be governed by Rule 9014. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct.	<b>(e) Procedure.</b> Rule 9014 governs any motion under this Rule 2007.2. The motion must be sent to the United States trustee and served on: <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• any committee elected under § 705 or appointed under § 1102, or its authorized agent; and</li> <li>• any other entity as the court orders.</li> </ul> In a Chapter 9 or 11 case, if no committee of unsecured creditors has been appointed under § 1102, the motion must also be served on the creditors included on the list filed under Rule 1007(d).

**Committee Note**

The language of Rule 2007.2 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 2008. Notice to Trustee of Selection</b></p>	<p><b>Rule 2008. Notice to the Person Selected as Trustee</b></p>
<p>The United States trustee shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee’s bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in writing of rejection of the office within seven days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in writing of acceptance of the office within seven days after receipt of notice of selection or shall be deemed to have rejected the office.</p>	<p>(a) <b>Giving Notice.</b> The United States trustee must immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee’s bond.</p> <p>(b) <b>Accepting the Position of Trustee.</b></p> <p>(1) <b><i>Trustee Who Has Filed a Blanket Bond.</i></b> A trustee selected in a Chapter 7, 12, or 13 case who has filed a blanket bond under Rule 2010 may reject the office by notifying the court and the United States trustee in writing within 7 days after receiving notice of selection. Otherwise, the trustee will be deemed to have accepted the office.</p> <p>(2) <b><i>Other Trustees.</i></b> Any other person selected as trustee may accept the office by notifying the court and the United States trustee in writing within 7 days after receiving notice of selection. Otherwise, the person will be deemed to have rejected the office.</p>

**Committee Note**

The language of Rule 2008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 2009. Trustees for Estates When Joint Administration Ordered</b></p>	<p><b>Rule 2009. Trustees for Jointly Administered Estates</b></p>
<p>(a) ELECTION OF SINGLE TRUSTEE FOR ESTATES BEING JOINTLY ADMINISTERED. If the court orders a joint administration of two or more estates under Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered, unless the case is under subchapter V of chapter 7 of the Code.</p>	<p>(a) <b>Creditors’ Right to Elect a Single Trustee.</b> Except in a case under Subchapter V of Chapter 7, if the court orders that 2 or more estates be jointly administered under Rule 1015(b), the creditors may elect a single trustee for those estates.</p>
<p>(b) RIGHT OF CREDITORS TO ELECT SEPARATE TRUSTEE. Notwithstanding entry of an order for joint administration under Rule 1015(b), the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code, unless the case is under subchapter V of chapter 7.</p>	<p>(b) <b>Creditors’ Right to Elect a Separate Trustee.</b> Except in a case under Subchapter V of Chapter 7, any debtor’s creditors may elect a separate trustee for the debtor’s estate under § 702—even if the court orders joint administration under Rule 1015(b).</p>
<p>(c) APPOINTMENT OF TRUSTEES FOR ESTATES BEING JOINTLY ADMINISTERED.</p> <p>(1) <i>Chapter 7 Liquidation Cases.</i> Except in a case governed by subchapter V of chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.</p> <p>(2) <i>Chapter 11 Reorganization Cases.</i> If the appointment of a trustee is ordered, the United States trustee may appoint one or more trustees for estates being jointly administered in chapter 11 cases.</p> <p>(3) <i>Chapter 12 Family Farmer’s Debt Adjustment Cases.</i> The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 12 cases.</p> <p>(4) <i>Chapter 13 Individual’s Debt</i></p>	<p>(c) <b>United States Trustee’s Right to Appoint Interim Trustees in Cases with Jointly Administered Estates.</b></p> <p>(1) <b>Chapter 7.</b> Except in a case under Subchapter V of Chapter 7, the United States trustee may appoint one or more interim trustees for estates being jointly administered in Chapter 7.</p> <p>(2) <b>Chapter 11.</b> If the court orders the appointment of a trustee, the United States trustee may appoint one or more trustees for estates being jointly administered in Chapter 11.</p> <p>(3) <b>Chapter 12 or 13.</b> The United States trustee may appoint one or more trustees for estates being jointly administered in Chapter 12 or 13.</p>

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<i>Adjustment Cases.</i> The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 13 cases.	
(d) POTENTIAL CONFLICTS OF INTEREST. On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee who has been elected or appointed, the court shall order the selection of separate trustees for estates being jointly administered.	<b>(d) Conflicts of Interest.</b> On a showing that a common trustee’s conflicts of interest will prejudice creditors or equity security holders of jointly administered estates, the court must order the selection of separate trustees for the estates.
(e) SEPARATE ACCOUNTS. The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.	<b>(e) Keeping Separate Accounts.</b> A trustee of jointly administered estates must keep separate accounts of each estate’s property and distribution.

**Committee Note**

The language of Rule 2009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** In (b) the NBC suggested replacing “the debtor’s estate” with “that debtor’s estate.” Also in (b) they suggested changing “any debtor’s creditors may elect” with “the creditors of any debtor may elect.”

**Response:** The style consultants do not like using “of” where it is not absolutely necessary, so they object to “the creditors of any debtor,” and it is not substantively different from “any debtor’s creditors.” As to “that debtor’s estate,” the original rule says “the estate of the debtor,” and “the debtor’s estate” accurately reflects that original language. We made no change.



ORIGINAL	REVISION
<b>Rule 2010. Qualification by Trustee; Proceeding on Bond</b>	<b>Rule 2010. Blanket Bond; Proceedings on the Bond</b>
(a) BLANKET BOND. The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.	(a) <b>Authorizing a Blanket Bond.</b> The United States trustee may authorize a blanket bond in the United States’ favor, conditioned on the faithful performance of a trustee’s official duties to cover: <ol style="list-style-type: none"> <li>(1) a person who qualifies as trustee in multiple cases; or</li> <li>(2) multiple trustees who each qualifies in a different case.</li> </ol>
(b) PROCEEDING ON BOND. A proceeding on the trustee’s bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.	(b) <b>Proceedings on the Bond.</b> A party in interest may bring a proceeding in the name of the United States on a trustee’s bond for the use of the entity injured by the trustee’s breach of the condition.

**Committee Note**

The language of Rule 2010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 2010(a)(1), the words “a number of cases” were changed to “multiple cases.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** In (a)(1) the NBC suggested changing “in a number of cases” to “in multiple cases,” which is the restyled language in (a)(2) with respect to “a number of trustees” in the original.

**Response:** Suggestion accepted.

ORIGINAL	REVISION
<b>Rule 2011. Evidence of Debtor in Possession or Qualification of Trustee</b>	<b>Rule 2011. Evidence That a Debtor Is a Debtor in Possession or That a Trustee Has Qualified</b>
(a) Whenever evidence is required that a debtor is a debtor in possession or that a trustee has qualified, the clerk may so certify and the certificate shall constitute conclusive evidence of that fact.	<b>(a) The Clerk’s Certification.</b> Whenever evidence is required that a debtor is a debtor in possession or that a trustee has qualified, the clerk may issue a certificate to that effect. The certification constitutes conclusive evidence of that fact.
(b) If a person elected or appointed as trustee does not qualify within the time prescribed by § 322(a) of the Code, the clerk shall so notify the court and the United States trustee.	<b>(b) Trustee’s Failure to Qualify.</b> If a person elected or appointed as trustee does not qualify within the time prescribed by § 322(a), the clerk must so notify the court and the United States trustee.

**Committee Note**

The language of Rule 2011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 2012. Substitution of Trustee or Successor Trustee; Accounting</b>	<b>Rule 2012. Substituting a Trustee in a Chapter 11 or 12 Case; Successor Trustee in a Pending Proceeding</b>
(a) TRUSTEE. If a trustee is appointed in a chapter 11 case or the debtor is removed as debtor in possession in a chapter 12 case, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.	(a) <b>Substituting a Trustee.</b> If a trustee is appointed in a Chapter 11 case or the debtor is removed as debtor in possession in a Chapter 12 case, the trustee is automatically substituted for the debtor in possession as a party in any pending action, proceeding, or matter.
(b) SUCCESSOR TRUSTEE. When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code (1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and (2) the successor trustee shall prepare, file, and transmit to the United States trustee an accounting of the prior administration of the estate.	(b) <b>Successor Trustee.</b> When a trustee dies, resigns, is removed, or otherwise ceases to hold office while a bankruptcy case is pending, the successor trustee is automatically substituted as a party in any pending action, proceeding, or matter. The successor trustee must prepare, file, and send to the United States trustee an accounting of the estate’s prior administration.

**Committee Note**

The language of Rule 2012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 2013. Public Record of Compensation Awarded to Trustees, Examiners, and Professionals</b>	<b>Rule 2013. Keeping a Public Record of Compensation Awarded by the Court to Examiners, Trustees, and Professionals</b>
(a) RECORD TO BE KEPT. The clerk shall maintain a public record listing fees awarded by the court (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professionals employed by trustees, and (2) to examiners. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee awarded. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge. "Trustees," as used in this rule, does not include debtors in possession.	(a) <b>In General.</b> The clerk must keep a public record of fees the court awards to examiners and trustees, and to attorneys, accountants, appraisers, auctioneers, and other professionals that trustees employ. The record must include the case name and case number, the name of the individual or firm receiving the fee, and the amount awarded. The record must be maintained chronologically and be kept current and open for public examination without charge. "Trustee," as used in this Rule 2013, does not include a debtor in possession.
(b) SUMMARY OF RECORD. At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees awarded during the preceding year. The summary shall be open to examination by the public without charge. The clerk shall transmit a copy of the summary to the United States trustee.	(b) <b>Annual Summary of the Record.</b> At the end of each year, the clerk must prepare a summary of the public record, by individual or firm name, showing the total fees awarded during the year. The summary must be open for public examination without charge. The clerk must send a copy of the summary to the United States trustee.

### Committee Note

The language of Rule 2013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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### Changes Made After Publication and Comment

- Committee note has been added.
- In Rule 2013(a), the word "docket" was changed to "case."

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** In (a), NBC suggested changing “docket number” to “case number.”

***Response:*** Suggestion accepted.

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<p><b>Rule 2014. Employment of Professional Persons</b></p>	<p><b>Rule 2014. Employing Professionals</b></p>
<p>(a) APPLICATION FOR AND ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant’s knowledge, all of the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.</p>	<p>(a) <b>Order Approving Employment; Application for Employment.</b></p> <p>(1) <i>Order Approving Employment.</i> The court may approve the employment of an attorney, accountant, appraiser, auctioneer, agent, or other professional under § 327, § 1103, or § 1114 only on the trustee’s or committee’s application.</p> <p>(2) <i>Application for Employment.</i> The applicant must file the application and, except in a Chapter 9 case, must send a copy to the United States trustee. The application must state specific facts showing:</p> <p>(A) the necessity for the employment;</p> <p>(B) the name of the person to be employed;</p> <p>(C) the reasons for the selection;</p> <p>(D) the professional services to be rendered;</p> <p>(E) any proposed arrangement for compensation; and</p> <p>(F) to the best of the applicant’s knowledge, all the person’s connections with:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• creditors;</li> <li>• any other party in interest;</li> <li>• their respective attorneys and accountants;</li> <li>• the United States trustee; and</li> <li>• any person employed in the United States trustee’s office.</li> </ul>

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	<p><b>(3) <i>Verified Statement.</i></b> The application must be accompanied by a verified statement of the person to be employed, setting forth that person’s connections with any entity listed in (2)(F).</p>
<p>(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as attorney or accountant so employed, without further order of the court.</p>	<p><b>(b) <i>Services Rendered by a Member or Associate of a Law or Accounting Firm.</i></b> If a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant—or if a named attorney or accountant is employed—then any partner, member, or regular associate may act as so employed, without further court order.</p>

**Committee Note**

The language of Rule 2014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status</b></p>	<p><b>Rule 2015. Duty to Keep Records, Make Reports, and Give Notices</b></p>
<p>(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall:</p> <p>(1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed;</p> <p>(2) keep a record of receipts and the disposition of money and property received;</p> <p>(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;</p> <p>(4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case;</p> <p>(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter</p>	<p>(a) <b>Duties of a Trustee or Debtor in Possession.</b> A trustee or debtor in possession must:</p> <p>(1) in a Chapter 7 case and, if the court so orders, in a Chapter 11 case, file and send to the United States trustee a complete inventory of the debtor’s property within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed;</p> <p>(2) keep a record of receipts and the disposition of money and property received;</p> <p>(3) file:</p> <p>(A) the reports and summaries required by § 704(a)(8); and</p> <p>(B) if payments are made to employees, a statement of the amounts of deductions for all taxes required to be withheld or paid on the employees’ behalf and the place where these funds are deposited;</p> <p>(4) give notice of the case, as soon as possible after it commences, to the following entities, except those who know or have previously been notified of the case:</p> <p>(A) every entity known to be holding money or property subject to the debtor’s withdrawal or order, including every bank, savings- or building-and-loan association, public utility company, and</p>



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<p>during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6), file and transmit to the United States trustee a statement of any disbursements made during that quarter and of any fees payable under 28 U.S.C. § 1930(a)(6) for that quarter; and</p> <p>(6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and transmit to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by § 308. If the order for relief is within the first 15 days of a calendar month, a report shall be filed for the portion of the month that follows the order for relief. If the order for relief is after the 15<sup>th</sup> day of a calendar month, the period for the remainder of the month shall be included in the report for the next calendar month. Each report shall be filed no later than 21 days after the last day of the calendar month following the month covered by the report. The obligation to file reports under this subparagraph terminates on the effective date of the plan, or conversion or dismissal of the case.</p>	<p>Landlord with whom the debtor has a deposit; and</p> <p>(B) every insurance company that has issued a policy with a cash-surrender value payable to the debtor;</p> <p>(5) in a Chapter 11 case, on or before the last day of the month after each calendar quarter during which fees must be paid under 28 U.S.C. § 1930(a)(6), file and send to the United States trustee a statement of those fees and any disbursements made during that quarter; and</p> <p>(6) in a Chapter 11 small business case, unless the court, for cause, sets a different schedule, file and send to the United States trustee a report under § 308, using Form 425C, for each calendar month after the order for relief on the following schedule:</p> <ul style="list-style-type: none"> <li>• If the order for relief is within the first 15 days of a calendar month, the report must be filed for the rest of that month.</li> <li>• If the order for relief is after the 15<sup>th</sup>, the information for the rest of that month must be included in the report for the next calendar month.</li> </ul> <p>Each report must be filed within 21 days after the last day of the month following the month that the report covers. The obligation to file reports ends on the date that the plan becomes effective or the case is converted or dismissed.</p>
<p>(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer’s debt adjustment case, the debtor in</p>	<p><b>(b) Duties of a Chapter 12 Trustee or Debtor in Possession.</b> In a Chapter 12 case, the debtor in possession must perform the duties prescribed in (a)(2)–(4)</p>

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<p>possession shall perform the duties prescribed in clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.</p>	<p>And, if the court orders, file and send to the United States trustee a complete inventory of the debtor’s property within the time the court sets. If the debtor is removed as debtor in possession, the trustee must perform these duties.</p>
<p>(c) CHAPTER 13 TRUSTEE AND DEBTOR.</p> <p>(1) Business Cases. In a chapter 13 individual’s debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.(2) Nonbusiness Cases. In a chapter 13 individual’s debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.</p>	<p>(c) <b>Duties of a Chapter 13 Trustee and Debtor.</b></p> <p>(1) <b>Chapter 13 Business Case.</b> In a Chapter 13 case, a debtor engaged in business must:</p> <p>(A) perform the duties prescribed by (a)(2)–(4); and</p> <p>(B) if the court so orders, file and send to the United States trustee a complete inventory of the debtor’s property within the time the court sets.</p> <p>(2) <b>Other Chapter 13 Case.</b> In a Chapter 13 case in which the debtor is not engaged in business, the trustee must perform the duties prescribed by (a)(2).</p>
<p>(d) FOREIGN REPRESENTATIVE. In a case in which the court has granted recognition of a foreign proceeding under chapter 15, the foreign representative shall file any notice required under § 1518 of the Code within 14 days after the date when the representative becomes aware of the subsequent information.</p>	<p>(d) <b>Duties of a Chapter 15 Foreign Representative.</b> In a Chapter 15 case in which the court has granted recognition of a foreign proceeding, the foreign representative must file any notice required under § 1518 within 14 days after becoming aware of the subsequent information.</p>
<p>(e) TRANSMISSION OF REPORTS. In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of</p>	<p>(e) <b>Making Reports Available in a Chapter 11 Case.</b> In a Chapter 11 case, the court may order that copies or summaries of annual reports and other reports be</p>

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<p>other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports. A copy of every report or summary mailed or published pursuant to this subdivision shall be transmitted to the United States trustee.</p>	<p>Mailed to creditors, equity security holders, and indenture trustees. The court may also order that summaries of these reports be published. A copy of every such report or summary, whether mailed or published, must be sent to the United States trustee.</p>

**Committee Note**

The language of Rule 2015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** In (a)(6), the NBC noted that the existing rule (and restyled rule) are not clear whether this reporting requirement applies to cases under subchapter V of chapter 11. They also suggested that (b) and (c)(1) be consistent by inserting a list of (1) and (2) into (b), like (1)(A) and (B) in (c).

**Response:** The definition of “small business case” in § 101(51C) clearly excludes a case in which the debtor has elected treatment under subchapter V of chapter 11. There is no subchapter V “small business case.” No change is needed. The format of (c)(1) cannot be used for (b) without creating hanging text after numbered clauses, and that is not proper style.

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<p><b>Rule 2015.1. Patient Care Ombudsman</b></p>	<p><b>Rule 2015.1. Patient-Care Ombudsman</b></p>
<p>(a) <b>REPORTS.</b> A patient care ombudsman, at least 14 days before making a report under § 333(b)(2) of the Code, shall give notice that the report will be made to the court, unless the court orders otherwise. The notice shall be transmitted to the United States trustee, posted conspicuously at the health care facility that is the subject of the report, and served on: the debtor; the trustee; all patients; and any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct. The notice shall state the date and time when the report will be made, the manner in which the report will be made, and, if the report is in writing, the name, address, telephone number, email address, and website, if any, of the person from whom a copy of the report may be obtained at the debtor’s expense.</p>	<p>(a) <b>Notice of the Report.</b> Unless the court orders otherwise, a patient-care ombudsman must give at least 14 days’ notice before making a report under § 333(b)(2).</p> <p>(1) <b>Recipients of the Notice.</b> The notice must be sent to the United States trustee, posted conspicuously at the healthcare facility that is the report’s subject, and served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• all patients;</li> <li>• any committee elected under § 705 or appointed under § 1102 or its authorized agent;</li> <li>• in a Chapter 9 or 11 case, the creditors on the list filed under Rule 1007(d) if no committee of unsecured creditors has been appointed under § 1102; and</li> <li>• any other entity as the court orders.</li> </ul> <p>(2) <b>Contents of the Notice.</b> The notice must state:</p> <p>(A) the date and time when the report will be made;</p> <p>(B) the manner in which it will be made; and</p> <p>(C) if it will be written, the name, address, telephone number, email address, and any website of the person from whom a copy may be obtained at the debtor’s expense.</p>

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<p>(b) AUTHORIZATION TO REVIEW CONFIDENTIAL PATIENT RECORDS. A motion by a patient care ombudsman under § 333(c) to review confidential patient records shall be governed by Rule 9014, served on the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient’s health care, and transmitted to the United States trustee subject to applicable nonbankruptcy law relating to patient privacy. Unless the court orders otherwise, a hearing on the motion may not be commenced earlier than 14 days after service of the motion.</p>	<p><b>(b) Authorization to Review Confidential Patient Records.</b></p> <p><b>(1) <i>Motion to Review; Service.</i></b> A patient-care ombudsman’s motion under § 333(c) to review confidential patient records is governed by Rule 9014. The motion must:</p> <ul style="list-style-type: none"> <li>(A) be served on the patient;</li> <li>(B) be served on any family member or other contact person whose name and address have been given to the trustee or the debtor to provide information about the patient’s healthcare; and</li> <li>(C) be sent to the United States trustee, subject to applicable nonbankruptcy law relating to patient privacy.</li> </ul> <p><b>(2) <i>Time for a Hearing</i></b> . Unless the court orders otherwise, a hearing on the motion may not commence earlier than 14 days after the motion is served.</p>

**Committee Note**

The language of Rule 2015.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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<p><b>Rule 2015.2. Transfer of Patient in Health Care Business Case</b></p>	<p><b>Rule 2015.2. Transferring a Patient in a Health Care Business Case</b></p>
<p>Unless the court orders otherwise, if the debtor is a health care business, the trustee may not transfer a patient to another health care business under § 704(a)(12) of the Code unless the trustee gives at least 14 days’ notice of the transfer to the patient care ombudsman, if any, the patient, and any family member or other contact person whose name and address has been given to the trustee or the debtor for the purpose of providing information regarding the patient’s health care. The notice is subject to applicable nonbankruptcy law relating to patient privacy.</p>	<p>Unless the court orders otherwise, if the debtor is a health care business, the trustee may transfer a patient to another health care business under § 704(a)(12) only if the trustee gives at least 14 days’ notice of the transfer to:</p> <ul style="list-style-type: none"> <li>• any patient-care ombudsman;</li> <li>• the patient; and</li> <li>• any family member or other contact person whose name and address have been given to the trustee or the debtor to provide information about the patient’s healthcare.</li> </ul> <p>The notice is subject to applicable nonbankruptcy law concerning patient privacy.</p>

**Committee Note**

The language of Rule 2015.2 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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<p><b>Rule 2015.3. Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest</b></p>	<p><b>Rule 2015.3. Reporting Financial Information About Entities in Which a Chapter 11 Estate Holds a Substantial or Controlling Interest</b></p>
<p>(a) REPORTING REQUIREMENT. In a chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.</p>	<p>(a) <b>Reporting Requirement; Contents of the Report.</b> In a Chapter 11 case, the trustee or debtor in possession must file periodic financial reports of the value, operations, and profitability of each entity in which the estate holds a substantial or controlling interest—unless the entity is a publicly traded corporation or a debtor in a bankruptcy case. The reports must be prepared as prescribed by Form 426 and be based on the most recent information reasonably available to the filer.</p>
<p>(b) TIME FOR FILING; SERVICE. The first report required by this rule shall be filed no later than seven days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted. Copies of the report shall be served on the United States trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.</p>	<p>(b) <b>Time to File; Service.</b> The first report must be filed at least 7 days before the first date set for the meeting of creditors under § 341. Later reports must be filed at least every 6 months, until the date a plan becomes effective or the case is converted or dismissed. A copy of each report must be served on the United States trustee, any committee appointed under § 1102, and any other party in interest that has filed a request for it.</p>
<p>(c) PRESUMPTION OF SUBSTANTIAL OR CONTROLLING INTEREST; JUDICIAL DETERMINATION. For purposes of this rule, an entity of which the estate controls or owns at least a 20 percent interest, shall be presumed to be an entity in which the estate has a substantial or controlling interest. An entity in which the estate controls or owns less than a 20 percent interest shall</p>	<p>(c) <b>Presumption of a Substantial or Controlling Interest.</b></p> <p>(1) <i>When a Presumption Applies.</i> Under this Rule 2015.3, the estate is presumed to have a substantial or controlling interest in an entity of which it controls or owns at least a 20% interest. Otherwise, the estate is presumed not to have a substantial or controlling interest.</p>

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<p>be presumed not to be an entity in which the estate has a substantial or controlling interest. Upon motion, the entity, any holder of an interest therein, the United States trustee, or any other party in interest may seek to rebut either presumption, and the court shall, after notice and a hearing, determine whether the estate’s interest in the entity is substantial or controlling.</p>	<p>(2) <b><i>Rebutting the Presumption.</i></b> The entity, any holder of an interest in it, the United States trustee, or any other party in interest may move to rebut either presumption. After notice and a hearing, the court must determine whether the estate’s interest in the entity is substantial or controlling.</p>
<p>(d) MODIFICATION OF REPORTING REQUIREMENT. The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.</p>	<p>(d) <b>Modifying the Reporting Requirement.</b> After notice and a hearing, the court may vary the reporting requirements of (a) for cause, including that:</p> <ol style="list-style-type: none"> <li>(1) the trustee or debtor in possession is not able, after a good-faith effort, to comply with them; or</li> <li>(2) the required information is publicly available.</li> </ol>
<p>(e) NOTICE AND PROTECTIVE ORDERS. No later than 14 days before filing the first report required by this rule, the trustee or debtor in possession shall send notice to the entity in which the estate has a substantial or controlling interest, and to all holders—known to the trustee or debtor in possession—of an interest in that entity, that the trustee or debtor in possession expects to file and serve financial information relating to the entity in accordance with this rule. The entity in which the estate has a substantial or controlling interest, or a person holding an interest in that entity, may request protection of the information under § 107 of the Code.</p>	<p>(e) <b>Notice to Entities in Which the Estate has a Substantial or Controlling Interest; Protective Order.</b> At least 14 days before filing the first report under (a), the trustee or debtor in possession must send notice to every entity in which the estate has a substantial or controlling interest—and all known holders of an interest in the entity—that the trustee or debtor in possession expects to file and serve financial information about the entity in accordance with this Rule 2015.3. Any such entity, or person holding an interest in it, may request that the information be protected under § 107.</p>
<p>(f) EFFECT OF REQUEST. Unless the court orders otherwise, the pendency of a request under subdivisions (c), (d), or (e) of this rule shall not alter or stay the</p>	<p>(f) <b>Effect of a Request.</b> Unless the court orders otherwise, a pending request under (c), (d), or (e) does not alter or stay the requirements of (a).</p>



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requirements of subdivision (a).	

### Committee Note

The language of Rule 2015.3 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

### Changes Made After Publication and Comment

- Committee note has been added.
- In Rule 2015.3(b), the words “the plan” were changed to “a plan.”

### Summary of Public Comment

- **National Bankruptcy Conference (BK-2020-0002-0006):** In clause (b) the NBC suggested changing “date the plan becomes effective” to “date a plan becomes effective.”

**Response:** Accepted.

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<p><b>Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses</b></p>	<p><b>Rule 2016. Compensation for Services Rendered; Reimbursing Expenses</b></p>
<p>(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.</p>	<p>(a) <b>In General.</b></p> <p>(1) <b><i>Application.</i></b> An entity seeking from the estate interim or final compensation for services or reimbursement of necessary expenses must file an application showing:</p> <p>(A) in detail the amounts requested and the services rendered, time expended, and expenses incurred;</p> <p>(B) all payments previously made or promised for services rendered or to be rendered in connection with the case;</p> <p>(C) the source of the paid or promised compensation;</p> <p>(D) whether any previous compensation has been shared and whether an agreement or understanding exists between the applicant and any other entity for sharing compensation for services rendered or to be rendered in connection with the case; and</p> <p>(E) the particulars of any compensation sharing or agreement or understanding to share, except by the applicant as a member or regular associate of a law or accounting firm.</p> <p>(2) <b><i>Application for Services Rendered or to be Rendered by Attorney or Accountant.</i></b> The requirements of (a) apply to an application for compensation for services rendered by an attorney or accountant, even though a creditor or other entity files the application.</p>

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	<p>(3) <b><i>Copy to United States Trustee.</i></b>                      Except in a Chapter 9 case, the applicant must send a copy of the application to the United States trustee.</p>
<p>(b) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney’s law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.</p>	<p>(b) <b>Disclosing Compensation Paid or Promised to the Debtor’s Attorney.</b>                      Within 14 days after the order for relief— or at another time as the court orders— every debtor’s attorney (whether or not applying for compensation) must file and send to the United States trustee the statement required by § 329. The statement must show whether the attorney has shared or agreed to share compensation with any other entity and, if so, the particulars of any sharing or agreement to share, except with a member or regular associate of the attorney’s law firm. Within 14 days after any payment or agreement to pay not previously disclosed, the attorney must file and send to the United States trustee a supplemental statement.</p>
<p>(c) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO BANKRUPTCY PETITION PREPARER. Before a petition is filed, every bankruptcy petition preparer for a debtor shall deliver to the debtor, the declaration under penalty of perjury required by § 110(h)(2). The declaration shall disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration shall also describe the services performed and</p>	<p>(c) <b>Disclosing Compensation Paid or Promised to a Bankruptcy Petition Preparer.</b></p> <p>(1) <b><i>Basic Requirements.</i></b> Before a petition is filed, every bankruptcy petition preparer for a debtor must deliver to the debtor the declaration under penalty of perjury required by § 110(h)(2). The declaration must:</p> <p>(A) disclose any fee, and its source, received from or on behalf of the debtor within 12 months before the petition’s filing, together with</p>

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<p>documents prepared or caused to be prepared by the bankruptcy petition preparer. The declaration shall be filed with the petition. The petition preparer shall file a supplemental statement within 14 days after any payment or agreement not previously disclosed.</p>	<p>all unpaid fees charged to the debtor;</p> <p>(B) describe the services performed and the documents prepared or caused to be prepared by the bankruptcy petition preparer; and</p> <p>(C) be filed with the petition.</p> <p>(2) <b><i>Supplemental Statement.</i></b> Within 14 days after any later payment or agreement to pay not previously disclosed, the bankruptcy petition preparer must file a supplemental statement.</p>

**Committee Note**

The language of Rule 2016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<p><b>Rule 2017. Examination of Debtor’s Transactions with Debtor’s Attorney</b></p>	<p><b>Rule 2017. Examining Transactions Between a Debtor and the Debtor’s Attorney</b></p>
<p>(a) PAYMENT OR TRANSFER TO ATTORNEY BEFORE ORDER FOR RELIEF. On motion by any party in interest or on the court’s own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.</p>	<p>(a) <b>Payments or Transfers to an Attorney Made Before the Order for Relief.</b> On motion of a party in interest, or on its own, the court may, after notice and a hearing, determine whether a debtor’s direct or indirect payment of money or transfer of property to an attorney for services rendered or to be rendered was excessive if it was made:</p> <ol style="list-style-type: none"> <li>(1) in contemplation of the filing of a bankruptcy petition by or against the debtor, or</li> <li>(2) before the order for relief is entered in an involuntary case.</li> </ol>
<p>(b) PAYMENT OR TRANSFER TO ATTORNEY AFTER ORDER FOR RELIEF. On motion by the debtor, the United States trustee, or on the court’s own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.</p>	<p>(b) <b>Payments or Transfers to an Attorney Made After the Order for Relief Is Entered.</b> On motion of the debtor or the United States trustee, or on its own, the court may, after notice and a hearing, determine whether a debtor’s payment of money or transfer of property—or agreement to pay money or transfer property—to an attorney after an order for relief is entered is excessive. It does not matter for the determination whether the payment or transfer is made, or to be made, direct or indirect, if the payment, transfer, or agreement is for services related to the case.</p>

**Committee Note**

The language of Rule 2017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

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<p><b>Rule 2018. Intervention; Right to Be Heard</b></p>	<p><b>Rule 2018. Intervention by an Interested Entity; Right to Be Heard</b></p>
<p>(a) PERMISSIVE INTERVENTION. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.</p>	<p>(a) <b>In General.</b> After hearing on such notice as the court orders and for cause, the court may permit an interested entity to intervene generally or regarding any specified matter.</p>
<p>(b) INTERVENTION BY ATTORNEY GENERAL OF A STATE. In a chapter 7, 11, 12, or 13 case, the Attorney General of a State may appear and be heard on behalf of consumer creditors if the court determines the appearance is in the public interest, but the Attorney General may not appeal from any judgment, order, or decree in the case.</p>	<p>(b) <b>Intervention by a State Attorney General.</b> In a Chapter 7, 11, 12, or 13 case, a state attorney general may appear and be heard on behalf of consumer creditors if the court determines that the appearance is in the public interest. But the state attorney general may not appeal from any judgment, order, or decree entered in the case.</p>
<p>(c) CHAPTER 9 MUNICIPALITY CASE. The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case. Representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court.</p>	<p>(c) <b>Intervention by the United States Secretary of the Treasury or a State Representative.</b> In a Chapter 9 case:</p> <ol style="list-style-type: none"> <li>(1) the United States Secretary of the Treasury may—and if requested by the court must—intervene; and</li> <li>(2) a representative of the state where the debtor is located may intervene on matters the court specifies.</li> </ol>
<p>(d) LABOR UNIONS. In a chapter 9, 11, or 12 case, a labor union or employees’ association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees. A labor union or employees’ association which exercises its right to be heard under this subdivision shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law.</p>	<p>(d) <b>Intervention by a Labor Union or an Association Representing the Debtor’s Employees.</b> In a Chapter 9, 11, or 12 case, a labor union or an association representing the debtor’s employees has the right to be heard on the economic soundness of a plan affecting the employees’ interests. Unless otherwise permitted by law, the labor union or employees’ association exercising that right may not appeal any judgment, order, or decree related to the plan.</p>

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(e) SERVICE ON ENTITIES COVERED BY THIS RULE. The court may enter orders governing the service of notice and papers on entities permitted to intervene or be heard pursuant to this rule.	(e) <b>Serving Entities Covered by This Rule.</b> The court may issue orders governing the service of notice and papers on entities permitted to intervene or be heard under this Rule 2018.

**Committee Note**

The language of Rule 2018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.
- In Rule 2018(d), the words “exercising that right” were inserted after the words “employees’ association.”

**Summary of Public Comment**

- **National Bankruptcy Conference (BK-2020-0002-0006):** The NBC believes that in (d) the restyled rule changes the substance of the original rule by eliminating the phrase “which exercises its right to be heard under this subdivision.”

**Response:** We added the language “exercising that right” to convey that concept.



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<p><b>Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases</b></p>	<p><b>Rule 2019. Disclosures by Groups, Committees, and Other Entities in a Chapter 9 or 11 Case</b></p>
<p>(a) DEFINITIONS. In this rule the following terms have the meanings indicated:</p> <p>(1) “Disclosable economic interest” means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.</p> <p>(2) “Represent” or “represents” means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.</p>	<p>(a) <b>Definitions.</b> In this Rule 2019:</p> <p>(1) “disclosable economic interest” means any claim, interest, pledge, lien, option, participation, derivative instrument, or other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest; and</p> <p>(2) “represent” or “represents” means to take a position before the court or to solicit votes regarding a plan’s confirmation on another’s behalf.</p>
<p>(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.</p> <p>(1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.</p> <p>(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:</p> <p>(A) an indenture trustee;</p> <p>(B) an agent for one or more other entities under an agreement</p>	<p>(b) <b>Who Must Disclose.</b></p> <p>(1) <b><i>In General.</i></b> In a Chapter 9 or 11 case, a verified statement containing the information listed in (c) must be filed by every group or committee consisting of or representing, and every entity representing, multiple creditors or equity security holders that are:</p> <p>(A) acting in concert to advance their common interests; and</p> <p>(B) not composed entirely of affiliates or insiders of one another.</p> <p>(2) <b><i>When a Disclosure Statement Is Not Required.</i></b> Unless the court orders otherwise, an entity need not file the statement described in (1) solely because it is:</p> <p>(A) an indenture trustee;</p>

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<p>for the extension of credit;</p> <p style="padding-left: 40px;">(C) a class action representative; or</p> <p style="padding-left: 40px;">(D) a governmental unit that is not a person.</p>	<p style="padding-left: 40px;">(B) an agent for one or more other entities under an agreement to extend credit;</p> <p style="padding-left: 40px;">(C) a class-action representative; or</p> <p style="padding-left: 40px;">(D) a governmental unit that is not a person.</p>
<p>(c) INFORMATION REQUIRED. The verified statement shall include:</p> <p style="padding-left: 40px;">(1) the pertinent facts and circumstances concerning:</p> <p style="padding-left: 80px;">(A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or</p> <p style="padding-left: 80px;">(B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;</p> <p style="padding-left: 40px;">(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:</p> <p style="padding-left: 80px;">(A) name and address;</p> <p style="padding-left: 80px;">(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and</p> <p style="padding-left: 80px;">(C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee</p>	<p>(c) <b>Required Information.</b> The verified statement must include:</p> <p style="padding-left: 40px;">(1) the pertinent facts and circumstances concerning:</p> <p style="padding-left: 80px;">(A) for a group or committee (except a committee appointed under § 1102 or § 1114), its formation, including the name of each entity at whose instance it was formed or for whom it has agreed to act; or</p> <p style="padding-left: 80px;">(B) for an entity, the entity’s employment, including the name of each creditor or equity security holder at whose instance the employment was arranged;</p> <p style="padding-left: 40px;">(2) if not disclosed under (1), for each member of a group or committee and for an entity:</p> <p style="padding-left: 80px;">(A) name and address;</p> <p style="padding-left: 80px;">(B) the nature and amount of each disclosable economic interest held in relation to the debtor when the group or committee was formed or the entity was employed; and</p> <p style="padding-left: 80px;">(C) for each member of a group or committee claiming to represent any entity in addition to its own members (except a committee appointed under § 1102 or § 1114), the quarter and year in which each disclosable economic interest was acquired—unless it was acquired more than 1 year before the petition was filed;</p>

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<p>appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;</p> <p>(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:</p> <p>(A) name and address;</p> <p>and</p> <p>(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and</p> <p>(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.</p>	<p>(3) if not disclosed under (1) or (2), for each creditor or equity security holder represented by an entity, group, or committee (except a committee appointed under § 1102 or § 1114):</p> <p>(A) name and address; and</p> <p>(B) the nature and amount of each disclosable economic interest held in relation to the debtor on the statement’s date; and</p> <p>(4) a copy of any instrument authorizing the group, committee, or entity to act on behalf of creditors or equity security holders.</p>
<p>(d) SUPPLEMENTAL STATEMENTS. If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemental statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.</p>	<p><b>(d) Supplemental Statements.</b> If a fact disclosed in its most recent statement has changed materially, a group, committee, or entity must file a verified supplemental statement whenever it takes a position before the court or solicits votes on a plan’s confirmation. The supplemental statement must set forth any material changes in the information specified in (c).</p>
<p>(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.</p> <p>(1) On motion of any party in interest, or on its own motion, the court may determine whether there has been a failure to comply with any provision of this rule.</p>	<p><b>(e) Failure to Comply; Sanctions.</b></p> <p>(1) <i>Failure to Comply.</i> On a party in interest’s motion, or on its own, the court may determine whether there has been a failure to comply with this Rule 2019.</p>

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<p>(2) If the court finds such a failure to comply, it may:</p> <p style="padding-left: 40px;">(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;</p> <p style="padding-left: 40px;">(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or</p> <p style="padding-left: 40px;">(C) grant other appropriate relief.</p>	<p><b>(2) <i>Sanctions.</i></b> If the court finds a failure to comply, it may:</p> <p style="padding-left: 40px;">(A) refuse to permit the group, committee, or entity to be heard or to intervene in the case;</p> <p style="padding-left: 40px;">(B) hold invalid any authority, acceptance, rejection, or objection that the group, committee, or entity has given, procured, or received; or</p> <p style="padding-left: 40px;">(C) grant other appropriate relief.</p>

**Committee Note**

The language of Rule 2019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

ORIGINAL	REVISION
<b>Rule 2020. Review of Acts by United States Trustee</b>	<b>Rule 2020. Reviewing an Act by a United States Trustee</b>
A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014.	A proceeding to contest any act or failure to act by a United States trustee is governed by Rule 9014.

**Committee Note**

The language of Rule 2020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Changes Made After Publication and Comment**

- Committee note has been added.

**Summary of Public Comment**

- No comments were submitted.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

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

3 \* \* \* \* \*

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

6 \* \* \* \* \*

7 (5) An individual debtor in a chapter 11  
8 case (unless under subchapter V) shall file a  
9 statement of current monthly income, prepared as  
10 prescribed by the appropriate Official Form.

11 \* \* \* \* \*

12 (h) INTERESTS ACQUIRED OR ARISING  
13 AFTER PETITION. If, as provided by § 541(a)(5) of the  
14 Code, the debtor acquires or becomes entitled to acquire any  
15 interest in property, the debtor shall within 14 days after the

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

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16 information comes to the debtor's knowledge or within such  
17 further time the court may allow, file a supplemental  
18 schedule in the chapter 7 liquidation case, chapter 11  
19 reorganization case, chapter 12 family farmer's debt  
20 adjustment case, or chapter 13 individual debt adjustment  
21 case. If any of the property required to be reported under  
22 this subdivision is claimed by the debtor as exempt, the  
23 debtor shall claim the exemptions in the supplemental  
24 schedule. ~~The~~ This duty to file a supplemental schedule ~~in~~  
25 ~~accordance with this subdivision~~ continues even after the  
26 case is closed, except for property acquired after an order is  
27 entered; ~~notwithstanding the closing of the case, except that~~  
28 ~~the schedule need not be filed in a chapter 11, chapter 12, or~~  
29 ~~chapter 13 case with respect to property acquired after entry~~  
30 ~~of the order~~

31 (1) confirming a chapter 11 plan (other  
32 than one confirmed under § 1191(b)); or

33                   (2)     discharging the debtor in a chapter 12  
34                   case, or a chapter 13 case, or a case under subchapter  
35                   V of chapter 11 in which the plan is confirmed under  
36                   § 1191(b).

37   \* \* \* \* \*

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. As amended, subdivision (b)(5) of the rule includes an exception for subchapter V cases. Because Code § 1129(a)(15) is inapplicable to such cases, there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

Subdivision (h) is amended to provide that the duty to file a supplemental schedule under the rule terminates upon confirmation of the plan in a subchapter V case, unless the plan is confirmed under § 1191(b), in which case it terminates upon discharge as provided in § 1192.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.



1 **Rule 1020. ~~Small Business~~ Chapter 11 Reorganization**  
2 **Case for Small Business Debtors**

3 (a) SMALL BUSINESS DEBTOR

4 DESIGNATION. In a voluntary chapter 11 case, the debtor  
5 shall state in the petition whether the debtor is a small  
6 business debtor and, if so, whether the debtor elects to have  
7 subchapter V of chapter 11 apply. In an involuntary chapter  
8 11 case, the debtor shall file within 14 days after entry of the  
9 order for relief a statement as to whether the debtor is a small  
10 business debtor and, if so, whether the debtor elects to have  
11 subchapter V of chapter 11 apply. ~~Except as provided in~~  
12 ~~subdivision (e), the~~ The status of the case as a small business  
13 case or a case under subchapter V of chapter 11 shall be in  
14 accordance with the debtor's statement under this  
15 subdivision, unless and until the court enters an order finding  
16 that the debtor's statement is incorrect.

17 (b) OBJECTING TO DESIGNATION. ~~Except~~  
18 ~~as provided in subdivision (e), the~~ The United States trustee  
19 or a party in interest may file an objection to the debtor's

20 statement under subdivision (a) no later than 30 days after  
21 the conclusion of the meeting of creditors held under  
22 § 341(a) of the Code, or within 30 days after any amendment  
23 to the statement, whichever is later.

24 ~~(e) APPOINTMENT OF COMMITTEE OF~~  
25 ~~UNSECURED CREDITORS. If a committee of unsecured~~  
26 ~~creditors has been appointed under § 1102(a)(1), the case~~  
27 ~~shall proceed as a small business case only if, and from the~~  
28 ~~time when, the court enters an order determining that the~~  
29 ~~committee has not been sufficiently active and~~  
30 ~~representative to provide effective oversight of the debtor~~  
31 ~~and that the debtor satisfies all the other requirements for~~  
32 ~~being a small business. A request for a determination under~~  
33 ~~this subdivision may be filed by the United States trustee or~~  
34 ~~a party in interest only within a reasonable time after the~~  
35 ~~failure of the committee to be sufficiently active and~~  
36 ~~representative. The debtor may file a request for a~~

37 ~~determination at any time as to whether the committee has~~  
38 ~~been sufficiently active and representative.~~

39 (d~~c~~) PROCEDURE FOR OBJECTION OR  
40 DETERMINATION. Any objection or request for a  
41 determination under this rule shall be governed by Rule 9014  
42 and served on: the debtor; the debtor’s attorney; the United  
43 States trustee; the trustee; the creditors included on the list  
44 filed under Rule 1007(d) or, if any a committee has been  
45 appointed under § 1102(a)(3), the committee or its  
46 authorized agent, ~~or, if no committee of unsecured creditors~~  
47 ~~has been appointed under § 1102, the creditors included on~~  
48 ~~the list filed under Rule 1007(d);~~ and any other entity as the  
49 court directs.

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019 (“SBRA”), Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to include that option and to require a small business debtor to state in its voluntary petition, or in a statement filed within 14 days after the order for relief is

entered in an involuntary case, whether it elects to proceed under subchapter V. The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.

Former subdivision (c) of the rule is deleted because the existence or level of activity of a creditors' committee is no longer a criterion for small-business-debtor status. The SBRA eliminated that portion of the definition of "small business debtor" in § 101(51D) of the Code.

Former subdivision (d) is redesignated as subdivision (c), and the list of entities to be served is revised to reflect that in most small business and subchapter V cases there will not be a committee of creditors.

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### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

### **Summary of Public Comment**

No comments were submitted.

1 **Rule 2009. Trustees for Estates When Joint**  
2 **Administration Ordered**

3 (a) ELECTION OF SINGLE TRUSTEE FOR  
4 ESTATES BEING JOINTLY ADMINISTERED. If the  
5 court orders a joint administration of two or more estates  
6 under Rule 1015(b), creditors may elect a single trustee for  
7 the estates being jointly administered, unless the case is  
8 under subchapter V of chapter 7 or subchapter V of chapter  
9 11 of the Code.

10 (b) RIGHT OF CREDITORS TO ELECT  
11 SEPARATE TRUSTEE. Notwithstanding entry of an order  
12 for joint administration under Rule 1015(b), the creditors of  
13 any debtor may elect a separate trustee for the estate of the  
14 debtor as provided in § 702 of the Code, unless the case is  
15 under subchapter V of chapter 7 or subchapter V of chapter  
16 11 of the Code.

17 (c) APPOINTMENT OF TRUSTEES FOR  
18 ESTATES BEING JOINTLY ADMINISTERED.

19 (1) *Chapter 7 Liquidation Cases.* \* \* \* \* \*

20 (2) *Chapter 11 Reorganization Cases.* If  
21 the appointment of a trustee is ordered or is required  
22 by the Code, the United States trustee may appoint  
23 one or more trustees for estates being jointly  
24 administered in chapter 11 cases.

25 \* \* \* \* \*

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. In a case under that subchapter, § 1183 of the Code requires the United States trustee to appoint a trustee, so there will be no election. Accordingly, subdivisions (a) and (b) of the rule are amended to except cases under subchapter V from their coverage. Subdivision (c)(2), which addresses the appointment of trustees in jointly administered chapter 11 cases, is amended to make it applicable to cases under subchapter V.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 2012. Substitution of Trustee or Successor**  
2 **Trustee; Accounting**

3 (a) TRUSTEE. If a trustee is appointed in a chapter  
4 11 case (other than under subchapter V), or the debtor is  
5 removed as debtor in possession in a chapter 12 case or in a  
6 case under subchapter V of chapter 11, the trustee is  
7 substituted automatically for the debtor in possession as a  
8 party in any pending action, proceeding, or matter.

9 \* \* \* \* \*

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (a) of the rule is amended to include any case under that subchapter in which the debtor is removed as debtor in possession under § 1185 of the Code.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 2015. Duty to Keep Records, Make Reports, and**  
2 **Give Notice of Case or Change of Status**

3 (a) TRUSTEE OR DEBTOR IN POSSESSION. A  
4 trustee or debtor in possession shall:

5 (1) in a chapter 7 liquidation case and, if  
6 the court directs, in a chapter 11 reorganization case  
7 (other than under subchapter V), file and transmit to  
8 the United States trustee a complete inventory of the  
9 property of the debtor within 30 days after qualifying  
10 as a trustee or debtor in possession, unless such an  
11 inventory has already been filed;

12 (2) keep a record of receipts and the  
13 disposition of money and property received;

14 (3) file the reports and summaries  
15 required by § 704(a)(8) of the Code, which shall  
16 include a statement, if payments are made to  
17 employees, of the amounts of deductions for all taxes  
18 required to be withheld or paid for and in behalf of



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19 employees and the place where these amounts are  
20 deposited;

21 (4) as soon as possible after the  
22 commencement of the case, give notice of the case to  
23 every entity known to be holding money or property  
24 subject to withdrawal or order of the debtor,  
25 including every bank, savings or building and loan  
26 association, public utility company, and landlord  
27 with whom the debtor has a deposit, and to every  
28 insurance company which has issued a policy having  
29 a cash surrender value payable to the debtor, except  
30 that notice need not be given to any entity who has  
31 knowledge or has previously been notified of the  
32 case;

33 (5) in a chapter 11 reorganization case  
34 (other than under subchapter V), on or before the last  
35 day of the month after each calendar quarter during  
36 which there is a duty to pay fees under 28 U.S.C.

37 § 1930(a)(6), file and transmit to the United States  
38 trustee a statement of any disbursements made  
39 during that quarter and of any fees payable under 28  
40 U.S.C. § 1930(a)(6) for that quarter; and

41 (6) in a chapter 11 small business case,  
42 unless the court, for cause, sets another reporting  
43 interval, file and transmit to the United States trustee  
44 for each calendar month after the order for relief, on  
45 the appropriate Official Form, the report required by  
46 § 308. If the order for relief is within the first 15 days  
47 of a calendar month, a report shall be filed for the  
48 portion of the month that follows the order for relief.  
49 If the order for relief is after the 15th day of a  
50 calendar month, the period for the remainder of the  
51 month shall be included in the report for the next  
52 calendar month. Each report shall be filed no later  
53 than 21 days after the last day of the calendar month  
54 following the month covered by the report. The

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55 obligation to file reports under this subparagraph  
56 terminates on the effective date of the plan, or  
57 conversion or dismissal of the case.

58 (b) TRUSTEE, DEBTOR IN POSSESSION,  
59 AND DEBTOR IN A CASE UNDER SUBCHAPTER V OF  
60 CHAPTER 11. In a case under subchapter V of chapter 11,  
61 the debtor in possession shall perform the duties prescribed  
62 in (a)(2)–(4) and, if the court directs, shall file and transmit  
63 to the United States trustee a complete inventory of the  
64 debtor’s property within the time fixed by the court. If the  
65 debtor is removed as debtor in possession, the trustee shall  
66 perform the duties of the debtor in possession prescribed in  
67 this subdivision (b). The debtor shall perform the duties  
68 prescribed in (a)(6).

69 (bc) CHAPTER 12 TRUSTEE AND DEBTOR  
70 IN POSSESSION. In a chapter 12 family farmer’s debt  
71 adjustment case, the debtor in possession shall perform the  
72 duties prescribed in clauses (2)–(4) of subdivision (a) of this

73 rule and, if the court directs, shall file and transmit to the  
74 United States trustee a complete inventory of the property of  
75 the debtor within the time fixed by the court. If the debtor is  
76 removed as debtor in possession, the trustee shall perform  
77 the duties of the debtor in possession prescribed in this  
78 ~~paragraph~~ subdivision (c).

79 (e) CHAPTER 13 TRUSTEE AND  
80 DEBTOR.

81 (1) *Business Cases*. In a chapter  
82 13 individual's debt adjustment case, when  
83 the debtor is engaged in business, the debtor  
84 shall perform the duties prescribed by clauses  
85 (2)–(4) of subdivision (a) of this rule and, if  
86 the court directs, shall file and transmit to the  
87 United States trustee a complete inventory of  
88 the property of the debtor within the time  
89 fixed by the court.

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90 (2) *Nonbusiness Cases*. In a chapter 13  
91 individual's debt adjustment case, when the debtor is  
92 not engaged in business, the trustee shall perform the  
93 duties prescribed by clause (2) of subdivision (a) of  
94 this rule.

95 ~~(d)~~ FOREIGN REPRESENTATIVE. In a case in  
96 which the court has granted recognition of a foreign  
97 proceeding under chapter 15, the foreign representative shall  
98 file any notice required under § 1518 of the Code within 14  
99 days after the date when the representative becomes aware  
100 of the subsequent information.

101 ~~(e)~~ TRANSMISSION OF REPORTS. In a  
102 chapter 11 case the court may direct that copies or  
103 summaries of annual reports and copies or summaries of  
104 other reports shall be mailed to the creditors, equity security  
105 holders, and indenture trustees. The court may also direct the  
106 publication of summaries of any such reports. A copy of

- 107 every report or summary mailed or published pursuant to this  
108 subdivision shall be transmitted to the United States trustee.

### **Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) is amended to prescribe the duties of a debtor in possession, trustee, and debtor in a subchapter V case. Those cases are excepted from subdivision (a) because, unlike other chapter 11 cases, there will generally be both a trustee and a debtor in possession. Subdivision (b) also reflects that § 1187 of the Code prescribes reporting duties for the debtor in a subchapter V case.

Former subdivisions (b), (c), (d), and (e) are redesignated (c), (d), (e), and (f) respectively.

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### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

### **Summary of Public Comment**

No comments were submitted.

1 **Rule 3010. Small Dividends and Payments in Cases**  
2 **Under Chapter 7 Liquidation, Subchapter V of Chapter**  
3 **11, Chapter 12 Family Farmer's Debt Adjustment, and**  
4 **Chapter 13 Individual's Debt Adjustment Cases**

5 \* \* \* \* \*

6 (b) CASES UNDER SUBCHAPTER V OF  
7 CHAPTER 11, CHAPTER 12, AND CHAPTER 13  
8 CASES. In a case under subchapter V of chapter 11, chapter  
9 12, or chapter 13, ease no payment in an amount less than  
10 \$15 shall be distributed by the trustee to any creditor unless  
11 authorized by local rule or order of the court. Funds not  
12 distributed because of this subdivision shall accumulate and  
13 shall be paid whenever the accumulation aggregates \$15.  
14 Any funds remaining shall be distributed with the final  
15 payment.

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. To avoid the undue cost and inconvenience of distributing small payments, the title and subdivision (b) are amended to include subchapter V cases.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.



1 **Rule 3011. Unclaimed Funds in Cases Under Chapter 7**  
2 **Liquidation, Subchapter V of Chapter 11, Chapter 12**  
3 **Family Farmer's Debt Adjustment, and Chapter 13**  
4 **Individual's Debt Adjustment Cases**

5 The trustee shall file a list of all known names and  
6 addresses of the entities and the amounts which they are  
7 entitled to be paid from remaining property of the estate that  
8 is paid into court pursuant to § 347(a) of the Code.

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The rule is amended to include such cases because § 347(a) of the Code applies to them.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 3014. Election Under § 1111(b) by Secured**  
2 **Creditor in Chapter 9 Municipality or Chapter 11**  
3 **Reorganization Case**

4 An election of application of § 1111(b)(2) of the  
5 Code by a class of secured creditors in a chapter 9 or 11 case  
6 may be made at any time prior to the conclusion of the  
7 hearing on the disclosure statement or within such later time  
8 as the court may fix. If the disclosure statement is  
9 conditionally approved pursuant to Rule 3017.1, and a final  
10 hearing on the disclosure statement is not held, the election  
11 of application of § 1111(b)(2) may be made not later than the  
12 date fixed pursuant to Rule 3017.1(a)(2) or another date the  
13 court may fix. In a case under subchapter V of chapter 11 in  
14 which § 1125 of the Code does not apply, the election may  
15 be made not later than a date the court may fix. The election  
16 shall be in writing and signed unless made at the hearing on  
17 the disclosure statement. The election, if made by the  
18 majorities required by § 1111(b)(1)(A)(i), shall be binding  
19 on all members of the class with respect to the plan.

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is amended to provide a deadline for making an election under § 1111(b) in such cases that is set by the court.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 3016. Filing of Plan and Disclosure Statement in a**  
2 **Chapter 9 Municipality or Chapter 11 Reorganization**  
3 **Case**

4 (a) IDENTIFICATION OF PLAN. Every  
5 proposed plan and any modification thereof shall be dated  
6 and, in a chapter 11 case, identified with the name of the  
7 entity or entities submitting or filing it.

8 (b) DISCLOSURE STATEMENT. In a chapter  
9 9 or 11 case, a disclosure statement, if required under § 1125  
10 of the Code, or evidence showing compliance with § 1126(b)  
11 shall be filed with the plan or within a time fixed by the  
12 court, unless the plan is intended to provide adequate  
13 information under § 1125(f)(1). If the plan is intended to  
14 provide adequate information under § 1125(f)(1), it shall be  
15 so designated, and Rule 3017.1 shall apply as if the plan is a  
16 disclosure statement.

17 \* \* \* \* \*

18 (d) STANDARD FORM SMALL BUSINESS  
19 DISCLOSURE STATEMENT AND PLAN. In a small

20 business case or a case under subchapter V of chapter 11, the  
21 court may approve a disclosure statement and may confirm  
22 a plan that conform substantially to the appropriate Official  
23 Forms or other standard forms approved by the court.

#### **Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) of the rule is amended to reflect that under § 1181(b) of the Code, § 1125 does not apply to subchapter V cases (and thus a disclosure statement is not required) unless the court for cause orders otherwise. Subdivision (d) is amended to include subchapter V cases as ones in which Official Forms are available for a reorganization plan and, when required, a disclosure statement.

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#### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

#### **Summary of Public Comment**

No comments were submitted.

1 **Rule 3017.1. Court Consideration of Disclosure**  
2 **Statement in a Small Business Case or in a Case Under**  
3 **Subchapter V of Chapter 11**

4 (a) CONDITIONAL APPROVAL OF  
5 DISCLOSURE STATEMENT. In a small business case or  
6 in a case under subchapter V of chapter 11 in which the court  
7 has ordered that § 1125 applies, the court may, on  
8 application of the plan proponent or on its own initiative,  
9 conditionally approve a disclosure statement filed in  
10 accordance with Rule 3016. On or before conditional  
11 approval of the disclosure statement, the court shall:

12 (1) fix a time within which the holders of  
13 claims and interests may accept or reject the plan;

14 (2) fix a time for filing objections to the  
15 disclosure statement;

16 (3) fix a date for the hearing on final  
17 approval of the disclosure statement to be held if a  
18 timely objection is filed; and

19 (4) fix a date for the hearing on  
20 confirmation.

21 \* \* \* \* \*

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to cover such cases when the court orders that § 1125 of the Code applies.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 3017.2. Fixing of Dates by the Court in**  
2 **Subchapter V Cases in Which There Is No Disclosure**  
3 **Statement**

4 In a case under subchapter V of chapter 11 in which  
5 § 1125 does not apply, the court shall:

6 (a) fix a time within which the holders of  
7 claims and interests may accept or reject the plan;

8 (b) fix a date on which an equity security  
9 holder or creditor whose claim is based on a security  
10 must be the holder of record of the security in order  
11 to be eligible to accept or reject the plan;

12 (c) fix a date for the hearing on  
13 confirmation; and

14 (d) fix a date for transmitting the plan,  
15 notice of the time within which the holders of claims  
16 and interests may accept or reject it, and notice of the  
17 date for the hearing on confirmation.

**Committee Note**

The rule is added in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No.



116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there generally will not be a disclosure statement in a subchapter V case, *see* § 1181(b) of the Code, the rule is added to authorize the court in such a case to act at a time other than when a disclosure statement is approved to set certain times and dates.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 3018. Acceptance or Rejection of Plan in a Chapter**  
2 **9 Municipality or a Chapter 11 Reorganization Case**

3 (a) ENTITIES ENTITLED TO ACCEPT OR  
4 REJECT PLAN; TIME FOR ACCEPTANCE OR  
5 REJECTION. A plan may be accepted or rejected in  
6 accordance with § 1126 of the Code within the time fixed by  
7 the court pursuant to Rule 3017, 3017.1, or 3017.2. Subject  
8 to subdivision (b) of this rule, an equity security holder or  
9 creditor whose claim is based on a security of record shall  
10 not be entitled to accept or reject a plan unless the equity  
11 security holder or creditor is the holder of record of the  
12 security on the date the order approving the disclosure  
13 statement is entered or on another date fixed by the court  
14 under Rule 3017.2, or fixed for cause; after notice and a  
15 hearing. For cause shown, the court after notice and hearing  
16 may permit a creditor or equity security holder to change or  
17 withdraw an acceptance or rejection. Notwithstanding  
18 objection to a claim or interest, the court after notice and  
19 hearing may temporarily allow the claim or interest in an

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30 FEDERAL RULES OF BANKRUPTCY PROCEDURE

20 amount which the court deems proper for the purpose of  
21 accepting or rejecting a plan.

22 \* \* \* \* \*

**Committee Note**

Subdivision (a) of the rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and cases under subchapter V of chapter 11.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

1 **Rule 3019. Modification of Accepted Plan in a Chapter**  
2 **9 Municipality or a Chapter 11 Reorganization Case**

3 \* \* \* \* \*

4 (b) MODIFICATION OF PLAN AFTER  
5 CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If  
6 the debtor is an individual, a request to modify the plan under  
7 § 1127(e) of the Code is governed by Rule 9014. The request  
8 shall identify the proponent and shall be filed together with  
9 the proposed modification. The clerk, or some other person  
10 as the court may direct, shall give the debtor, the trustee, and  
11 all creditors not less than 21 days' notice by mail of the time  
12 fixed to file objections and, if an objection is filed, the  
13 hearing to consider the proposed modification, unless the  
14 court orders otherwise with respect to creditors who are not  
15 affected by the proposed modification. A copy of the notice  
16 shall be transmitted to the United States trustee, together  
17 with a copy of the proposed modification. Any objection to  
18 the proposed modification shall be filed and served on the  
19 debtor, the proponent of the modification, the trustee, and

20 any other entity designated by the court, and shall be  
21 transmitted to the United States trustee.

22 (c) MODIFICATION OF PLAN AFTER  
23 CONFIRMATION IN A SUBCHAPTER V CASE. In a  
24 case under subchapter V of chapter 11, a request to modify  
25 the plan under § 1193(b) or (c) of the Code is governed by  
26 Rule 9014, and the provisions of this Rule 3019(b) apply.

**Committee Note**

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in such cases under § 1193(b) or (c) of the Code.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

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

2 \* \* \* \* \*

3 (c) TIME FOR FILING. In a voluntary chapter 7  
4 case, chapter 12 case, or chapter 13 case, a proof of claim is  
5 timely filed if it is filed not later than 70 days after the order  
6 for relief under that chapter or the date of the order of  
7 conversion to a case under chapter 12 or chapter 13. In an  
8 involuntary chapter 7 case, a proof of claim is timely filed if  
9 it is filed not later than 90 days after the order for relief under  
10 that chapter is entered. But in all these cases, the following  
11 exceptions apply:

12 \* \* \* \* \*

13 (6) On motion filed by a creditor before  
14 or after the expiration of the time to file a proof of

---

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

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2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 claim, the court may extend the time by not more  
16 than 60 days from the date of the order granting the  
17 motion. The motion may be granted if the court finds  
18 that:

19 ~~(A)~~ the notice was insufficient  
20 under the circumstances to give the creditor a  
21 reasonable time to file a proof of claim  
22 because the debtor failed to timely file the list  
23 of creditors' names and addresses required by  
24 Rule 1007(a); or

25 ~~(B)~~ the notice was insufficient  
26 under the circumstances to give the creditor a  
27 reasonable time to file a proof of claim, and  
28 the notice was mailed to the creditor at a  
29 foreign address.

30 \* \* \* \* \*

**Committee Note**

Rule 3002(c)(6) is amended to provide a single standard for granting motions for an extension of time to file

a proof of claim, whether the creditor has a domestic address or a foreign address. If the notice to such creditor was “insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim,” the court may grant an extension.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.



1 **Rule 5005. Filing and Transmittal of Papers**

2 \* \* \* \* \*

3 (b) TRANSMITTAL TO THE UNITED  
4 STATES TRUSTEE.

5 (1) The complaints, notices, motions,  
6 applications, objections and other papers required to  
7 be transmitted to the United States trustee ~~by these~~  
8 ~~rules shall be mailed or delivered to an office of the~~  
9 ~~United States trustee, or to another place designated~~  
10 ~~by the United States trustee, in the district where the~~  
11 ~~case under the Code is pending~~ may be sent by filing  
12 with the court's electronic-filing system in  
13 accordance with Rule 9036, unless a court order or  
14 local rule provides otherwise.

15 (2) The entity, other than the clerk,  
16 transmitting a paper to the United States trustee other  
17 than through the court's electronic-filing system  
18 shall promptly file as proof of such transmittal a

19 ~~verified~~ statement identifying the paper and stating  
20 the manner by which and the date on which it was  
21 transmitted to the United States trustee.

22 (3) Nothing in these rules shall require  
23 the clerk to transmit any paper to the United States  
24 trustee if the United States trustee requests in writing  
25 that the paper not be transmitted.

#### **Committee Note**

Subdivision (b)(1) is amended to authorize the clerk or parties to transmit papers to the United States trustee by electronic means in accordance with Rule 9036, regardless of whether the United States trustee is a registered user with the court's electronic-filing system. Subdivision (b)(2) is amended to recognize that parties meeting transmittal obligations to the United States trustee using the court's electronic-filing system need not file a statement evidencing transmittal under Rule 5005(b)(2). The amendment to subdivision (b)(2) also eliminates the requirement that statements evidencing transmittal filed under Rule 5005(b)(2) be verified.

---

#### **Changes Made After Publication and Comment**

A strikethrough was added to the word "verified."

**Summary of Public Comment**

**National Bankruptcy Conference (BK-2020-0002-0006)** -- Noted that the redlining in the text was missing an indication that the word “verified” was deleted, although the Advisory Committee Note mentioned the deletion.

1 **Rule 7004. Process; Service of Summons, Complaint**

2 \* \* \* \* \*

3 (i) SERVICE OF PROCESS BY TITLE. This  
4 subdivision (i) applies to service on a domestic or foreign  
5 corporation or partnership or other unincorporated  
6 association under Rule 7004(b)(3) or on an officer of an  
7 insured depository institution under Rule 7004(h). The  
8 defendant’s officer or agent need not be correctly named in  
9 the address – or even be named – if the envelope is addressed  
10 to the defendant’s proper address and directed to the  
11 attention of the officer’s or agent’s position or title.

**Committee Note**

New Rule 7004(i) is intended to reject those cases interpreting Rule 7004(b)(3) and Rule 7004(h) to require service on a named officer, managing or general agent or other agent, rather than use of their titles. Service to a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the “Chief Executive Officer,” “President,” “Officer for Receiving Service of Process,” “Managing Agent,” “General Agent,” “Officer,” or “Agent for Receiving Service of Process” (or other similar titles) is sufficient.

---

**Changes Made After Publication and Comment**

A comma was removed after the words “Rule 7004(b)(3)” in the Rule, and the Advisory Committee Note was modified to replace the word “Agent” with “Agent for Receiving Service of Process.”

**Summary of Public Comment**

No comments were submitted.

1 **Rule 8023. Voluntary Dismissal.**

2 (a) STIPULATED DISMISSAL. The clerk of  
3 the district court or BAP must dismiss an appeal if the parties  
4 file a signed dismissal agreement specifying how costs are  
5 to be paid and pay any court fees that are due.

6 (b) APPELLANT’S MOTION TO DISMISS.  
7 An appeal may be dismissed on the appellant’s motion on  
8 terms agreed to by the parties or fixed by the district court or  
9 BAP.

10 (c) OTHER RELIEF. A court order is required  
11 for any relief under Rule 8023(a) or (b) beyond the dismissal  
12 of an appeal—including approving a settlement, vacating an  
13 action of the bankruptcy court, or remanding the case to it.

14 (d) COURT APPROVAL. This rule does not  
15 alter the legal requirements governing court approval of a  
16 settlement, payment, or other consideration.

### **Committee Note**

The amendment is intended to conform the rule to the revised version of Federal Rule of Appellate Procedure 42(b) on which it was modelled. It clarifies that the fees that must be paid are court fees, not attorney’s fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., Fed. R. Bankr. P. 9019 (requiring court approval of compromise or settlement). The amendment clarifies that any order beyond mere dismissal—including approving a settlement, vacating or remanding—requires a court order.

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### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

### **Summary of Public Comment**

No comments were submitted.

**Fill in this information to identify your case:**

Debtor 1 \_\_\_\_\_  
 First Name Middle Name Last Name

Debtor 2 \_\_\_\_\_  
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
 (State)

Case number \_\_\_\_\_  
 (If known)

Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

12/21

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 (other than under Subchapter V). If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

**Part 1:** Calculate Your Current Monthly Income

1. What is your marital and filing status? Check one only.

- Not married.** Fill out Column A, lines 2-11.
- Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
- Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

**Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case.** 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

	Column A Debtor 1	Column B Debtor 2												
2. <b>Your gross wages, salary, tips, bonuses, overtime, and commissions</b> (before all payroll deductions).	\$ _____	\$ _____												
3. <b>Alimony and maintenance payments.</b> Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____												
4. <b>All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.</b> Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____												
5. <b>Net income from operating a business, profession, or farm</b>	<table border="0" style="margin: auto;"> <tr> <td></td> <td style="background-color: #e0e0e0;">Debtor 1</td> <td style="background-color: #e0e0e0;">Debtor 2</td> </tr> <tr> <td>Gross receipts (before all deductions)</td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td>Ordinary and necessary operating expenses</td> <td style="text-align: right;">- \$ _____</td> <td style="text-align: right;">- \$ _____</td> </tr> <tr> <td>Net monthly income from a business, profession, or farm</td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> </table>			Debtor 1	Debtor 2	Gross receipts (before all deductions)	\$ _____	\$ _____	Ordinary and necessary operating expenses	- \$ _____	- \$ _____	Net monthly income from a business, profession, or farm	\$ _____	\$ _____
	Debtor 1	Debtor 2												
Gross receipts (before all deductions)	\$ _____	\$ _____												
Ordinary and necessary operating expenses	- \$ _____	- \$ _____												
Net monthly income from a business, profession, or farm	\$ _____	\$ _____												
	\$ _____	\$ _____												
6. <b>Net income from rental and other real property</b>	<table border="0" style="margin: auto;"> <tr> <td></td> <td style="background-color: #e0e0e0;">Debtor 1</td> <td style="background-color: #e0e0e0;">Debtor 2</td> </tr> <tr> <td>Gross receipts (before all deductions)</td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td>Ordinary and necessary operating expenses</td> <td style="text-align: right;">- \$ _____</td> <td style="text-align: right;">- \$ _____</td> </tr> <tr> <td>Net monthly income from rental or other real property</td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> </table>			Debtor 1	Debtor 2	Gross receipts (before all deductions)	\$ _____	\$ _____	Ordinary and necessary operating expenses	- \$ _____	- \$ _____	Net monthly income from rental or other real property	\$ _____	\$ _____
	Debtor 1	Debtor 2												
Gross receipts (before all deductions)	\$ _____	\$ _____												
Ordinary and necessary operating expenses	- \$ _____	- \$ _____												
Net monthly income from rental or other real property	\$ _____	\$ _____												
	\$ _____	\$ _____												



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Debtor 1 \_\_\_\_\_  
 First Name Middle Name Last Name

Case number (if known) \_\_\_\_\_

	Column A Debtor 1	Column B Debtor 2			
<b>7. Interest, dividends, and royalties</b>	\$ _____	\$ _____			
<b>8. Unemployment compensation</b>	\$ _____	\$ _____			
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ↓					
For you .....	\$ _____				
For your spouse .....	\$ _____				
<b>9. Pension or retirement income.</b> Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	\$ _____	\$ _____			
<b>10. Income from all other sources not listed above.</b> Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.	\$ _____	\$ _____			
_____	\$ _____	\$ _____			
_____	\$ _____	\$ _____			
Total amounts from separate pages, if any.	+ \$ _____	+ \$ _____			
<b>11. Calculate your total current monthly income.</b> Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	\$ _____	+	\$ _____	=	\$ _____
	<b>Total current monthly income</b>				

**Part 2:** Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

**X** \_\_\_\_\_  
 Signature of Debtor 1

**X** \_\_\_\_\_  
 Signature of Debtor 2

Date \_\_\_\_\_  
 MM / DD / YYYY

Date \_\_\_\_\_  
 MM / DD / YYYY

Official Form 122 (Committee Note) (12/21)

### **Committee Note**

Official Form 122B is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. As amended, the initial instruction in the form includes an exception for subchapter V cases. Because Code § 1129(a)(15) is inapplicable to such cases, there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

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### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

### **Summary of Public Comment**

No comments were submitted.

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

For Publication for Public Comment

# Bankruptcy Rules Restyling

## 3000 Series

### Preface

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

[The Committee Note to Rule 1001 is included here for reference for purposes of publication. It will not be included in the final rule.

#### Committee Note to Rule 1001

The Bankruptcy Rules are the fifth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence took effect in 2011. The restyled Bankruptcy Rules apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, Civil and Evidence Rules.

**General Guidelines.** Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure, at page x (Feb. 2005) (available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article909.pdf> and <https://www.michbar.org/file/barjournal/article/documents/pdf4article921.pdf>); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 *Scribes J. Legal Writing* 25 (2008-2009).

**Formatting Changes.** Many of the changes in the restyled Bankruptcy Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed.

**Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words.** The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words. The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The

absence of intensifiers in the restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

**Rule Numbers.** The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

**No Substantive Change.** The style changes to the rules are intended to make no changes in substantive meaning. The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. An example in the Bankruptcy Rules would be “meeting of creditors.”

**Legislative Rules.** In those cases in which Congress enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 361) and Rule 7004(h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), the Committee has not restyled the rule.]

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ORIGINAL	REVISION
PART III—CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS	<b>PART III. CLAIMS; PLANS; DISTRIBUTIONS TO CREDITORS AND EQUITY SECURITY HOLDERS</b>
<b>Rule 3001. Proof of Claim</b>	<b>Rule 3001. Proof of Claim</b>
(a) FORM AND CONTENT. A proof of claim is a written statement setting forth a creditor’s claim. A proof of claim shall conform substantially to the appropriate Official Form.	<b>(a) Definition and Form.</b> A proof of claim is a written statement of a creditor’s claim. It must substantially conform to Form 410.
(b) WHO MAY EXECUTE. A proof of claim shall be executed by the creditor or the creditor’s authorized agent except as provided in Rules 3004 and 3005.	<b>(b) Who May Sign a Proof of Claim.</b> Only a creditor or the creditor’s agent may sign a proof of claim—except as provided in Rules 3004 and 3005.
<p>(c) SUPPORTING INFORMATION.</p> <p>(1) <i>Claim Based on a Writing.</i> Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.</p> <p>(2) <i>Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.</i> In a case in which the debtor is an individual:</p> <p>(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.</p> <p>(B) If a security interest is claimed in the debtor’s property, a statement of the amount necessary to cure any default as of the date of the</p>	<p><b>(c) Required Supporting Information.</b></p> <p>(1) <b><i>Claim or Interest Based on a Writing.</i></b> If a claim or an interest in the debtor’s property securing the claim is based on a writing, the creditor must file a copy with the proof of claim—except for a claim based on a consumer-credit agreement under (4). If the writing has been lost or destroyed, a statement explaining the loss or destruction must be filed with the claim.</p> <p>(2) <b><i>Additional Information in an Individual Debtor’s Case.</i></b> If the debtor is an individual, the creditor must file with the proof of claim:</p> <p>(A) an itemized statement of the principal amount and any interest, fees, expenses, or other charges incurred before the petition was filed;</p> <p>(B) for any claimed security interest in the debtor’s property, the amount needed to cure any default as of the date the petition was filed; and</p>

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<p>petition shall be filed with the proof of claim.</p> <p>(C) If a security interest is claimed in property that is the debtor’s principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.</p> <p>(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:</p> <p>(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or</p> <p>(ii) award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.</p> <p><i>(3) Claim Based on an Open-End or Revolving Consumer Credit Agreement.</i></p> <p>(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor’s real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:</p> <p>(i) the name of the entity from whom the creditor</p>	<p>(C) for any claimed security interest in the debtor’s principal residence:</p> <p>(i) Form 410A; and</p> <p>(ii) if there is an escrow account connected with the claim, an escrow-account statement, prepared as of the date the petition was filed, that is consistent in form with applicable nonbankruptcy law.</p> <p>(3) <b><i>Sanctions in an Individual-Debtor Case.</i></b> In a case with an individual debtor, if a claim holder fails to provide any information required by (c)(1) and (2), the court may, after notice and a hearing, take one or both of these actions:</p> <p>(A) preclude the holder from presenting the information in any form as evidence in any contested matter or adversary proceeding in the case—unless the court determines that the failure is substantially justified or is harmless; and</p> <p>(B) award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.</p> <p>(4) <b><i>Claim Based on an Open-End or Revolving Consumer-Credit Agreement.</i></b></p> <p>(A) <i>Required Statement.</i> Except when the claim is secured by an interest in the debtor’s real property, a proof of claim for a claim based on an open-end or revolving consumer-credit agreement must be accompanied by a statement that</p>

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<p>purchased the account;</p> <p style="padding-left: 40px;">(ii) the name of the entity to whom the debt was owed at the time of an account holder’s last transaction on the account;</p> <p style="padding-left: 40px;">(iii) the date of an account holder’s last transaction;</p> <p style="padding-left: 40px;">(iv) the date of the last payment on the account; and</p> <p style="padding-left: 40px;">(v) the date on which the account was charged to profit and loss.</p> <p>(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.</p>	<p>shows the following information about the credit account:</p> <p>(i) the name of the entity from whom the creditor purchased the account;</p> <p>(ii) the name of the entity to whom the debt was owed at the time of an account holder’s last transaction on the account;</p> <p>(iii) the date of that last transaction;</p> <p>(iv) the date of the last payment on the account; and</p> <p>(v) the date that the account was charged to profit and loss.</p> <p>(B) <i>Copy to a Party in Interest.</i> On a party in interest’s written request, the creditor must send a copy of the document described in (c)(1) to that party in interest within 30 days after the request is sent.</p>
<p>(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.</p>	<p><b>(d) Claim Based on a Security Interest in the Debtor’s Property.</b> If a creditor claims a security interest in the debtor’s property, the proof of claim must be accompanied by evidence that the security interest has been perfected.</p>
<p>(e) TRANSFERRED CLAIM.</p> <p style="padding-left: 40px;">(1) <i>Transfer of Claim Other Than for Security Before Proof Filed.</i> If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.</p> <p style="padding-left: 40px;">(2) <i>Transfer of Claim Other than for Security after Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after</p>	<p><b>(e) Transferred Claim.</b></p> <p>(1) <b><i>Claim Transferred Before a Proof of Claim Is Filed.</i></b> Unless the transfer was made for security, if a claim was transferred before a proof of claim was filed, only the transferee or an indenture trustee may file a proof of claim.</p>



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<p>the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.</p> <p>(3) <i>Transfer of Claim for Security Before Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.</p> <p>(4) <i>Transfer of Claim for Security</i></p>	<p>(2) <b><i>Claim Transferred After a Proof of Claim Was Filed.</i></b></p> <p>(A) <i>Filing Evidence of the Transfer.</i> Unless the transfer was made for security, the transferee of a claim that was transferred after a proof of claim was filed must file evidence of the transfer—except for a claim based on a publicly traded note, bond, or debenture.</p> <p>(B) <i>Notice of the Filing and the Time for Objecting.</i> The clerk must immediately notify the alleged transferor, by mail, that evidence of the transfer has been filed and that the alleged transferor has 21 days after the notice is mailed to file an objection. The court may extend the time to file it.</p> <p>(C) <i>Hearing on an Objection; Substituting the Transferee.</i> If, on timely objection by the alleged transferor and after notice and a hearing, the court finds that the claim was transferred other than for security, the court must substitute the transferee for the transferor. If the alleged transferor does not file a timely objection, the court must substitute the transferee for the transferor.</p> <p>(3) <b><i>Claim Transferred for Security Before a Proof of Claim is Filed.</i></b></p> <p>(A) <i>Right to File a Proof of Claim.</i> If a claim (except one based on a publicly traded note, bond, or debenture) was transferred for security before the proof of claim was filed, either the transferor or transferee (or both) may file a proof of claim for the full amount. The proof of claim must include a</p>

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<p><i>after Proof Filed.</i> If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.</p> <p>(5) <i>Service of Objection or Motion; Notice of Hearing.</i> A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.</p>	<p>statement setting forth the terms of the transfer.</p> <p>(B) <i>Notice of a Right to Join in a Proof of Claim; Consolidating Proofs.</i> If either the transferor or transferee files a proof of claim, the clerk must, by mail, immediately notify the other of the right to join in the claim. If both file proofs of the same claim, the claims must be consolidated.</p> <p>(C) <i>Failure to File an Agreement About the Rights of the Transferor and Transferee.</i> On a party in interest’s motion and after notice and a hearing, the court must issue appropriate orders regarding the rights of the transferor and transferee if either one fails to file an agreement on voting the claim, receiving dividends on it, or participating in the estate’s administration.</p> <p><b>(4) <i>Claim Transferred for Security After a Proof of Claim Has Been Filed.</i></b></p> <p>(A) <i>Filing Evidence of the Transfer.</i> If a claim (except one based on a publicly traded note, bond, or debenture) was transferred for security after a proof of claim was filed, the transferee must file a statement that sets forth the terms of the transfer.</p> <p>(B) <i>Notice of the Filing and the Time for Objecting.</i> The clerk must immediately notify the alleged transferor, by mail, that evidence of the transfer has been filed and that the alleged transferor has 21 days after the notice is mailed to file an objection. The court may extend the time to file it</p> <p>(C) <i>Hearing on an Objection.</i> If the alleged transferor files a timely objection,</p>

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	<p>the court must, after notice and a hearing, determine whether the transfer was for security.</p> <p>(D) <i>Failure to File an Agreement About the Rights of the Transferor and Transferee.</i> On a party in interest’s motion and after notice and a hearing, the court must issue appropriate orders regarding the rights of the transferor and transferee if either one fails to file an agreement on voting the claim, receiving dividends on it, or participating in the estate’s administration.</p> <p>(5) <b><i>Serving an Objection or Motion; Notice of a Hearing.</i></b> At least 30 days before a hearing, a copy of any objection filed under (2) or (4) or any motion filed under (3) or (4) must be mailed or delivered to either the transferor or transferee as appropriate, together with notice of the hearing.</p>
<p>(f) EVIDENTIARY EFFECT. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.</p>	<p><b>(f) Proof of Claim as Prima Facie Evidence of a Claim and Its Amount.</b> A proof of claim signed and filed in accordance with these rules is prima facie evidence of the validity and amount of the claim.</p>
<p>(g)<sup>1</sup> To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.</p>	<p><b>(g) Proving the Ownership and Quantity of Grain.</b> To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.</p>

<sup>1</sup> So in original. Subsec. (g) adopted without a catchline.

**Committee Note**

The language of most provisions in Rule 3001 have been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. Rule 3001(g) has not been restyled (except to add a title) because it was enacted by Congress, P.L. 98-353, 98 Stat. 361, Sec. 354 (1984). The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides no authority to modify statutory language.

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<p><b>Rule 3002. Filing Proof of Claim or Interest</b></p>	<p><b>Rule 3002. Filing a Proof of Claim or Interest</b></p>
<p>(a) NECESSITY FOR FILING. A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.</p>	<p>(a) <b>Need to File.</b> Unless Rule 1019(c), 3003, 3004, or 3005 provides otherwise, every creditor or equity security holder must file a proof of claim or interest for the claim or interest to be allowed. A lien that secures a claim is not void solely because an entity failed to file a proof of claim.</p>
<p>(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.</p>	<p>(b) <b>Where to File.</b> The proof of claim or interest must be filed in the district where the case is pending and in accordance with Rule 5005.</p>
<p>(c) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply:</p> <p>(1) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of</p>	<p>(c) <b>Time to File.</b> In a voluntary Chapter 7 case or in a Chapter 12 or 13 case, the proof of claim is timely if it is filed within 70 days after the order for relief or entry of an order converting the case to Chapter 12 or 13. In an involuntary Chapter 7 case, a proof of claim is timely filed if it is filed within 90 days after the order for relief is entered. These exceptions apply in all cases:</p> <p>(1) <b>Governmental Unit.</b> A governmental unit’s proof of claim is timely if it is filed within 180 days after the order for relief. But a proof of claim resulting from a tax return filed under § 1308 is timely if it is filed within 180 days after the order for relief or within 60 days after the tax return is filed. On motion filed by a governmental unit before the time expires and for cause, the court may extend the time to file a proof of claim.</p> <p>(2) <b>Infant or Incompetent Person.</b> In the interests of justice, the court may extend the time for an infant or incompetent person—or a representative of either—to file a</p>

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<p>claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.</p> <p>(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.</p> <p>(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity’s interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.</p> <p>(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.</p> <p>(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days’ notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.</p> <p>(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted</p>	<p>proof of claim, but only if the extension will not unduly delay case administration.</p> <p>(3) <b><i>Unsecured Claim That Arises from a Judgment.</i></b> An unsecured claim that arises in favor of an entity or becomes allowable because of a judgment may be filed within 30 days after the judgment becomes final if it is to recover money or property from that entity or denies or avoids the entity’s interest in property. The claim must not be allowed if the judgment imposes a liability that is not satisfied—or a duty that is not performed—within the 30 days or any additional time set by the court.</p> <p>(4) <b><i>Claim Arising from a Rejected Executory Contract or Unexpired Lease.</i></b> A proof of claim for a claim that arises from a rejected executory contract or an unexpired lease may be filed within the time set by the court.</p> <p>(5) <b><i>Notice That Assets May Be Available to Pay a Dividend.</i></b> The clerk must, by mail, give at least 90 days’ notice to creditors that a dividend payment appears possible and that proofs of claim must be filed by the date set forth in the notice if:</p> <p>(A) a notice of insufficient assets to pay a dividend had been given under Rule 2002(e); and</p> <p>(B) the trustee later notifies the court that a dividend appears possible.</p> <p>(6) <b><i>Claim Secured by a Security Interest in the Debtor’s Principal Residence.</i></b> A proof of a claim secured by a security interest in the debtor’s principal residence is timely filed if:</p> <p>(A) the proof of claim and attachments required by Rule 3001(c)(2)(C) are</p>

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<p>if the court finds that:</p> <p style="padding-left: 40px;">(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or</p> <p style="padding-left: 40px;">(B) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.</p> <p style="padding-left: 40px;">(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if:</p> <p style="padding-left: 80px;">(A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and</p> <p style="padding-left: 80px;">(B) any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.</p>	<p>filed within 70 days after the order for relief; and</p> <p style="padding-left: 40px;">(B) the attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim within 120 days after the order for relief.</p> <p><b>(7) <i>Extending the Time to File.</i></b> On a creditor's motion filed before or after the time to file a proof of claim has expired, the court may extend the time to file by no more than 60 days from the date of its order. The motion may be granted if the court finds that:</p> <p style="padding-left: 40px;">(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file because the debtor failed to timely file the list of creditors and their names and addresses as required by Rule 1007(a); or</p> <p style="padding-left: 40px;">(B) the notice was mailed to the creditor at a foreign address and was insufficient to give the creditor a reasonable time to file.</p>

**Committee Note**

The language of Rule 3002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence</b></p>	<p><b>Rule 3002.1. Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence in a Chapter 13 Case</b></p>
<p>(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor’s principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.</p>	<p>(a) <b>In General.</b> This rule applies in a Chapter 13 case to a claim that is secured by a security interest in the debtor’s principal residence and for which the plan requires the trustee or debtor to make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.</p>
<p>(b) NOTICE OF PAYMENT CHANGES; OBJECTION.</p> <p>(1) <i>Notice.</i> The holder of the claim shall file and serve on the debtor, debtor’s counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.</p> <p>(2) <i>Objection.</i> A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.</p>	<p>(b) <b>Notice of a Payment Change.</b></p> <p>(1) <b><i>Notice by the Claim Holder.</i></b> The claim holder must file a notice of any change in the amount of an installment payment—including any change resulting from an interest-rate or escrow-account adjustment. At least 21 days before the new payment is due, the notice must be filed and served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the debtor’s attorney; and</li> <li>• the trustee.</li> </ul> <p>If the claim arises from a home-equity line of credit, the court may modify this requirement.</p> <p>(2) <b><i>Party in Interest’s Objection.</i></b> A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments under § 1322(b)(5). Unless the court orders otherwise, if no motion is filed by the</p>



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	<p>day before the new payment is due, the change goes into effect.</p>
<p>(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor’s counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor’s principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.</p>	<p><b>(c) Fees, Expenses, and Charges Incurred After the Case Was Filed; Notice by the Claim Holder.</b> The claim holder must file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable against the debtor or the debtor’s principal residence. Within 180 days after the fees, expenses, or charges were incurred, the notice must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the debtor’s attorney; and</li> <li>• the trustee.</li> </ul>
<p>(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder’s proof of claim. The notice is not subject to Rule 3001(f).</p>	<p><b>(d) Filing Notice as a Supplement to a Proof of Claim.</b> A notice under (b) or (c) must be filed as a supplement to the proof of claim using Form 410S-1 or 410S-2, respectively. The notice is not subject to Rule 3001(f).</p>
<p>(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.</p>	<p><b>(e) Determining Fees, Expenses, or Charges.</b> On a party in interest’s motion filed within one year after the notice in (c) was served, the court must, after notice and a hearing, determine whether paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments under § 1322(b)(5).</p>
<p>(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on</p>	<p><b>(f) Notice of the Final Cure Payment.</b></p> <p><b>(1) Contents of a Notice.</b> Within 30 days after the debtor completes all</p>

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<p>the holder of the claim, the debtor, and debtor’s counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.</p>	<p>payments under a Chapter 13 plan, the trustee must file a notice:</p> <p>(A) stating that the debtor has paid in full the amount required to cure any default on the claim; and</p> <p>(B) informing the claim holder of its obligation to file and serve a response under (g).</p> <p>(2) <b><i>Serving the Notice.</i></b> The notice must be served on:</p> <ul style="list-style-type: none"> <li>• the claim holder;</li> <li>• the debtor; and</li> <li>• the debtor’s attorney.</li> </ul> <p>(3) <b><i>The Debtor’s Right to File.</i></b> The debtor may file and serve the notice if:</p> <p>(A) the trustee fails to do so; and</p> <p>(B) the debtor contends that the final cure payment has been made and all plan payments have been completed.</p>
<p>(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor’s counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder’s proof of</p>	<p>(g) <b>Response to a Notice of the Final Cure Payment.</b></p> <p>(1) <b><i>Required Statement.</i></b> Within 21 days after the notice under (f) is served, the claim holder must file and serve a statement that:</p> <p>(A) indicates whether:</p> <p>(i) the claim holder agrees that the debtor has paid in full the amount required to cure any default on the claim; and</p> <p>(ii) the debtor is otherwise current on all payments under § 1322(b)(5); and</p> <p>(B) itemizes the required cure or postpetition amounts, if any, that</p>

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<p>claim and is not subject to Rule 3001(f).</p>	<p>the claim holder contends remain unpaid as of the statement’s date.</p> <p><b>(2) <i>Persons to be Served.</i></b> The holder must serve the statement on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the debtor’s attorney; and</li> <li>• the trustee.</li> </ul> <p><b>(3) <i>Statement to be a Supplement</i></b> The statement must be filed as a supplement to the proof of claim and is not subject to Rule 3001(f).</p>
<p><b>(h) DETERMINATION OF FINAL CURE AND PAYMENT.</b> On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.</p>	<p><b>(h) Determining the Final Cure Payment.</b> On the debtor’s or trustee’s motion filed within 21 days after the statement under (g) is served, the court must, after notice and a hearing, determine whether the debtor has cured the default and made all required postpetition payments.</p>
<p><b>(i) FAILURE TO NOTIFY.</b> If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:</p> <p style="padding-left: 40px;">(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or</p> <p style="padding-left: 40px;">(2) award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.</p>	<p><b>(i) Failure to Give Notice.</b> If the claim holder fails to provide any information required by (b), (c), or (g), the court may, after notice and a hearing, take one or both of these actions:</p> <p style="padding-left: 40px;">(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case— unless the failure was substantially justified or is harmless; and</p> <p style="padding-left: 40px;">(2) award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.</p>

**Committee Note**

The language of Rule 3002.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases</b></p>	<p><b>Rule 3003. Chapter 9 or 11— Filing a Proof of Claim or Equity Interest</b></p>
<p>(a) APPLICABILITY OF RULE. This rule applies in chapter 9 and 11 cases.</p>	<p>(a) <b>Scope.</b> This rule applies only in a Chapter 9 or 11 case.</p>
<p>(b) SCHEDULE OF LIABILITIES AND LIST OF EQUITY SECURITY HOLDERS.</p> <p>(1) <i>Schedule of Liabilities.</i> The schedule of liabilities filed pursuant to § 521(l) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.</p> <p>(2) <i>List of Equity Security Holders.</i> The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.</p>	<p>(b) <b>Scheduled Liabilities and Listed Equity Security Holders as Prima Facie Evidence of Validity and Amount.</b></p> <p>(1) <b><i>Creditor’s Claim.</i></b> An entry on the schedule of liabilities filed under § 521(a)(1)(B)(i) is prima facie evidence of the validity and the amount of a creditor’s claim—except for a claim shown as disputed, contingent, or unliquidated. Filing a proof of claim is unnecessary except as provided in (c)(2).</p> <p>(2) <b><i>Interest of an Equity Security Holder.</i></b> An entry on the list of equity security holders filed under Rule 1007(a)(3) is prima facie evidence of the validity and the amount of the equity interest. Filing a proof of the interest is unnecessary except as provided in (c)(2).</p>
<p>(c) FILING PROOF OF CLAIM.</p> <p>(1) <b>Who May File.</b> Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.</p> <p>(2) <b>Who Must File.</b> Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be</p>	<p>(c) <b>Filing a Proof of Claim.</b></p> <p>(1) <b><i>Who May File a Proof of Claim.</i></b> A creditor or indenture trustee may file a proof of claim.</p> <p>(2) <b><i>Who Must File a Proof of Claim or Interest.</i></b> A creditor or equity security holder whose claim or interest is not scheduled—or is shown as disputed, contingent, or unliquidated—must file a proof of claim or interest. A creditor who fails to do so will not be treated as a creditor for that claim for voting and distribution.</p>

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<p>treated as a creditor with respect to such claim for the purposes of voting and distribution.</p> <p>(3) Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).</p> <p>(4) Effect of Filing Claim or Interest. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code.</p> <p>(5) Filing by Indenture Trustee. An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.</p>	<p><b>(3) Time to File.</b> The court must set the time to file a proof of claim or interest and may, for cause, extend the time. If the time has expired, the proof of claim or interest may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (3), (4), and (7).</p> <p><b>(4) Proof of Claim by an Indenture Trustee.</b> An indenture trustee may file a proof of claim on behalf of all known or unknown holders of securities issued under the trust instrument under which it is trustee.</p> <p><b>(5) Effect of Filing a Proof of Claim or Interest.</b> A proof of claim or interest signed and filed under (c) supersedes any scheduling under § 521(a)(1) of the claim or interest.</p>
<p>(d) PROOF OF RIGHT TO RECORD STATUS. For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, an entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. An objection to the statement may be filed by any party in interest.</p>	<p><b>(d) Treating a Nonrecord Holder of a Security as the Record Holder.</b> For the purpose of Rules 3017, 3018, and 3021 and receiving notices, an entity that is not a record holder of a security may file a statement setting forth facts that entitle the entity to be treated as the record holder. A party in interest may file an objection to the statement.</p>

**Committee Note**

The language of Rule 3003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3004. Filing of Claims by Debtor or Trustee</b></p>	<p><b>Rule 3004. Proof of Claim Filed by the Debtor or Trustee for a Creditor</b></p>
<p>If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.</p>	<p><b>(a) Filing by the Debtor or Trustee.</b> If a creditor does not file a proof of claim within the time prescribed by Rule 3002(c) or Rule 3003(c), the debtor or trustee may do so within 30 days after the creditor’s time to file expires.</p> <p><b>(b) Notice by the Clerk.</b> The clerk must promptly give notice of the filing to:</p> <ul style="list-style-type: none"> <li>• the creditor;</li> <li>• the debtor; and</li> <li>• the trustee.</li> </ul>

**Committee Note**

The language of Rule 3004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor</b></p>	<p><b>Rule 3005. Filing a Proof of Claim or Accepting or Rejecting a Plan by a Surety, Endorser, Guarantor, or Other Codebtor</b></p>
<p>(a) FILING OF CLAIM. If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution.</p>	<p>(a) <b>In General.</b> If a creditor fails to file a proof of claim within the time prescribed by Rule 3002(c) or Rule 3003(c), it may be filed by an entity that, along with the debtor, is or may be liable to the creditor or has given security for the creditor’s debt. The entity must do so within 30 days after the creditor’s time to file expires. A distribution on such a claim may be made only on satisfactory proof that the original debt will be diminished by the distribution.</p>
<p>(b) FILING OF ACCEPTANCE OR REJECTION; SUBSTITUTION OF CREDITOR. An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity’s own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice prior to confirmation of a plan of the creditor’s intention to act in the creditor’s own behalf, the creditor shall be substituted for the obligor with respect to that claim.</p>	<p>(b) <b>Accepting or Rejecting a Plan in a Creditor’s Name.</b> An entity that has filed a proof of claim on behalf of a creditor under (a) may accept or reject a plan in the creditor’s name. If the creditor’s name is unknown, the entity may do so in its own name. But the creditor must be substituted for the entity on that claim if the creditor:</p> <ol style="list-style-type: none"> <li>(1) files a proof of claim within the time permitted by Rule 3003(c); or</li> <li>(2) files notice, before the plan is confirmed, of an intent to act in the creditor’s own behalf.</li> </ol>

**Committee Note**

The language of Rule 3005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.



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<p><b>Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan</b></p>	<p><b>Rule 3006. Withdrawing a Proof of Claim; Effect on a Plan</b></p>
<p>A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors’ committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.</p>	<p>(a) <b>Notice of Withdrawal; Limitations.</b> A creditor may withdraw a proof of claim by filing a notice of withdrawal. But unless the court orders otherwise after notice and a hearing, a creditor may not withdraw a proof of claim if:</p> <ul style="list-style-type: none"> <li>(A) an objection to it has been filed;</li> <li>(B) a complaint has been filed against the creditor in an adversary proceeding; or</li> <li>(C) the creditor has accepted or rejected the plan or has participated significantly in the case.</li> </ul> <p>(b) <b>Notice of the Hearing; Order Permitting Withdrawal.</b> Notice of the hearing must be served on:</p> <ul style="list-style-type: none"> <li>• the trustee or debtor in possession; and</li> <li>• any creditors’ committee elected under § 705(a) or appointed under § 1102.</li> </ul> <p>The court’s order permitting a creditor to withdraw a proof of claim must contain any terms and conditions the court deems proper.</p> <p>(c) <b>Effect of Withdrawing a Proof of Claim.</b> Unless the court orders otherwise, an authorized withdrawal constitutes withdrawal of any related acceptance or rejection of a plan.</p>

**Committee Note**

The language of Rule 3006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3007. Objections to Claims</b></p>	<p><b>Rule 3007. Objecting to a Claim</b></p>
<p>(a) TIME AND MANNER OF SERVICE.</p> <p>(1) <i>Time of Service.</i> An objection to the allowance of a claim and a notice of objection that substantially conforms to the appropriate Official Form shall be filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing.</p> <p>(2) <i>Manner of Service.</i></p> <p>(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant’s original or amended proof of claim as the person to receive notices, at the address so indicated; and</p> <p>(i) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or</p> <p>(ii) if the objection is to a claim of an insured depository institution, in the manner provided by Rule 7004(h).</p> <p>(B) Service of the objection and notice shall also be made by first-class mail or other permitted means on the debtor or debtor in possession, the trustee, and, if applicable, the entity filing the proof of claim under Rule 3005.</p>	<p>(a) <b>Time and Manner of Serving the Objection.</b></p> <p>(1) <b><i>Time to Serve.</i></b> An objection to a claim and a notice of the objection must be filed and served at least 30 days before a scheduled hearing on the objection or any deadline for the claim holder to request a hearing.</p> <p>(2) <b><i>Whom to Serve; Manner of Service.</i></b></p> <p>(A) <i>Serving the Claim Holder.</i> The notice—using Form 420B—and objection must be served by mail on the person the claim holder most recently designated to receive notices on the claim holder’s original or latest amended proof of claim, at the address so indicated. If the objection is to a claim of:</p> <p>(i) the United States or one of its officers or agencies, service must be made as if it were a summons and complaint under Rule 7004(b)(4) or (5); or</p> <p>(ii) an insured depository institution, service must be made under Rule 7004(h).</p> <p>(B) <i>Serving Others.</i> The notice and objection must also be served, by mail (or other permitted means), on:</p> <ul style="list-style-type: none"> <li>• the debtor or debtor in possession;</li> <li>• the trustee; and</li> <li>• if applicable, the entity that filed the proof of claim under Rule 3005.</li> </ul>

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<p>(b) DEMAND FOR RELIEF REQUIRING AN ADVERSARY PROCEEDING. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.</p>	<p><b>(b) Demanding Relief Under Rule 7001 Not Permitted.</b> In objecting to a claim, a party in interest must not include a demand for a type of relief specified in Rule 7001 but may include the objection in an adversary proceeding.</p>
<p>(c) LIMITATION ON JOINDER OF CLAIMS OBJECTIONS. Unless otherwise ordered by the court or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.</p>	<p><b>(c) Limit on Omnibus Objections.</b> Unless the court orders otherwise or (d) permits, objections to more than one claim may not be joined in a single objection.</p>
<p>(d) OMNIBUS OBJECTION. Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:</p> <ul style="list-style-type: none"> <li>(1) they duplicate other claims;</li> <li>(2) they have been filed in the wrong case;</li> <li>(3) they have been amended by subsequently filed proofs of claim;</li> <li>(4) they were not timely filed;</li> <li>(5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;</li> <li>(6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;</li> <li>(7) they are interests, rather than claims; or</li> </ul>	<p><b>(d) Omnibus Objection.</b> Subject to (e), objections to more than one claim may be joined in a single objection if:</p> <ul style="list-style-type: none"> <li>(1) all the claims were filed by the same entity; or</li> <li>(2) the objections are based solely on grounds that the claims should be disallowed, in whole or in part, because they: <ul style="list-style-type: none"> <li>(A) duplicate other claims;</li> <li>(B) were filed in the wrong case;</li> <li>(C) have been amended by later proofs of claim;</li> <li>(D) were not timely filed;</li> <li>(E) have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;</li> <li>(F) were presented in a form that does not comply with applicable rules and the objection states that because of the noncompliance the objector is unable to determine a claim’s validity;</li> <li>(G) are interests, not claims; or</li> </ul> </li> </ul>

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<p>(8) they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.</p>	<p>(H) assert a priority in an amount that exceeds the maximum amount allowable under § 507.</p>
<p>(e) REQUIREMENTS FOR OMNIBUS OBJECTION. An omnibus objection shall:</p> <p>(1) state in a conspicuous place that claimants receiving the objection should locate their names and claims in the objection;</p> <p>(2) list claimants alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by category of claims;</p> <p>(3) state the grounds of the objection to each claim and provide a cross-reference to the pages in the omnibus objection pertinent to the stated grounds;</p> <p>(4) state in the title the identity of the objector and the grounds for the objections;</p> <p>(5) be numbered consecutively with other omnibus objections filed by the same objector; and</p> <p>(6) contain objections to no more than 100 claims.</p>	<p>(e) <b>Required Content of an Omnibus Objection.</b> An omnibus objection must:</p> <p>(1) state in a conspicuous place that claim holders can find their names and claims in the objection;</p> <p>(2) list the claim holders alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claim holders by category of claims;</p> <p>(3) state for each claim the grounds for the objection and provide a cross-reference to the pages where pertinent information about the grounds appears;</p> <p>(4) state in the title the objector’s identity and the grounds for the objections;</p> <p>(5) be numbered consecutively with other omnibus objections filed by the same objector; and</p> <p>(6) contain objections to no more than 100 claims.</p>
<p>(f) FINALITY OF OBJECTION. The finality of any order regarding a claim objection included in an omnibus objection shall be determined as though the claim had been subject to an individual objection.</p>	<p>(f) <b>Finality of an Order When Objections Are Joined.</b> When objections are joined, the finality of an order regarding any claim must be determined as though it had been subject to an individual objection.</p>

**Committee Note**

The language of Rule 3007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<b>Rule 3008. Reconsideration of Claims</b>	<b>Rule 3008. Reconsidering an Order Allowing or Disallowing a Claim</b>
A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.	A party in interest may move to reconsider an order allowing or disallowing a claim. After notice and a hearing, the court must issue an appropriate order.

**Committee Note**

The language of Rule 3008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<b>Rule 3009. Declaration and Payment of Dividends in a Chapter 7 Liquidation Case</b>	<b>Rule 3009. Chapter 7—Paying Dividends</b>
<p>In a chapter 7 case, dividends to creditors shall be paid as promptly as practicable. Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.</p>	<p>In a Chapter 7 case, dividends to creditors on claims that have been allowed must be paid as soon as practicable. A dividend check must be made payable to and mailed to the creditor. But if a power of attorney authorizing another entity to receive payment has been filed under Rule 9010, the check must be:</p> <ul style="list-style-type: none"> <li>(a) made payable to both the creditor and the other entity; and</li> <li>(b) mailed to the other entity.</li> </ul>

**Committee Note**

The language of Rule 3009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 3010. Small Dividends and Payments in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases</b></p>	<p><b>Rule 3010. Chapter 7, 12, or 13—Limits on Small Dividends and Payments</b></p>
<p>(a) CHAPTER 7 CASES. In a chapter 7 case no dividend in an amount less than \$5 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.</p>	<p><b>(a) Chapter 7.</b> In a Chapter 7 case, the trustee must not distribute to a creditor any dividend less than \$5 unless authorized to do so by local rule or court order. A dividend not distributed must be treated in the same manner as unclaimed funds under § 347.</p>
<p>(b) CHAPTER 12 AND CHAPTER 13 CASES. In a chapter 12 or chapter 13 case no payment in an amount less than \$15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates \$15. Any funds remaining shall be distributed with the final payment.</p>	<p><b>(b) Chapter 12 or 13.</b> In a Chapter 12 or 13 case, the trustee must not distribute to a creditor any payment less than \$15 unless authorized to do so by local rule or court order. Distribution must be made when accumulated funds total \$15 or more. Any remaining funds must be distributed with the final payment.</p>

**Committee Note**

The language of Rule 3010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p><b>Rule 3011. Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases</b></p>	<p><b>Rule 3011. Chapter 7, 12, or 13—Listing Unclaimed Funds</b></p>
<p>The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.</p>	<p>The trustee must:</p> <ul style="list-style-type: none"> <li>(a) file a list of the known names and addresses of entities entitled to payment from any remaining property of the estate that is paid into court under § 347(a); and</li> <li>(b) include the amount due each entity.</li> </ul>

**Committee Note**

The language of Rule 3011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 3012. Determining the Amount of Secured and Priority Claims</b></p>	<p><b>Rule 3012. Determining the Amount of a Secured or Priority Claim</b></p>
<p>(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:</p> <p>(1) the amount of a secured claim under § 506(a) of the Code; or</p> <p>(2) the amount of a claim entitled to priority under § 507 of the Code.</p>	<p>(a) <b>In General.</b> On a party in interest’s request, after notice and a hearing, the court may determine the amount of a secured claim under § 506(a) or the amount of a priority claim under § 507. The notice must be served on:</p> <ul style="list-style-type: none"> <li>• the claim holder; and</li> <li>• any other entity the court designates.</li> </ul>
<p>(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.</p>	<p>(b) <b>Determining the Amount of a Claim.</b></p> <p>(1) <b>Secured Claim.</b> Except as provided in (c), a request to determine the amount of a secured claim may be made by motion, in an objection to a claim, or in a plan filed in a Chapter 12 or 13 case. If the request is included in a plan, a copy of the plan must be served on the claim holder and any other entity the court designates as if it were a summons and complaint under Rule 7004.</p> <p>(2) <b>Priority Claim.</b> A request to determine the amount of a priority claim may be made only by motion after the claim is filed or in an objection to the claim.</p>
<p>(c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired.</p>	<p>(c) <b>Governmental Unit’s Secured Claim.</b> A request to determine the amount of a governmental unit’s secured claim may be made only by motion—or in an objection to a claim—filed after:</p> <p>(A) the governmental unit has filed the proof of claim; or</p> <p>(B) the time to file it under Rule 3002(c)(1) has expired.</p>

**Committee Note**

The language of Rule 3012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3013. Classification of Claims and Interests</b></p>	<p><b>Rule 3013. Determining Classes of Creditors and Equity Security Holders</b></p>
<p>For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§ 1122, 1222(b)(1), and 1322(b)(1) of the Code.</p>	<p>For purposes of a plan and its acceptance, the court may, on motion after notice and a hearing, determine classes of creditors and equity security holders under §§ 1122, 1222(b)(1), and 1322(b)(1). The notice must be served as the court directs.</p>

**Committee Note**

The language of Rule 3013 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3014. Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3014. Chapter 9 or 11—Secured Creditors’ Election to Apply § 1111(b)</b></p>
<p>An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.</p>	<p><b>(a) Time for an Election.</b> In a Chapter 9 or 11 case, before a hearing on the disclosure statement concludes, a class of secured creditors may elect to apply § 1111(b)(2). If the disclosure statement is conditionally approved under Rule 3017.1 and a final hearing on it is not held, the election must be made within the time provided in Rule 3017.1(a)(2). In either situation, the court may set another time for the election.</p> <p><b>(b) Signed Writing; Binding Effect.</b> The election must be made in writing and signed unless made at the hearing on the disclosure statement. An election made by the majorities required by § 1111(b)(1)(A)(i) is binding on all members of the class.</p>

**Committee Note**

The language of Rule 3014 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case</b></p>	<p><b>Rule 3015. Chapter 12 or 13—Time to File a Plan; Nonstandard Provisions; Objection to Confirmation; Effect of Confirmation; Modifying a Plan</b></p>
<p>(a) FILING A CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.</p>	<p>(a) <b>Time to File a Chapter 12 Plan.</b> The debtor may file a Chapter 12 plan:</p> <ol style="list-style-type: none"> <li>(1) with the petition; or</li> <li>(2) within the time prescribed by § 1221.</li> </ol>
<p>(b) FILING A CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.</p>	<p>(b) <b>Time to File a Chapter 13 Plan.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>In General.</i></b> The debtor may file a Chapter 13 plan with the petition or within 14 days after it is filed. The time to file may not be extended except for cause and on notice as the court directs.</li> <li>(2) <b><i>Case Converted to Chapter 13.</i></b> If a case is converted to Chapter 13, the plan must be filed within 14 days after conversion. The time may not be extended except for cause and on notice as the court directs.</li> </ol>
<p>(c) FORM OF CHAPTER 13 PLAN. If there is an Official Form for a plan filed in a chapter 13 case, that form must be used unless a Local Form has been adopted in compliance with Rule 3015.1. With either the Official Form or a Local Form, a nonstandard provision is effective only if it is included in a section of the form designated for nonstandard provisions and is also identified in accordance with any other requirements of the form. As used in this rule and the Official Form or a Local Form, “nonstandard provision” means a provision not otherwise included in the Official or Local Form or deviating from it.</p>	<p>(c) <b>Form of a Chapter 13 Plan.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>In General.</i></b> In filing a Chapter 13 plan, the debtor must use Form 113, unless the court has adopted a local form under Rule 3015.1.</li> <li>(2) <b><i>Nonstandard Provision.</i></b> With either form, a nonstandard provision is effective only if it is included in the section of the form that is designated for nonstandard provisions and is identified in accordance with any other requirements of the form. A nonstandard provision is one that is not included in the form or deviates from it.</li> </ol>

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<p>(d) NOTICE. If the plan is not included with the notice of the hearing on confirmation mailed under Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court.</p>	<p><b>(d) Serving a Copy of the Plan.</b> If the plan was not included with the notice of a confirmation hearing mailed under Rule 2002, the debtor must serve the plan on the trustee and creditors when it is filed.</p>
<p>(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed under subdivision (a) or (b) of this rule.</p>	<p><b>(e) Copy to the United States Trustee.</b> The clerk must promptly send to the United States trustee a copy of any plan filed under (a) or (b) or any modification of it.</p>
<p>(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, at least seven days before the date set for the hearing on confirmation, unless the court orders otherwise. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.</p>	<p><b>(f) Objection to Confirmation; Determining Good Faith When No Objection is Filed.</b></p> <p><b>(1) <i>Serving an Objection.</i></b> An entity that objects to confirmation of a plan must file and serve the objection on the debtor, trustee, and any other entity the court designates, and must send a copy to the United States trustee. Unless the court orders otherwise, the objection must be filed, served, and sent at least seven days before the date set for the confirmation hearing. The objection is governed by Rule 9014.</p> <p><b>(2) <i>When No Objection Is Filed.</i></b> If no objection is timely filed, the court may, without receiving evidence, determine that the plan has been proposed in good faith and not by any means forbidden by law.</p>
<p>(g) EFFECT OF CONFIRMATION. Upon the confirmation of a chapter 12 or chapter 13 plan:</p> <p>(1) any determination in the plan made under Rule 3012 about the amount of a secured claim is binding on the holder of the claim, even if the holder files a contrary proof of claim or the debtor schedules that claim, and</p>	<p><b>(g) Effect of Confirmation of a Chapter 12 or 13 Plan on the Amount of a Secured Claim; Terminating the Stay.</b></p> <p><b>(1) <i>Secured Claim.</i></b> When a plan is confirmed, the amount of a secured claim—determined in the plan under Rule 3012—becomes binding on the holder of the claim. That is the effect even if the holder files a contrary proof</p>

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<p>regardless of whether an objection to the claim has been filed; and</p> <p>(2) any request in the plan to terminate the stay imposed by § 362(a), § 1201(a), or § 1301(a) is granted.</p>	<p>of claim, the debtor schedules that claim, or an objection to the claim is filed.</p> <p>(2) <b><i>Terminating the Stay.</i></b> When a plan is confirmed, a request in the plan to terminate the stay imposed under § 362(a), § 1201(a), or § 1301(a) is granted.</p>
<p>(h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days’ notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.</p>	<p>(h) <b>Modifying a Plan After It Is Confirmed.</b></p> <p>(1) <b><i>Request to Modify a Plan After It Is Confirmed.</i></b> A request to modify a confirmed plan under § 1229 or § 1329 must identify the proponent and include the proposed modification. Unless the court orders otherwise for creditors not affected by the modification, the clerk or the court’s designee must:</p> <ul style="list-style-type: none"> <li>(A) give the debtor, trustee, and creditors at least 21 days’ notice, by mail, of the time to file objections and the date of any hearing;</li> <li>(B) send a copy of the notice to the United States trustee; and</li> <li>(C) include a copy or summary of the modification.</li> </ul> <p>(2) <b><i>Objecting to a Modification.</i></b> Rule 9014 governs an objection to a proposed modification. An objection must be filed and served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee; and</li> <li>• any other entity the court designates.</li> </ul> <p>A copy must also be sent to the United States trustee.</p>

**Committee Note**

The language of Rule 3015 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3015.1. Requirements for a Local Form for Plans Filed in a Chapter 13 Case</b></p>	<p><b>Rule 3015.1 Requirements for a Local Form for a Chapter 13 Plan</b></p>
<p>Notwithstanding Rule 9029(a)(1), a district may require that a Local Form for a plan filed in a chapter 13 case be used instead of an Official Form adopted for that purpose if the following conditions are satisfied:</p> <p>(a) a single Local Form is adopted for the district after public notice and an opportunity for public comment;</p> <p>(b) each paragraph is numbered and labeled in boldface type with a heading stating the general subject matter of the paragraph;</p> <p>(c) the Local Form includes an initial paragraph for the debtor to indicate that the plan does or does not:</p> <p>(1) contain any nonstandard provision;</p> <p>(2) limit the amount of a secured claim based on a valuation of the collateral for the claim; or</p> <p>(3) avoid a security interest or lien;</p> <p>(d) the Local Form contains separate paragraphs for:</p> <p>(1) curing any default and maintaining payments on a claim secured by the debtor’s principal residence;</p> <p>(2) paying a domestic-support obligation;</p> <p>(3) paying a claim described in the final paragraph of § 1325(a) of the Bankruptcy Code; and</p> <p>(4) surrendering property that secures a claim with a request that</p>	<p>As an exception to Rule 9029(a)(1), a court may require that a single local form be used for a chapter 13 plan in its district instead of Official Form 113 if it:</p> <p>(a) is adopted after public notice and an opportunity for comment;</p> <p>(b) numbers and labels each paragraph in boldface type with a heading that states its general subject matter;</p> <p>(c) includes an opening paragraph for the debtor to indicate that the plan does or does not:</p> <p>(1) contain a nonstandard provision;</p> <p>(2) limit the amount of a secured claim based on a valuation of the collateral; or</p> <p>(3) avoid a security interest or lien;</p> <p>(d) contains separate paragraphs relating to:</p> <p>(1) curing any default and maintaining payments on a claim secured by the debtor’s principal residence;</p> <p>(2) paying a domestic support obligation;</p> <p>(3) paying a claim described in the final paragraph of § 1325(a); and</p> <p>(4) surrendering property that secures a claim and requesting that the stay under § 362(a) or 1301(a) related to the property be terminated; and</p> <p>(e) contains a final paragraph providing a place for:</p> <p>(1) nonstandard provisions as defined in Rule 3015(c), with a warning</p>

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<p>the stay under §§ 362(a) and 1301(a) be terminated as to the surrendered collateral; and</p> <p>(e) the Local Form contains a final paragraph for:</p> <p>(1) the placement of nonstandard provisions, as defined in Rule 3015(c), along with a statement that any nonstandard provision placed elsewhere in the plan is void; and</p> <p>(2) certification by the debtor’s attorney or by an unrepresented debtor that the plan contains no nonstandard provision other than those set out in the final paragraph.</p>	<p>that any nonstandard provision placed elsewhere in the plan is void; and</p> <p>(2) a certification by the debtor’s attorney, or by an unrepresented debtor, that the plan does not contain any nonstandard provision except as set out in the final paragraph.</p>

**Committee Note**

The language of Rule 3015.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3016. Chapter 9 or 11—Plan and Disclosure Statement</b></p>
<p>(a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.</p>	<p>(a) <b>In General.</b> In a Chapter 9 or 11 case, every proposed plan or modification must be dated. In a Chapter 11 case, the plan must name the entity or entities proposing or filing it.</p>
<p>(b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement under § 1125 of the Code or evidence showing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.</p>	<p>(b) <b>Filing a Disclosure Statement.</b></p> <p>(1) <i>In General.</i> In a Chapter 9 or 11 case, unless (2) applies, the disclosure statement required by § 1125 or evidence showing compliance with § 1126(b) must be filed with the plan or at another time set by the court.</p> <p>(2) <i>Providing Information Under § 1125(f)(1).</i> A plan intended to provide adequate information under § 1125(f)(1) must be so designated. Rule 3017.1 then applies as if the plan were a disclosure statement.</p>
<p>(c) INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.</p>	<p>(c) <b>Injunction in a Plan.</b> If the plan provides for an injunction against conduct not otherwise enjoined by the Code, the plan and disclosure statement must:</p> <p>(1) describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined; and</p> <p>(2) identify the entities that would be subject to the injunction.</p>
<p>(d) STANDARD FORM SMALL BUSINESS DISCLOSURE STATEMENT AND PLAN. In a small business case, the court may approve a disclosure statement and may confirm a plan that conform substantially to the appropriate Official Forms or other standard forms approved by the court.</p>	<p>(d) <b>Form of a Disclosure Statement and Plan in a Small Business Case.</b> In a small business case, the court may approve a disclosure statement that substantially conforms to Form 425B and confirm a plan that substantially conforms to Form 425A—or, in either instance, to a standard form approved by the court.</p>

**Committee Note**

The language of Rule 3016 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3017. Court Consideration of Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3017. Chapter 9 or 11—Hearing on a Disclosure Statement and Plan</b></p>
<p>(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 28 days’ notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any other entity designated by the court, at any time before the disclosure statement is approved or by an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.</p>	<p>(a) <b>Hearing on a Disclosure Statement; Objections.</b></p> <p>(1) <i>Notice and Hearing.</i></p> <p>(A) <i>Notice.</i> Except as provided in Rule 3017.1 for a small business case, the court must hold a hearing on a disclosure statement filed under Rule 3016(b) and any objection or modification to it. The hearing must be held on at least 28 days’ notice under Rule 2002(b) to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• creditors;</li> <li>• equity security holders; and</li> <li>• other parties in interest.</li> </ul> <p>(B) <i>Limit on Sending the Plan and Disclosure Statement.</i> A copy of the plan and disclosure statement must be mailed with the notice of a hearing to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• any trustee or appointed committee;</li> <li>• the Securities and Exchange Commission; and</li> <li>• any party in interest that, in writing, requests a copy of the disclosure statement or plan.</li> </ul> <p>(2) <i>Objecting to a Disclosure Statement.</i> An objection to a disclosure statement must be filed and served before the disclosure statement</p>

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	<p>is approved or by an earlier date the court sets. The objection must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• any appointed committee; and</li> <li>• any other entity the court designates.</li> </ul> <p><b>(3) Chapter 11—Copies to the United States Trustee.</b> In a Chapter 11 case, a copy of every item required to be served or mailed under this Rule 3017(a) must also be sent to the United States trustee within the prescribed time.</p>
<p><b>(b) DETERMINATION ON DISCLOSURE STATEMENT.</b> Following the hearing the court shall determine whether the disclosure statement should be approved.</p>	<p><b>(b) Court Ruling on the Disclosure Statement.</b> After the hearing, the court must determine whether the disclosure statement should be approved.</p>
<p><b>(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION.</b> On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.</p>	<p><b>(c) Time to Accept or Reject a Plan and for the Confirmation Hearing.</b> At the time or before the disclosure statement is approved, the court:</p> <ol style="list-style-type: none"> <li>(1) must set a deadline for the holders of claims and interests to accept or reject the plan; and</li> <li>(2) may set a date for a confirmation hearing.</li> </ol>
<p><b>(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS.</b> Upon approval of a disclosure statement,—<sup>2</sup> except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or</p>	<p><b>(d) Hearing on Confirmation.</b></p> <p><b>(1) Transmitting the Plan and Related Documents.</b></p> <p><b>(A) In General.</b> After the disclosure statement has been approved, the court must order the debtor in possession, the trustee, the plan</p>

<sup>2</sup> So in original. The comma probably should not appear.

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<p>equity security holders—the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,</p> <p>(1) the plan or a court-approved summary of the plan;</p> <p>(2) the disclosure statement approved by the court;</p> <p>(3) notice of the time within which acceptances and rejections of the plan may be filed; and</p> <p>(4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.</p> <p>In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. If the court opinion is not transmitted or only a summary of the plan is transmitted, the court opinion or the plan shall be provided on request of a party in interest at the plan proponent’s expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan</p>	<p>proponent, or the clerk to mail the following items to creditors and equity security holders and, in a Chapter 11 case, to send a copy of each to the United States trustee:</p> <p>(i) the court-approved disclosure statement;</p> <p>(ii) the plan or a court-approved summary of it;</p> <p>(iii) a notice of the time to file acceptances and rejections of the plan; and</p> <p>(iv) any other information as the court directs—including any opinion approving the disclosure statement or a court-approved summary of the opinion.</p> <p>(B) <i>Exception.</i> The court may vary the requirements for an unimpaired class of creditors or equity security holders.</p> <p>(2) <b><i>Time to Object to a Plan; Notice of the Confirmation Hearing.</i></b> Notice of the time to file an objection to a plan’s confirmation and the date of the hearing on confirmation must be mailed to creditors and equity security holders in accordance with Rule 2002(b). A ballot that conforms to Form 314 must also be mailed to creditors and equity security holders who are entitled to vote on the plan. If the court’s opinion is not sent (or only a summary of the plan was sent), a party in interest may request a copy of the opinion or plan, which must be provided at the plan proponent’s expense.</p> <p>(3) <b><i>Notice to Unimpaired Classes.</i></b> If the court orders that the disclosure statement and plan (or the plan</p>

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<p>proponent’s expense, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing.</p>	<p>summary) not be mailed to an unimpaired class, a notice that the class has been designated in the plan as unimpaired must be mailed to the class members. The notice must show:</p> <ul style="list-style-type: none"> <li>(A) the name and address of the person from whom the plan (or summary) and the disclosure statement may be obtained at the plan proponent’s expense;</li> <li>(B) the time to file an objection to the plan’s confirmation; and</li> <li>(C) the date of the confirmation hearing.</li> </ul> <p><b>(4) <i>Definition of “Creditors” and “Equity Security Holders.”</i></b> In this Rule 3017(d), “creditors” and “equity security holders” include record holders of stock, bonds, debentures, notes, and other securities on the date the order approving the disclosure statement is entered—or another date the court sets for cause and after notice and a hearing.</p>
<p>(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of the procedures, and enter any orders the court deems appropriate.</p>	<p><b>(e) Procedure for Sending Information to Beneficial Holders of Securities.</b> At the hearing under (a), the court must:</p> <ul style="list-style-type: none"> <li>(1) determine the adequacy of the procedures for sending the documents and information listed in (d)(1) to beneficial holders of stock, bonds, debentures, notes, and other securities; and</li> <li>(2) issue any appropriate orders.</li> </ul>
<p>(f) NOTICE AND TRANSMISSION OF DOCUMENTS TO ENTITIES SUBJECT TO AN INJUNCTION UNDER A PLAN. If a plan provides for an injunction against conduct not otherwise enjoined under the Code and</p>	<p><b>(f) Sending Information to Entities Subject to an Injunction.</b></p> <p><b>(1) <i>Timing of the Notice.</i></b> This Rule 3017(f) applies if, under a plan, an entity that is not a creditor or equity</p>



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<p>an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:</p> <p style="padding-left: 40px;">(1) at least 28 days’ notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and</p> <p style="padding-left: 40px;">(2) to the extent feasible, a copy of the plan and disclosure statement.</p>	<p>security holder is subject to an injunction against conduct not otherwise enjoined by the Code. At the hearing under (a), the court must consider procedures to provide the entity with at least 28 days’ notice of:</p> <p style="padding-left: 40px;">(A) the time to file an objection; and</p> <p style="padding-left: 40px;">(B) the date of the confirmation hearing.</p> <p><b>(2) <i>Contents of the Notice.</i></b> The notice must:</p> <p style="padding-left: 40px;">(A) provide the information required by Rule 2002(c)(3); and</p> <p style="padding-left: 40px;">(B) if feasible, include a copy of the plan and disclosure statement.</p>

**Committee Note**

The language of Rule 3017 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 3017.1. Court Consideration of Disclosure Statement in a Small Business Case</b>	<b>Rule 3017.1. Disclosure Statement in a Small Business Case</b>
<p>(a) <b>CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT.</b> In a small business case, the court may, on application of the plan proponent or on its own initiative, conditionally approve a disclosure statement filed in accordance with Rule 3016. On or before conditional approval of the disclosure statement, the court shall:</p> <p style="padding-left: 40px;">(1) fix a time within which the holders of claims and interests may accept or reject the plan;</p> <p style="padding-left: 40px;">(2) fix a time for filing objections to the disclosure statement;</p> <p style="padding-left: 40px;">(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and</p> <p style="padding-left: 40px;">(4) fix a date for the hearing on confirmation.</p>	<p>(a) <b>Conditionally Approving a Disclosure Statement.</b> In a small business case, the court may, on motion of the plan proponent or on its own, conditionally approve a disclosure statement filed under Rule 3016. Before doing so, the court must:</p> <p style="padding-left: 40px;">(1) set the time within which the claim holders and interest holders may accept or reject the plan;</p> <p style="padding-left: 40px;">(2) set the time to file an objection to the disclosure statement;</p> <p style="padding-left: 40px;">(3) if a timely objection is filed, set the date for the hearing on final approval of the disclosure statement; and</p> <p style="padding-left: 40px;">(4) set a date for the confirmation hearing.</p>
<p>(b) <b>APPLICATION OF RULE 3017.</b> Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).</p>	<p>(b) <b>Effect of a Conditional Approval.</b> Rule 3017(a)–(c) and (e) do not apply to a conditionally approved disclosure statement. But conditional approval is considered approval in applying Rule 3017(d).</p>
<p>(c) <b>FINAL APPROVAL.</b></p> <p style="padding-left: 40px;">(1) <i>Notice.</i> Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.</p>	<p>(c) <b>Time to File an Objection; Date of a Hearing.</b></p> <p style="padding-left: 40px;">(1) <b>Notice.</b> Notice must be given under Rule 2002(b) of the time to file an objection and the date of a hearing to consider final approval of the disclosure statement. The notice may</p>

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<p>(2) <i>Objections.</i> Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.</p> <p>(3) <i>Hearing.</i> If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.</p>	<p>be combined with notice of the confirmation hearing.</p> <p>(2) <i>Time to File an Objection to the Disclosure Statement.</i> An objection to the disclosure statement must be filed before the disclosure statement is finally approved or by an earlier date set by the court. The objection must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• any appointed committee; and</li> <li>• any other entity the court designates.</li> </ul> <p>A copy must also be sent to the United States trustee.</p> <p>(3) <i>Hearing on an Objection to the Disclosure Statement.</i> If a timely objection to the disclosure statement is filed, the court must hold a hearing on final approval either before or combined with the confirmation hearing.</p>

**Committee Note**

The language of Rule 3017.1 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p><b>Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan</b></p>
<p>(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.</p>	<p>(a) <b>In General.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>Who May Accept or Reject a Plan.</i></b> Within the time set by the court under Rule 3017, a claim holder or equity security holder may accept or reject a Chapter 9 or Chapter 11 plan under § 1126.</li> <li>(2) <b><i>Claim Based on a Security of Record.</i></b> Subject to (b), an equity security holder or creditor whose claim is based on a security of record may accept or reject a plan only if the equity security holder or creditor is the holder of record:             <ol style="list-style-type: none"> <li>(A) on the date the order approving the disclosure statement is entered; or</li> <li>(B) on another date the court sets after notice and a hearing and for cause.</li> </ol> </li> <li>(3) <b><i>Changing or Withdrawing an Acceptance or Rejection.</i></b> After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance or rejection.</li> <li>(4) <b><i>Temporarily Allowing a Claim or Interest.</i></b> Even if an objection to a claim or interest has been filed, the court may, after notice and a hearing, temporarily allow a claim or interest in an amount that the court considers proper for voting to accept or reject a plan.</li> </ol>
<p>(b) ACCEPTANCES OR REJECTIONS OBTAINED BEFORE PETITION. An equity security holder or creditor whose claim is based on a security of record who accepted or</p>	<p>(b) <b>Treatment of Acceptances or Rejections Obtained Before the Petition Was Filed.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>Acceptance or Rejection by a Nonholder of Record.</i></b> An equity security holder or creditor who</li> </ol>

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<p>rejected the plan before the commencement of the case shall not be deemed to have accepted or rejected the plan pursuant to § 1126(b) of the Code unless the equity security holder or creditor was the holder of record of the security on the date specified in the solicitation of such acceptance or rejection for the purposes of such solicitation. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code.</p>	<p>accepted or rejected a plan before the petition was filed will not be considered to have accepted or rejected the plan under § 1126(b) if the equity security holder or creditor:</p> <ul style="list-style-type: none"> <li>(A) has a claim or interest based on a security of record; and</li> <li>(B) was not the security’s holder of record on the date specified in the solicitation of the acceptance or rejection.</li> </ul> <p>(2) <b>Defective Solicitations.</b> A holder of a claim or interest who accepted or rejected a plan before the petition was filed will not be considered to have accepted or rejected the plan if the court finds, after notice and a hearing, that:</p> <ul style="list-style-type: none"> <li>(A) the plan was not sent to substantially all creditors and equity security holders of the same class;</li> <li>(B) an unreasonably short time was prescribed for those creditors and equity security holders to accept or reject the plan; or</li> <li>(C) the solicitation did not comply with § 1126(b).</li> </ul>
<p>(c) <b>FORM OF ACCEPTANCE OR REJECTION.</b> An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security</p>	<p>(c) <b>Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.</b></p> <ul style="list-style-type: none"> <li>(1) <b>Form.</b> An acceptance or rejection of a plan must: <ul style="list-style-type: none"> <li>(A) be in writing;</li> <li>(B) identify the plan or plans;</li> <li>(C) be signed by the creditor or equity security holder—or an authorized agent; and</li> </ul> </li> </ul>

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<p>holder may indicate a preference or preferences among the plans so accepted.</p>	<p>(D) conform to Form 314.</p> <p>(2) <i>When More Than One Plan Is Distributed.</i> If more than one plan is transmitted under Rule 3017, a creditor or equity security holder may accept or reject one or more plans and may indicate preferences among the plans accepted.</p>
<p>(d) ACCEPTANCE OR REJECTION BY PARTIALLY SECURED CREDITOR. A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.</p>	<p><b>(d) Partially Secured Creditor.</b> If a creditor’s claim has been allowed in part as a secured claim and in part as an unsecured claim, the creditor may accept or reject a plan in both capacities.</p>

**Committee Note**

The language of Rule 3018 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 3019. Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3019. Chapter 9 or 11—Modifying a Plan</b></p>
<p>(a) MODIFICATION OF PLAN BEFORE CONFIRMATION. In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.</p>	<p>(a) <b>Modifying a Plan Before Confirmation.</b> In a Chapter 9 or 11 case, after a plan has been accepted and before confirmation, the plan proponent may file a modification. The modification is considered accepted by any creditor or equity security holder who has accepted it in writing. For others who have not accepted it in writing but have accepted the plan, the modification is considered accepted if, after notice and a hearing, the court finds that it does not adversely change the treatment of their claims or interests. The notice must be served on:</p> <ul style="list-style-type: none"> <li>• the trustee;</li> <li>• any appointed committee; and</li> <li>• any other entity the court designates.</li> </ul>
<p>(b) MODIFICATION OF PLAN AFTER CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days’ notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification</p>	<p>(b) <b>Modifying a Plan After Confirmation in an Individual Debtor’s Chapter 11 Case.</b></p> <p>(1) <i>In General.</i> When a plan in an individual debtor’s Chapter 11 case has been confirmed, a request to modify it under § 1127(e) is governed by Rule 9014. The request must identify the proponent, and the proposed modification must be filed with it.</p> <p>(2) <i>Time to File an Objection; Service.</i></p> <p>(A) <i>Time.</i> Unless the court orders otherwise for creditors who are not affected by the proposed modification, the clerk—or the court’s designee—must give the debtor, trustee, and creditors at least 21 days’ notice, by mail, of:</p> <ul style="list-style-type: none"> <li>(i) the time to file an objection; and</li> </ul>

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<p>shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee.</p>	<p>(ii) if an objection is filed, the date of a hearing to consider the proposed modification.</p> <p>(B) <i>Service.</i> Any objection must be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the entity proposing the modification;</li> <li>• the trustee; and</li> <li>• any other entity the court designates.</li> </ul> <p>A copy of the notice, modification, and objection must also be sent to the United States trustee.</p>

**Committee Note**

The language of Rule 3019 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.



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<p><b>Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or Chapter 11 Reorganization Case</b></p>	<p><b>Rule 3020. In a Chapter 11 Case, Depositing Funds Before the Plan is Confirmed; Confirmation in a Chapter 9 or 11 Case</b></p>
<p>(a) DEPOSIT. In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.</p>	<p>(a) <b>Chapter 11—Depositing Funds Before the Plan is Confirmed.</b> Before a plan is confirmed in a Chapter 11 case, the court may order that the funds required to be distributed upon confirmation be deposited with the trustee or debtor in possession. The funds must be kept in a special account and used only to make the distribution.</p>
<p>(b) OBJECTION TO AND HEARING ON CONFIRMATION IN A CHAPTER 9 OR CHAPTER 11 CASE.</p> <p>(1) <i>Objection.</i> An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for filing objections. An objection to confirmation is governed by Rule 9014.</p> <p>(2) <i>Hearing.</i> The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.</p>	<p>(b) <b>Chapter 9 or 11—Objecting to Confirmation; Confirmation Hearing.</b></p> <p>(1) <b><i>Objecting to Confirmation.</i></b> In a Chapter 9 or 11 case, an objection to confirmation is governed by Rule 9014. The objection must be filed and served within the time set by the court and be served on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• the plan proponent;</li> <li>• any appointed committee; and</li> <li>• any other entity the court designates.</li> </ul> <p>(2) <b><i>Copy to the United States Trustee.</i></b> In a Chapter 11 case, the objecting party must send a copy of the objection to the United States trustee within the time set to file an objection.</p> <p>(3) <b><i>Hearing on the Objection; Procedure If No Objection Is Filed.</i></b> After notice and a hearing as provided in Rule 2002, the court must rule on confirmation. If no objection is timely filed, the court may, without receiving</p>

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	<p>evidence, determine that the plan was proposed in good faith and not by any means forbidden by law.</p>
<p>(c) ORDER OF CONFIRMATION.</p> <p>(1) The order of confirmation shall conform to the appropriate Official Form. If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.</p> <p>(2) Notice of entry of the order of confirmation shall be mailed promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.</p> <p>(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).</p>	<p>(c) <b>Confirmation Order.</b></p> <p>(1) <b><i>Form of the Order; Injunctive Relief.</i></b> A confirmation order must conform to Form 315. If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order must:</p> <p>(A) describe the acts enjoined in reasonable detail;</p> <p>(B) be specific in its terms regarding the injunction; and</p> <p>(C) identify the entities subject to the injunction.</p> <p>(2) <b><i>Notice of Confirmation.</i></b> Notice of entry of a confirmation order must be promptly mailed to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the trustee;</li> <li>• creditors;</li> <li>• equity security holders;</li> <li>• other parties in interest; and</li> <li>• if known, identified entities subject to an injunction described in (1).</li> </ul> <p>(3) <b><i>Copy to the United States Trustee.</i></b> In a Chapter 11 case, a copy of the order must be sent to the United States trustee under Rule 2002(k).</p>
<p>(d) RETAINED POWER. Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.</p>	<p>(d) <b>Retained Power to Issue Future Orders Relating to Administration.</b> After a plan is confirmed, the court may continue to issue orders needed to administer the estate.</p>

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(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.	<b>(e) Staying a Confirmation Order.</b> Unless the court orders otherwise, a confirmation order is stayed for 14 days after its entry.

**Committee Note**

The language of Rule 3020 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 3021. Distribution Under Plan</b>	<b>Rule 3021. Distributing Funds Under a Plan</b>
<p>Except as provided in Rule 3020(e), after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims under Rule 3003(c)(5) that have been allowed. For purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.</p>	<p><b>(a) In General.</b> After confirmation and when any stay under Rule 3020(e) expires, payments under the plan must be distributed to:</p> <ul style="list-style-type: none"> <li>• creditors whose claims have been allowed;</li> <li>• interest holders whose interests have not been disallowed; and</li> <li>• indenture trustees whose claims under Rule 3003(c)(5) have been allowed.</li> </ul> <p><b>(b) Definition of “Creditors” and “Interest Holders.”</b> In this Rule 3021:</p> <p>(1) “creditors” includes record holders of bonds, debentures, notes, and other debt securities as of the initial distribution date, unless the plan or confirmation order states a different date; and</p> <p>(2) “interest holders” includes record holders of stock and other equity securities as of the initial distribution date, unless the plan or confirmation order states a different date.</p>

**Committee Note**

The language of Rule 3021 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<b>Rule 3022. Final Decree in Chapter 11 Reorganization Case</b>	<b>Rule 3022. Chapter 11—Final Decree</b>
After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.	After the estate is fully administered in a Chapter 11 case, the court must, on its own or on a party in interest’s motion, enter a final decree closing the case.

**Committee Note**

The language of Rule 3022 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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# **Bankruptcy Rules Restyling**

## **4000 Series**

### **Preface**

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART IV—THE DEBTOR: DUTIES AND BENEFITS	<b>PART IV. THE DEBTOR’S DUTIES AND BENEFITS</b>
<b>Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements</b>	<b>Rule 4001. Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Using Cash Collateral; Obtaining Credit; Various Agreements</b>
<p>(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.</p> <p>(1) <i>Motion.</i> A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.</p> <p>(2) <i>Ex Parte Relief.</i> Relief from a stay under § 362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) may be granted without prior notice only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the</p>	<p>(a) <b>Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.</b></p> <p>(1) <b><i>Motion.</i></b> A motion under § 362(d) for relief from the automatic stay—or a motion under § 363(e) to prohibit or condition the use, sale, or lease of property—must comply with Rule 9014. The motion must be served on:</p> <p>(A) the following, as applicable:</p> <ul style="list-style-type: none"> <li>(i) a committee elected under § 705 or appointed under § 1102;</li> <li>(ii) the committee’s authorized agent; or</li> <li>(iii) the creditors included on the list filed under Rule 1007(d) if the case is a Chapter 9 or Chapter 11 case and no committee of unsecured creditors has been appointed under § 1102; and</li> </ul> <p>(B) any other entity the court designates.</p> <p>(2) <b><i>Relief Without Notice.</i></b> Relief from a stay under § 362(a)—or a request under § 363(e) to prohibit or condition the use, sale, or lease of property—may be granted without prior notice only if:</p> <p>(A) specific facts—shown by either an affidavit or a verified motion—</p>

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<p>reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) or § 363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay or reconsideration of the order prohibiting or conditioning the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.</p> <p>(3) <i>Stay of Order.</i> An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.</p>	<p>clearly demonstrate that the movant will suffer immediate and irreparable injury, loss, or damage before the adverse party or its attorney can be heard in opposition; and</p> <p>(B) the movant’s attorney certifies to the court in writing what efforts, if any, have been made to give notice and why it should not be required.</p> <p>(3) <b><i>Notice of Relief; Motion for Reinstatement or Reconsideration.</i></b></p> <p>(A) <i>Notice of Relief.</i> A party who obtains relief under (2) and under § 362(f) or § 363(e) must:</p> <p>(i) immediately give oral notice both to the debtor and to the trustee or the debtor-in-possession; and</p> <p>(ii) promptly send them a copy of the order granting relief.</p> <p>(B) <i>Motion for Reinstatement or Reconsideration.</i> On 2 days’ notice to the party who obtained relief under (2)—or on shorter notice as the court may order—the adverse party may move to reinstate the stay or reconsider the order prohibiting or conditioning the use, sale, or lease of property. The court must proceed expeditiously to hear and decide the motion.</p> <p>(4) <b><i>Stay of an Order Granting Relief from the Automatic Stay.</i></b> Unless the court orders otherwise, an order granting a motion for relief from the automatic stay under (1) is stayed for 14 days after it is entered.</p>



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<p>(b) USE OF CASH COLLATERAL.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:</p> <p>(i) the name of each entity with an interest in the cash collateral;</p> <p>(ii) the purposes for the use of the cash collateral;</p> <p>(iii) the material terms, including duration, of the use of the cash collateral; and</p> <p>(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity’s interest is adequately protected.</p> <p>(C) <i>Service.</i> The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the</p>	<p><b>(b) Using Cash Collateral.</b></p> <p><b>(1) <i>Motion; Contents; Service.</i></b></p> <p>(A) <i>Motion.</i> A motion for authorization to use cash collateral must comply with Rule 9014 and must be accompanied by a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion must include a concise statement of the relief requested, no longer than five pages. If the motion exceeds five pages, it must begin with the statement. The statement must list or summarize all material provisions (citing their locations in the relevant documents), including:</p> <p>(i) the name of each entity with an interest in the cash collateral;</p> <p>(ii) how it will be used;</p> <p>(iii) the material terms of its use, including duration; and</p> <p>(iv) all liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no such protection is proposed, an explanation of how each entity’s interest is adequately protected.</p> <p>(C) <i>Service.</i> The motion must be served on:</p> <p>(i) each entity with an interest in the cash collateral;</p> <p>(ii) all those who must be served under (a)(1)(A); and</p> <p>(iii) any other entity the court designates.</p>

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<p>creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.</p> <p>(2) <i>Hearing.</i> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(3) <i>Notice.</i> Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.</p>	<p><b>(2) <i>Hearings; Notice.</i></b></p> <p>(A) <i>Preliminary and Final Hearings.</i> The court may begin a final hearing on the motion no earlier than 14 days after it has been served. If the motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize using only the cash collateral necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(B) <i>Notice.</i> Notice of a hearing must be given to the parties who must be served with the motion under (1)(C) and to any other entity the court designates.</p>
<p>(c) OBTAINING CREDIT.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order</p>	<p><b>(c) Obtaining Credit.</b></p> <p><b>(1) <i>Motion; Contents; Service.</i></b></p> <p>(A) <i>Motion.</i> A motion for authorization to obtain credit must comply with Rule 9014 and must be accompanied by a copy of the credit agreement and a proposed form of order.</p> <p>(B) <i>Contents.</i> The motion must include a concise statement of the relief requested, no longer than five pages. If the motion exceeds five pages, it must begin with the statement. The statement must list or summarize all material provisions of the credit agreement and form of order (citing their locations in the relevant documents), including interest rates, maturity dates, default provisions, liens, and borrowing</p>

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<p>includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:</p> <p style="padding-left: 40px;">(i) a grant of priority or a lien on property of the estate under § 364(c) or (d);</p> <p style="padding-left: 40px;">(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim;</p> <p style="padding-left: 40px;">(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;</p> <p style="padding-left: 40px;">(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;</p> <p style="padding-left: 40px;">(v) a waiver or modification of any entity’s authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364;</p>	<p>limits and conditions. If the credit agreement or form of order includes any of the provisions listed below in (i)-(xi), the concise statement must also list or summarize each one, describe its nature and extent, cite its location in the proposed agreement and form of order, and identify any that would remain effective if interim approval were to be granted but final relief denied under (2). The provisions are:</p> <p>(i) a grant of priority or a lien on property of the estate under § 364(c) or (d);</p> <p>(ii) the providing of adequate protection or priority for a claim that arose before the case commenced—including a lien on property of the estate, or the use of property of the estate or of credit obtained under § 364 to make cash payments on the claim;</p> <p>(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the case commenced, or of any lien securing the claim;</p> <p>(iv) a waiver or modification of Code provisions or applicable rules regarding the automatic stay;</p> <p>(v) a waiver or modification of an entity’s right to file a plan, seek to extend the time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or</p>

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<p>(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;</p> <p>(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;</p> <p>(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;</p> <p>(ix) the indemnification of any entity;</p> <p>(x) a release, waiver, or limitation of any right under § 506(c); or</p> <p>(xi) the granting of a lien on any claim or cause of action arising under §§ 544,<sup>1</sup> 545, 547, 548, 549, 553(b), 723(a), or 724(a).</p> <p>(C) <i>Service.</i> The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity that the court directs.</p> <p>(2) <i>Hearing.</i> The court</p>	<p>request authorization to obtain credit under § 364;</p> <p>(vi) the establishment of deadlines for filing a plan of reorganization, approving a disclosure statement, holding a hearing on confirmation, or entering a confirmation order;</p> <p>(vii) a waiver or modification of the applicability of nonbankruptcy law regarding perfecting or enforcing a lien on property of the estate;</p> <p>(viii) a release, waiver, or limitation on a claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;</p> <p>(ix) the indemnification of any entity;</p> <p>(x) a release, waiver, or limitation of any right under § 506(c); or</p> <p>(xi) the granting of a lien on a claim or cause of action arising under § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).</p> <p>(C) <i>Service.</i> The motion must be served on all those who must be served under (a)(1)(A) and any other entity the court designates.</p> <p><b>(2) <i>Hearings; Notice.</i></b></p> <p>(A) <i>Preliminary and Final Hearings.</i> The court may begin a final hearing on the motion no earlier than 14 days after it has been served. If the</p>

<sup>1</sup> So in original. Probably should be only one section symbol.

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<p>may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(3) <i>Notice.</i> Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.</p> <p>(4) <i>Inapplicability in a Chapter 13 Case.</i> This subdivision (c) does not apply in a chapter 13 case.</p>	<p>motion so requests, the court may conduct a preliminary hearing before that 14-day period ends. After a preliminary hearing, the court may authorize obtaining credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.</p> <p>(B) <i>Notice.</i> Notice of a hearing must be given to the parties who must be served with the motion under (1)(C) and to any other entity the court designates.</p> <p>(3) <b><i>Inapplicability in a Chapter 13 Case.</i></b> This subdivision (c) does not apply in a chapter 13 case.</p>
<p>(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.</p> <p>(1) <i>Motion; Service.</i></p> <p>(A) <i>Motion.</i> A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:</p> <p>(i) an agreement to provide adequate protection;</p> <p>(ii) an agreement to prohibit or condition the use, sale, or lease of property;</p> <p>(iii) an agreement to modify or terminate the stay provided</p>	<p>(d) <b>Various Agreements: Relief from the Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Providing Adequate Protection; Using Cash Collateral; or Obtaining Credit.</b></p> <p>(1) <b><i>Motion; Contents; Service.</i></b></p> <p>(A) <i>Motion.</i> A motion to approve any of the following must be accompanied by a copy of the agreement and a proposed form of order:</p> <p>(i) an agreement to provide adequate protection;</p> <p>(ii) an agreement to prohibit or condition the use, sale, or lease of property;</p> <p>(iii) an agreement to modify or terminate the stay provided for in § 362;</p>

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<p>for in § 362;</p> <p style="padding-left: 40px;">(iv) an agreement to use cash collateral; or</p> <p style="padding-left: 40px;">(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity’s lien or interest in such property.</p> <p style="padding-left: 40px;">(B) <i>Contents.</i> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.</p> <p style="padding-left: 40px;">(C) <i>Service.</i> The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.</p> <p style="padding-left: 40px;">(2) <i>Objection.</i> Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of</p>	<p style="padding-left: 20px;">(iv) an agreement to use cash collateral; or</p> <p style="padding-left: 20px;">(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate under which the entity consents to creating a lien that is senior or equal to the entity’s lien or interest in the property.</p> <p style="padding-left: 20px;">(B) <i>Contents.</i> The motion must include a concise statement of the relief requested, no longer than five pages. If the motion exceeds five pages, it must begin with the statement. The statement must:</p> <p style="padding-left: 40px;">(i) list or summarize all the agreement’s material provisions (citing their locations in the relevant documents); and</p> <p style="padding-left: 40px;">(ii) briefly list or summarize, cite the location of, and describe the nature and extent of each provision in the proposed form of order, agreement, or other document of the type listed in (c)(1)(B).</p> <p style="padding-left: 20px;">(C) <i>Service.</i> The motion must be served on all those who must be served under (a)(1)(A) and any other entity the court designates.</p> <p style="padding-left: 20px;">(2) <i>Objection.</i> Notice of the motion must be mailed to the parties on whom service of the motion is required and any other entity the court designates. The notice must include the time within which objections may be filed and served on the debtor-in-possession or trustee. Unless the court sets a different time, any objections must be</p>

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<p>this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.</p> <p>(3) <i>Disposition; Hearing.</i> If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days’ notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.</p> <p>(4) <i>Agreement in Settlement of Motion.</i> The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.</p>	<p>filed within 14 days after the notice is mailed.</p> <p>(3) <i>Disposition Without a Hearing.</i> If no objection is filed, the court may enter an order approving or disapproving the agreement without holding a hearing.</p> <p>(4) <i>Hearing.</i> If an objection is filed or if the court decides that a hearing is appropriate, the court must hold one after giving at least 7 days’ notice to:</p> <ul style="list-style-type: none"> <li>• the objector;</li> <li>• the movant;</li> <li>• the parties who must be served with the motion under (1)(C); and</li> <li>• any other entity the court designates.</li> </ul> <p>(5) <i>Agreement to Settle a Motion.</i> The court may decide that a motion made under (a), (b), or (c) was sufficient to give reasonable notice of the agreement’s material provisions and an opportunity for a hearing. If so, the court may order that the procedures prescribed in (1)–(4) do not apply and may approve the agreement without further notice.</p>

**Committee Note**

The language of Rule 4001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 4002. Duties of Debtor</b></p>	<p><b>Rule 4002. Debtor’s Duties</b></p>
<p>(a) IN GENERAL. In addition to performing other duties prescribed by the Code and rules, the debtor shall:</p> <p style="padding-left: 40px;">(1) attend and submit to an examination at the times ordered by the court;</p> <p style="padding-left: 40px;">(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;</p> <p style="padding-left: 40px;">(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor’s withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;</p> <p style="padding-left: 40px;">(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and</p> <p style="padding-left: 40px;">(5) file a statement of any change of the debtor’s address.</p>	<p>(a) <b>In General.</b> In addition to performing other duties that are required by the Code or these rules, the debtor must:</p> <p style="padding-left: 40px;">(1) attend and submit to an examination when the court orders;</p> <p style="padding-left: 40px;">(2) attend a hearing on a complaint objecting to discharge and, if called, testify as a witness;</p> <p style="padding-left: 40px;">(3) if a schedule of property has not yet been filed under Rule 1007, report to the trustee immediately in writing:</p> <p style="padding-left: 80px;">(A) the location of any real property in which the debtor has an interest; and</p> <p style="padding-left: 80px;">(B) the name and address of every person holding money or property subject to the debtor’s withdrawal or order;</p> <p style="padding-left: 40px;">(4) cooperate with the trustee in preparing an inventory, examining proofs of claim, and administering the estate; and</p> <p style="padding-left: 40px;">(5) file a statement of any change in the debtor’s address.</p>
<p>(b) INDIVIDUAL DEBTOR’S DUTY TO PROVIDE DOCUMENTATION.</p> <p style="padding-left: 40px;">(1) <i>Personal Identification.</i> Every individual debtor shall bring to the meeting of creditors under § 341:</p> <p style="padding-left: 80px;">(A) a picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor’s identity; and</p> <p style="padding-left: 80px;">(B) evidence of social security number(s), or a written statement that such documentation does not exist.</p>	<p>(b) <b>Individual Debtor’s Duty to Provide Documents.</b></p> <p style="padding-left: 40px;">(1) <b><i>Personal Identifying Information.</i></b> An individual debtor must bring to the § 341 meeting of creditors:</p> <p style="padding-left: 80px;">(A) a government-issued identification containing the debtor’s picture, or other personal identifying information that establishes the debtor’s identity; and</p> <p style="padding-left: 80px;">(B) evidence of any social-security number, or a written statement that no such evidence exists.</p>



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<p>(2) <i>Financial Information.</i> Every individual debtor shall bring to the meeting of creditors under § 341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor’s possession:</p> <p>(A) evidence of current income such as the most recent payment advice;</p> <p>(B) unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor’s depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and</p> <p>(C) documentation of monthly expenses claimed by the debtor if required by § 707(b)(2)(A) or (B).</p> <p>(3) <i>Tax Return.</i> At least 7 days before the first date set for the meeting of creditors under § 341, the debtor shall provide to the trustee a copy of the debtor’s federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.</p> <p>(4) <i>Tax Returns Provided to Creditors.</i> If a creditor, at least 14 days before the first date set for the meeting of creditors under § 341, requests a copy of the debtor’s tax return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the</p>	<p>(2) <i>Financial Documents.</i> An individual debtor must bring the following documents (or copies) to the § 341 meeting of creditors and make them available to the trustee—or provide a written statement that they do not exist or are not in the debtor’s possession:</p> <p>(A) evidence of current income, such as the most recent payment advice;</p> <p>(B) unless the trustee or the United States trustee instructs otherwise, a statement for each depository or investment account—including a checking, savings, or money-market account, mutual fund or brokerage account—for the period that includes the petition’s filing date; and</p> <p>(C) if required by § 707(b)(2)(A) or (B), documents showing claimed monthly expenses.</p> <p>(3) <i>Tax Return to Be Provided to the Trustee.</i> At least 7 days before the first date set for the § 341 meeting of creditors, the debtor must provide the trustee with:</p> <p>(A) a copy of the debtor’s federal income-tax return, including any attachments to it, for the most recent tax year ending before the case was commenced and for which the debtor filed a return;</p> <p>(B) a transcript of the return; or</p> <p>(C) a written statement that the documentation does not exist.</p> <p>(4) <i>Tax Return to Be Provided to a Creditor.</i> Upon a creditor’s request at least 14 days before the first date set for the § 341 meeting of creditors, the debtor must provide the creditor with the tax information specified in (3).</p>

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<p>meeting of creditors under § 341, shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.</p> <p style="padding-left: 40px;">(5) <i>Confidentiality of Tax Information.</i> The debtor’s obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts.</p>	<p>The debtor must do so at least 7 days before the meeting.</p> <p>(5) <b><i>Safeguarding Confidential Tax Information.</i></b> The debtor’s obligation to provide tax returns under (3) and (4) is subject to procedures established by the Director of the Administrative Office of the United States Courts for safeguarding confidential tax information.</p>

**Committee Note**

The language of Rule 4002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 4003. Exemptions</b>	<b>Rule 4003. Exemptions</b>
<p>(a) CLAIM OF EXEMPTIONS. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.</p>	<p>(a) <b>Claiming an Exemption.</b> A debtor must list the property claimed as exempt under § 522 on Form 106C filed under Rule 1007. If the debtor fails to do so within the time specified in Rule 1007(c), a debtor’s dependent may file the list within 30 days after the debtor’s time to file expires.</p>
<p>(b) OBJECTING TO A CLAIM OF EXEMPTIONS.</p> <p>(1) Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.</p> <p>(2) The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall deliver or mail the objection to the debtor and the debtor’s attorney, and to any person filing the list of exempt property and that person’s attorney.</p> <p>(3) An objection to a claim of exemption based on § 522(q) shall be filed before the closing of the case. If an exemption is first claimed after a case is reopened, an objection shall be filed before the reopened case is closed.</p> <p>(4) A copy of any objection shall</p>	<p>(b) <b>Objecting to a Claimed Exemption.</b></p> <p>(1) <b>By a Party in Interest.</b> Except as (2) and (3) provide, a party in interest may file an objection to a claimed exemption within 30 days after the later of:</p> <ul style="list-style-type: none"> <li>• the conclusion of the § 341 meeting of creditors;</li> <li>• the filing of an amendment to the list; or</li> <li>• the filing of a supplemental schedule.</li> </ul> <p>On a party in interest’s motion filed before the time to object expires, the court may, for cause, extend the time to file an objection.</p> <p>(2) <b>By the Trustee for a Fraudulently Claimed Exemption.</b> If the debtor has fraudulently claimed an exemption, the trustee may file an objection within one year after the case is closed. The trustee must deliver or mail the objection to:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• the debtor’s attorney;</li> <li>• the person who filed the list of exempt property; and</li> <li>• that person’s attorney.</li> </ul>

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<p>be delivered or mailed to the trustee, the debtor and the debtor’s attorney, and the person filing the list and that person’s attorney.</p>	<p>(3) <b>Objection Based on § 522(q).</b> An objection based on § 522(q) must be filed:</p> <p>(A) before the case is closed; or</p> <p>(B) if an exemption is first claimed after a case has been reopened, before the reopened case is closed.</p> <p>(4) <b>Distributing Copies of the Objection.</b> A copy of any objection, other than one filed by the trustee under (b)(2), must be delivered or mailed to:</p> <ul style="list-style-type: none"> <li>• the trustee;</li> <li>• the debtor;</li> <li>• the debtor’s attorney;</li> <li>• the person who filed the list of exempt property; and</li> <li>• that person’s attorney.</li> </ul>
<p>(c) BURDEN OF PROOF. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.</p>	<p>(c) <b>Burden of Proof.</b> In a hearing under this Rule 4003, the objecting party has the burden of proving that an exemption was not properly claimed. After notice and a hearing, the court must determine the issues presented.</p>
<p>(d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT PROPERTY. A proceeding under § 522(f) to avoid a lien or other transfer of property exempt under the Code shall be commenced by motion in the manner provided by Rule 9014, or by serving a chapter 12 or chapter 13 plan on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint. Notwithstanding the provisions of subdivision (b), a creditor may object to</p>	<p>(d) <b>Avoiding a Lien or Other Transfer of Exempt Property.</b> A proceeding under § 522(f) to avoid a lien or other transfer of exempt property must be commenced by motion under Rule 9014, or by serving a Chapter 12 or 13 plan on the affected creditors as Rule 7004 provides for serving a summons and complaint. As an exception to (b), a creditor may object to a request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.</p>

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a request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.	

**Committee Note**

The language of Rule 4003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 4004. Grant or Denial of Discharge</b></p>	<p><b>Rule 4004. Granting or Denying a Discharge</b></p>
<p>(a) TIME FOR OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor’s discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 case, the complaint shall be filed no later than the first date set for the hearing on confirmation. In a chapter 13 case, a motion objecting to the debtor’s discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days’ notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee’s attorney.</p>	<p>(a) <b>Time to Object to a Discharge; Notice.</b></p> <ol style="list-style-type: none"> <li>(1) <b>Chapter 7.</b> In a Chapter 7 case, a complaint—or a motion under § 727(a)(8) or (9)—objecting to a discharge must be filed within 60 days after the first date set for the § 341(a) meeting of creditors.</li> <li>(2) <b>Chapter 11.</b> In a Chapter 11 case, a complaint objecting to a discharge must be filed on or before the first date set for the hearing on confirmation.</li> <li>(3) <b>Chapter 13.</b> In a Chapter 13 case, a motion objecting to a discharge under § 1328(f) must be filed within 60 days after the first date set for the § 341(a) meeting of creditors.</li> <li>(4) <b>Notice to the United States Trustee, the Creditors, and the Trustee.</b> At least 28 days’ notice of the time so fixed must be given to: <ul style="list-style-type: none"> <li>• the United States trustee under Rule 2002(k);</li> <li>• all creditors under Rule 2002(f);</li> <li>• the trustee; and</li> <li>• the trustee’s attorney.</li> </ul> </li> </ol>
<p>(b) EXTENSION OF TIME.</p> <ol style="list-style-type: none"> <li>(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.</li> <li>(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and</li> </ol>	<p>(b) <b>Extending the Time to File an Objection.</b></p> <ol style="list-style-type: none"> <li>(1) <b>Motion Before the Time Expires.</b> On a party in interest’s motion and after notice and a hearing, the court may, for cause, extend the time to object to a discharge. The motion must be filed before the time has expired.</li> <li>(2) <b>Motion After the Time Has Expired.</b> After the time to object has</li> </ol>

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<p>before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.</p>	<p>expired and before a discharge is granted, a party in interest may file a motion to extend the time to object if:</p> <p>(A) the objection is based on facts that, if learned after the discharge is granted, would provide a basis for revocation under § 727(d), and the movant did not know those facts in time to object; and</p> <p>(B) the movant files the motion promptly after learning those facts.</p>
<p>(c) GRANT OF DISCHARGE.</p> <p>(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:</p> <p>(A) the debtor is not an individual;</p> <p>(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor’s favor;</p> <p>(C) the debtor has filed a waiver under § 727(a)(10);</p> <p>(D) a motion to dismiss the case under § 707 is pending;</p> <p>(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;</p> <p>(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;</p> <p>(G) the debtor has not paid in full the filing fee prescribed by</p>	<p>(c) <b>Granting a Discharge.</b></p> <p>(1) <b>Chapter 7.</b> In a Chapter 7 case, when the times to object to discharge and to file a motion to dismiss the case under Rule 1017(e) expire, the court must promptly grant the discharge—except under these circumstances:</p> <p>(A) the debtor is not an individual;</p> <p>(B) a complaint, or a motion under § 727(a)(8) or (9), objecting to the discharge is pending;</p> <p>(C) the debtor has filed a waiver under § 727(a)(10);</p> <p>(D) a motion is pending to dismiss the case under § 707;</p> <p>(E) a motion is pending to extend the time to file a complaint objecting to the discharge;</p> <p>(F) a motion is pending to extend the time to file a motion to dismiss the case under Rule 1017(e)(1);</p> <p>(G) the debtor has not fully paid the filing fee required by 28 U.S.C. § 1930(a), together with any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is</p>

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<p>28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);</p> <p>(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);</p> <p>(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;</p> <p>(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;</p> <p>(K) a presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or</p> <p>(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under §521(f).</p> <p>(2) Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.</p> <p>(3) If the debtor is required to file a statement under Rule 1007(b)(8), the court shall not grant a discharge earlier than 30 days after the statement is filed.</p>	<p>payable to the clerk upon commencing a case—unless the court has waived the fees under 28 U.S.C. § 1930(f);</p> <p>(H) the debtor has not filed a statement showing that a course on personal financial management has been completed—if such a statement is required by Rule 1007(b)(7);</p> <p>(I) a motion is pending to delay or postpone a discharge under § 727(a)(12);</p> <p>(J) a motion is pending to extend the time to file a reaffirmation agreement under Rule 4008(a);</p> <p>(K) the court has not concluded a hearing on a presumption—in effect under § 524(m)—that a reaffirmation agreement is an undue hardship; or</p> <p>(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).</p> <p>(2) <b><i>Delay in Entering a Discharge in General.</i></b> On the debtor’s motion, the court may delay entering a discharge for 30 days and, on a motion made within that time, delay entry to a date certain.</p> <p>(3) <b><i>Delaying Entry Because of Rule 1007(b)(8).</i></b> If the debtor is required to file a statement under Rule 1007(b)(8), the court must not grant a discharge until at least 30 days after the statement is filed.</p> <p>(4) <b><i>Individual Chapter 11 or Chapter 13 Case.</i></b> In a Chapter 11 case in which the debtor is an individual—or in a Chapter 13 case—the court must not</p>



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(4) In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7).	grant a discharge if the debtor has not filed a statement required by Rule 1007(b)(7).
(d) APPLICABILITY OF RULES IN PART VII AND RULE 9014. An objection to discharge is governed by Part VII of these rules, except that an objection to discharge under §§ 727(a)(8), <sup>1</sup> (a)(9), or 1328(f) is commenced by motion and governed by Rule 9014.	<b>(d) Applying Part VII Rules and Rule 9014.</b> The Part VII rules govern an objection to a discharge, except that Rule 9014 governs an objection to a discharge under § 727(a)(8) or (9) or § 1328(f).
(e) ORDER OF DISCHARGE. An order of discharge shall conform to the appropriate Official Form.	<b>(e) Form of a Discharge Order.</b> A discharge order must conform to the appropriate Official Form.
(f) REGISTRATION IN OTHER DISTRICTS. An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.	<b>(f) Registering a Discharge in Another District.</b> A discharge order that becomes final may be registered in another district by filing a certified copy with the clerk of the court for that district. When registered, the order has the same effect as an order of the court where it is registered.
(g) NOTICE OF DISCHARGE. The clerk shall promptly mail a copy of the final order of discharge to those specified in subdivision (a) of this rule.	<b>(g) Notice of a Final Discharge Order.</b> The clerk must promptly mail a copy of the final discharge order to those entities listed in (a)(4).

### Committee Note

The language of Rule 4004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<sup>1</sup> So in original. Probably should be only one section symbol.

ORIGINAL	REVISION
<b>Rule 4005. Burden of Proof in Objecting to Discharge</b>	<b>Rule 4005. Burden of Proof in Objecting to a Discharge</b>
At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection.	At a trial on a complaint objecting to a discharge, the plaintiff has the burden of proof.

**Committee Note**

The language of Rule 4005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<b>Rule 4006. Notice of No Discharge</b>	<b>Rule 4006. Notice When No Discharge Is Granted</b>
<p>If an order is entered: denying a discharge; revoking a discharge; approving a waiver of discharge; or, in the case of an individual debtor, closing the case without the entry of a discharge, the clerk shall promptly notify all parties in interest in the manner provided by Rule 2002.</p>	<p>The clerk must promptly notify in the manner provided by Rule 2002(f) all parties in interest of an order:</p> <ul style="list-style-type: none"> <li>(a) denying a discharge;</li> <li>(b) revoking a discharge;</li> <li>(c) approving a waiver of discharge; or</li> <li>(d) closing an individual debtor’s case without entering a discharge.</li> </ul>

**Committee Note**

The language of Rule 4006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 4007. Determination of Dischargeability of a Debt</b></p>	<p><b>Rule 4007. Determining Whether a Debt Is Dischargeable</b></p>
<p>(a) PERSONS ENTITLED TO FILE COMPLAINT. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.</p>	<p>(a) <b>Who May File a Complaint.</b> A debtor or any creditor may file a complaint to determine whether a debt is dischargeable.</p>
<p>(b) TIME FOR COMMENCING PROCEEDING OTHER THAN UNDER § 523(c) OF THE CODE. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.</p>	<p>(b) <b>Time to File.</b> A complaint, except one under § 523(c), may be filed at any time. If a case is reopened to permit filing the complaint, no fee for reopening is required.</p>
<p>(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, CHAPTER 12 FAMILY FARMER’S DEBT ADJUSTMENT CASE, OR CHAPTER 13 INDIVIDUAL’S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED. Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days’ notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.</p>	<p>(c) <b>Chapter 7, 11, 12, or 13—Time to File a Complaint Under § 523(c); Notice of Time; Extension.</b> Except as (d) provides, a complaint to determine whether a debt is dischargeable under § 523(c) must be filed within 60 days after the first date set for the § 341(a) meeting of creditors. The clerk must give all creditors at least 30 days’ notice of the time to file in the manner provided by Rule 2002. On a party in interest’s motion filed before the time expires, the court may, after notice and a hearing and for cause, extend the time to file.</p>
<p>(d) TIME FOR FILING COMPLAINT UNDER § 523(a)(6) IN A CHAPTER 13 INDIVIDUAL’S DEBT ADJUSTMENT CASE; NOTICE OF</p>	<p>(d) <b>Chapter 13—Time to File a Complaint Under § 523(a)(6); Notice of Time; Extension.</b> When a debtor files a motion for a discharge under § 1328(b), the court</p>

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<p>TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.</p>	<p>must set the time to file a complaint under § 523(a)(6) to determine whether a debt is dischargeable. The clerk must give all creditors at least 30 days' notice of the time to file in the manner provided by Rule 2002. On a party in interest's motion filed before the time expires, the court may, after notice and a hearing and for cause, extend the time to file.</p>
<p>(e) APPLICABILITY OF RULES IN PART VII. A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.</p>	<p><b>(e) Applying Part VII Rules.</b> The Part VII rules govern a proceeding on a complaint filed under this Rule 4007.</p>

**Committee Note**

The language of Rule 4007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p><b>Rule 4008. Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement</b></p>	<p><b>Rule 4008. Reaffirmation Agreement and Supporting Statement</b></p>
<p>(a) FILING OF REAFFIRMATION AGREEMENT. A reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a) of the Code. The reaffirmation agreement shall be accompanied by a cover sheet, prepared as prescribed by the appropriate Official Form. The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.</p>	<p>(a) <b>Time to File; Cover Sheet.</b> A reaffirmation agreement must be filed within 60 days after the first date set for the § 341(a) meeting of creditors. The agreement must have a cover sheet prepared as prescribed by Form 427. At any time, the court may extend the time to file the agreement.</p>
<p>(b) STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT. The debtor’s statement required under § 524(k)(6)(A) of the Code shall be accompanied by a statement of the total income and expenses stated on schedules I and J. If there is a difference between the total income and expenses stated on those schedules and the statement required under § 524(k)(6)(A), the statement required by this subdivision shall include an explanation of the difference.</p>	<p>(b) <b>Supporting Statement.</b> The debtor’s supporting statement required by § 524(k)(6)(A) must be accompanied by a statement of the total income and expenses as shown on Schedules I and J. If the income and expenses shown on the supporting statement differ from those shown on the schedules, the supporting statement must explain the difference.</p>

**Committee Note**

The language of Rule 4008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

# **Bankruptcy Rules Restyling**

## **5000 Series**

### **Preface**

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART V—Courts and Clerks	<b>PART V. COURTS AND CLERKS</b>
<b>Rule 5001. Courts and Clerks’ Offices</b>	<b>Rule 5001. Courts and Clerks’ Offices</b>
(a) COURTS ALWAYS OPEN. The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.	<b>(a) Courts Always Open.</b> Bankruptcy courts are considered always open for filing a pleading, motion, or other paper; issuing and returning process; making rules; or entering an order.
(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. Except as otherwise provided in 28 U.S.C. § 152(c), all other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.	<b>(b) Location for Trials and Hearings; Proceedings in Chambers.</b> Every trial or hearing must be held in open court—in a regular courtroom if convenient. Except as provided in 28 U.S.C. § 152(c), any other act may be performed—or a proceeding held—in chambers anywhere within or outside the district. But unless it is ex parte, a hearing may be held outside the district only if all affected parties consent.
(c) CLERK’S OFFICE. The clerk’s office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and the legal holidays listed in Rule 9006(a).	<b>(c) Clerk’s Office Hours.</b> A clerk’s office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and the legal holidays listed in Rule 9006(a)(6).

#### Committee Note

The language of Rule 5001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.



ORIGINAL	REVISION
<p><b>Rule 5002. Restrictions on Approval of Appointments</b></p>	<p><b>Rule 5002. Restrictions on Approving Court Appointments</b></p>
<p>(a) APPROVAL OF APPOINTMENT OF RELATIVES PROHIBITED. The appointment of an individual as a trustee or examiner pursuant to § 1104 of the Code shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the appointment or the United States trustee in the region in which the case is pending. The employment of an individual as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the employment. The employment of an individual as attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 may be approved by the court if the individual is a relative of the United States trustee in the region in which the case is pending, unless the court finds that the relationship with the United States trustee renders the employment improper under the circumstances of the case. Whenever under this subdivision an individual may not be approved for appointment or employment, the individual’s firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof also may not be approved for appointment or employment.</p>	<p>(a) <b>Appointing or Employing Relatives.</b></p> <p>(1) <b><i>Trustee or Examiner.</i></b> A bankruptcy judge must not approve appointing an individual as a trustee or examiner under § 1104 if the individual is a relative of either the judge or the United States trustee in the region in which the case is pending.</p> <p>(2) <b><i>Attorney, Accountant, Appraiser, Auctioneer, or Other Professional Person.</i></b> A bankruptcy judge must not approve employing under § 327, § 1103, or § 1114 an individual as an attorney, accountant, appraiser, auctioneer, or other professional person who is a relative of the judge. The court may approve employing a relative of the United States trustee in the region in which the case is pending unless, under the circumstances in the case, the relationship makes the employment improper.</p> <p>(3) <b><i>Related Entities and Associates.</i></b> If an appointment under (1) or an employment under (2) is forbidden, so is appointing or employing:</p> <p>(A) the individual’s firm, partnership, corporation, or any other form of business association or relationship; or</p> <p>(B) a member, associate, or professional employee of an entity listed in (A).</p>
<p>(b) JUDICIAL DETERMINATION THAT APPROVAL OF APPOINTMENT OR EMPLOYMENT IS IMPROPER. A bankruptcy judge may not approve the</p>	<p>(b) <b>Other Considerations in Approving Appointments or Employment.</b> A bankruptcy judge must not approve appointing a person as a trustee or examiner under (a)(1), or employing a</p>

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appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.	person under (a)(2), if the person is, or has been, so connected with the judge or the United States trustee as to make the appointment or employment improper.

**Committee Note**

The language of Rule 5002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 5003. Records Kept By the Clerk</b></p>	<p><b>Rule 5003. Records to Be Kept by the Clerk</b></p>
<p>(a) BANKRUPTCY DOCKETS. The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.</p>	<p>(a) <b>Bankruptcy Docket.</b> The clerk must keep a docket in each case and must:</p> <ol style="list-style-type: none"> <li>(1) enter on the docket each judgment, order, and activity, as prescribed by the Director of the Administrative Office of the United States Courts; and</li> <li>(2) show the date of entry for each judgment or order.</li> </ol>
<p>(b) CLAIMS REGISTER. The clerk shall keep in a claims register a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors.</p>	<p>(b) <b>Claims Register.</b> When it appears that there will be a distribution to unsecured creditors, the clerk must keep in a claims register a list of the claims filed in the case.</p>
<p>(c) JUDGMENTS AND ORDERS. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a correct copy of every final judgment or order affecting title to or lien on real property or for the recovery of money or property, and any other order which the court may direct to be kept. On request of the prevailing party, a correct copy of every judgment or order affecting title to or lien upon real or personal property or for the recovery of money or property shall be kept and indexed with the civil judgments of the district court.</p>	<p>(c) <b>Judgments and Orders.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>In General.</i></b> In the form and manner prescribed by the Director of the Administrative Office of the United States Courts, the clerk must keep a copy of:             <ol style="list-style-type: none"> <li>(A) every final judgment or order affecting title to, or a lien on, real property;</li> <li>(B) every final judgment or order for the recovery of money or property; and</li> <li>(C) any other order the court designates.</li> </ol> </li> <li>(2) <b><i>Indexing with the District Court.</i></b> On a prevailing party’s request, a copy of the following must be kept and indexed with the district court’s civil judgments:             <ol style="list-style-type: none"> <li>(A) every final judgment or order affecting title to, or a lien on, real or personal property; and</li> </ol> </li> </ol>

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	(B) every final judgment or order for the recovery of money or property.
<p>(d) INDEX OF CASES; CERTIFICATE OF SEARCH. The clerk shall keep indices of all cases and adversary proceedings as prescribed by the Director of the Administrative Office of the United States Courts. On request, the clerk shall make a search of any index and papers in the clerk’s custody and certify whether a case or proceeding has been filed in or transferred to the court or if a discharge has been entered in its records.</p>	<p><b>(d) Index of Cases; Certificate of Search.</b></p> <p>(1) <i>Index of Cases.</i> The clerk must keep an index of cases and adversary proceedings in the form and manner prescribed by the Director of the Administrative Office of the United States Courts.</p> <p>(2) <i>Searching the Index; Certificate of Search.</i> On request, the clerk must search the index and papers in the clerk’s custody and certify whether a case or proceeding has been filed in or transferred to the court—and if so, whether a discharge has been entered.</p>
<p>(e) REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS AND CERTAIN TAXING AUTHORITIES. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local governmental unit responsible for collecting taxes within the district in which the case is pending may also file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes the mailing addresses designated under the first sentence of this subdivision, and a</p>	<p><b>(e) Register of Mailing Addresses of Federal and State Governmental Units and Certain Taxing Authorities.</b></p> <p>(1) <i>In General.</i> The United States—or a state or a territory where the court is located—may file a statement designating its mailing address. A taxing authority (including a local taxing authority) may also file a statement designating an address for serving requests under § 505(b). The designation must describe where to find further information about additional requirements for serving a request.</p> <p>(2) <i>Register of Mailing Address.</i></p> <p>(A) <i>In General.</i> In the form and manner prescribed by the Director of the Administrative Office of the United States Courts, the clerk must keep a register of the mailing addresses</p>

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<p>separate register of the addresses designated for the service of requests under § 505(b) of the Code. The clerk is not required to include in any single register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.</p>	<p>of the governmental units listed in the first sentence of (1) and a separate register containing the addresses of taxing authorities for serving requests under § 505(b).</p> <p>(B) <i>Number of Entries.</i> The clerk need not include in any register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. But if more than one mailing address is included, the clerk must also include information that would enable a user to determine when each address is applicable. Mailing to only one applicable address provides effective notice.</p> <p>(C) <i>Keeping the Register Current.</i> The clerk must update the register annually, as of January 2 of each year.</p> <p>(D) <i>Mailing Address Presumed to Be Proper.</i> A mailing address in the register is conclusively presumed to be proper. But a failure to use that address does not invalidate notice that is otherwise effective under applicable law.</p>
<p>(f) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall keep any other books and records required by the Director of the Administrative Office of the United States Courts.</p>	<p><b>(f) Other Books and Records.</b> The clerk must keep any other books and records required by the Director of the Administrative Office of the United States Courts.</p>

**Committee Note**

The language of Rule 5003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<b>Rule 5004. Disqualification</b>	<b>Rule 5004. Disqualifying a Bankruptcy Judge</b>
(a) DISQUALIFICATION OF JUDGE. A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.	<b>(a) From Presiding Over a Proceeding, Contested Matter, or Case.</b> A bankruptcy judge’s disqualification is governed by 28 U.S.C. § 455. The judge is disqualified from presiding over a proceeding or contested matter in which a disqualifying circumstance arises—and, when appropriate, from presiding over the entire case.
(b) DISQUALIFICATION OF JUDGE FROM ALLOWING COMPENSATION. A bankruptcy judge shall be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.	<b>(b) From Allowing Compensation.</b> The bankruptcy judge is disqualified from allowing compensation to a relative or to a person who is so connected with the judge as to make the judge’s allowing it improper.

#### Committee Note

The language of Rule 5004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<p><b>Rule 5005. Filing and Transmittal of Papers</b></p>	<p><b>Rule 5005. Filing Papers and Sending Copies to the United States Trustee</b></p>
<p>(a) FILING.</p> <p>(1) <i>Place of Filing.</i> The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.</p> <p>(2) <i>Electronic Filing and Signing.</i></p> <p>(A) <i>By a Represented Entity—Generally Required; Exceptions.</i> An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.</p> <p>(B) <i>By an Unrepresented Individual—When Allowed or Required.</i> An individual not represented by an attorney:</p> <p>(i) may file electronically only if allowed by court order or by local rule; and</p> <p>(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.</p>	<p>(a) <b>Filing Papers.</b></p> <p>(1) <b><i>With the Clerk.</i></b> Except as provided in 28 U.S.C. § 1409, the following papers required to be filed by these rules must be filed with the clerk in the district where the case is pending:</p> <ul style="list-style-type: none"> <li>• lists;</li> <li>• schedules;</li> <li>• statements;</li> <li>• proofs of claim or interest;</li> <li>• complaints;</li> <li>• motions;</li> <li>• applications;</li> <li>• objections; and</li> <li>• other papers.</li> </ul> <p>The clerk must not refuse to accept for filing any petition or other paper solely because it is not in the form required by these rules or any local rule or practice.</p> <p>(2) <b><i>With a Judge of the Court.</i></b> A judge may personally accept for filing a paper listed in (1). The judge must note on the paper the date of filing and promptly send it to the clerk.</p> <p>(3) <b><i>Electronic Filing and Signing.</i></b></p> <p>(A) <i>By a Represented Entity—Generally Required; Exceptions.</i> An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.</p> <p>(B) <i>By an Unrepresented Individual—</i></p>

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<p>(C) <i>Signing</i>. A filing made through a person’s electronic filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.</p> <p>(D) <i>Same as a Written Paper</i>. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.</p>	<p><i>When Allowed or Required</i>. An individual not represented by an attorney:</p> <ul style="list-style-type: none"> <li>(i) may file electronically only if allowed by court order or by local rule; and</li> <li>(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.</li> </ul> <p>(C) <i>Signing</i>. A filing made through a person’s electronic filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.</p> <p>(D) <i>Same as a Written Paper</i>. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.</p>
<p>(b) TRANSMITTAL TO THE UNITED STATES TRUSTEE.</p> <p>(1) The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.</p> <p>(2) The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee.</p> <p>(3) Nothing in these rules shall</p>	<p><b>(b) Sending Copies to the United States Trustee.</b> All papers required to be sent to the United States trustee must be mailed or delivered to the office of the United States trustee or other place within the district that the United States trustee designates. An entity, other than the clerk, that sends a paper to the United States trustee must promptly file a verified statement identifying the paper and stating the date it was sent. The clerk need not send a copy of a paper to a United States trustee who requests in writing that it not be sent.</p>



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<p>require the clerk to transmit any paper to the United States trustee if the United States trustee requests in writing that the paper not be transmitted.</p>	
<p>(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.</p>	<p>(c) <b>When a Paper Is Erroneously Filed or Delivered.</b></p> <p>(1) <b><i>Paper Intended for the Clerk.</i></b> If a paper intended to be filed with the clerk is erroneously delivered to a person listed below, that person must note on it the date of receipt and promptly send it to the clerk:</p> <ul style="list-style-type: none"> <li>• the United States trustee;</li> <li>• the trustee;</li> <li>• the trustee’s attorney;</li> <li>• a bankruptcy judge;</li> <li>• a district judge;</li> <li>• the clerk of the bankruptcy appellate panel; or</li> <li>• the clerk of the district court.</li> </ul> <p>(2) <b><i>Paper Intended for the United States Trustee.</i></b> If a paper intended for the United States trustee is erroneously delivered to the clerk or to another person listed in (1), the clerk or that person must note on it the date of receipt and promptly send it to the United States trustee.</p> <p>(3) <b><i>Applicable Filing Date.</i></b> In the interests of justice, the court may order that the original date of receipt shown on a paper erroneously delivered under (1) or (2) be deemed the date it was filed with the clerk or sent to the United States trustee.</p>

**Committee Note**

The language of Rule 5005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<b>Rule 5006. Certification of Copies of Papers</b>	<b>Rule 5006. Providing Certified Copies</b>
The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any paper filed with the clerk on payment of any prescribed fee.	Upon payment of the prescribed fee, the clerk must issue a certified copy of the record of any proceeding or any paper filed with the clerk.

#### Committee Note

The language of Rule 5006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<b>Rule 5007. Record of Proceedings and Transcripts</b>	<b>Rule 5007. Record of Proceedings and Transcripts</b>
<p>(a) FILING OF RECORD OR TRANSCRIPT. The reporter or operator of a recording device shall certify the original notes of testimony, tape recording, or other original record of the proceeding and promptly file them with the clerk. The person preparing any transcript shall promptly file a certified copy.</p>	<p>(a) <b>Filing Original Notes, Tape Recordings, and Other Original Records of a Proceeding; Transcripts.</b></p> <p>(1) <b>Records.</b> The reporter or operator of a recording device must certify the original notes of testimony, tape recordings, and other original records of a proceeding and must promptly file them with the clerk.</p> <p>(2) <b>Transcripts.</b> A person who prepares a transcript must promptly file a certified copy with the clerk.</p>
<p>(b) TRANSCRIPT FEES. The fees for copies of transcripts shall be charged at rates prescribed by the Judicial Conference of the United States. No fee may be charged for the certified copy filed with the clerk.</p>	<p>(b) <b>Fee for a Transcript.</b> The fee for a copy of a transcript must be charged at the rate prescribed by the Judicial Conference of the United States. No fee may be charged for filing the certified copy.</p>
<p>(c) ADMISSIBILITY OF RECORD IN EVIDENCE. A certified sound recording or a transcript of a proceeding shall be admissible as prima facie evidence to establish the record.</p>	<p>(c) <b>Sound Recording or Transcript as Prima Facie Evidence.</b> In any proceeding, a certified sound recording or a transcript of a proceeding is admissible as prima facie evidence of the record.</p>

**Committee Note**

The language of Rule 5007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p><b>Rule 5008. Notice Regarding Presumption of Abuse in Chapter 7 Cases of Individual Debtors</b></p>	<p><b>Rule 5008. Chapter 7—Notice That a Presumption of Abuse Has Arisen Under § 707(b)</b></p>
<p>If a presumption of abuse has arisen under § 707(b) in a chapter 7 case of an individual with primarily consumer debts, the clerk shall within 10 days after the date of the filing of the petition notify creditors of the presumption of abuse in accordance with Rule 2002. If the debtor has not filed a statement indicating whether a presumption of abuse has arisen, the clerk shall within 10 days after the date of the filing of the petition notify creditors that the debtor has not filed the statement and that further notice will be given if a later filed statement indicates that a presumption of abuse has arisen. If a debtor later files a statement indicating that a presumption of abuse has arisen, the clerk shall notify creditors of the presumption of abuse as promptly as practicable.</p>	<p>(a) <b>Notice to Creditors.</b> When a presumption of abuse under § 707(b) arises in a Chapter 7 case of an individual with primarily consumer debts, the clerk must, within 10 days after the petition is filed, so notify the creditors in accordance with Rule 2002(f)(1)(J).</p> <p>(b) <b>Debtor’s Statement.</b> If the debtor does not file a statement indicating whether a presumption has arisen, the clerk must, within 10 days after the petition is filed, so notify creditors and indicate that further notice will be given if a later-filed statement shows that the presumption has arisen. If the debtor later files such a statement , the clerk must promptly notify the creditors.</p>

#### Committee Note

The language of Rule 5008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<p><b>Rule 5009. Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied</b></p>	<p><b>Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied</b></p>
<p>(a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.</p>	<p>(a) <b>Closing a Chapter 7, 12, or 13 Case.</b> The estate in a Chapter 7, 12, or 13 case is presumed to have been fully administered when:</p> <ol style="list-style-type: none"> <li>(1) the trustee has filed a final report and final account and has certified that the estate has been fully administered; and</li> <li>(2) within 30 days after the filing, no objection to the report has been filed by the United States trustee or a party in interest.</li> </ol>
<p>(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to file a statement under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).</p>	<p>(b) <b>Chapter 7 or 13—Notice of a Failure to File a Statement About Completing a Course on Personal Financial Management.</b> This rule (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a statement under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a). The clerk must promptly notify the debtor that the case will be closed without entering a discharge unless the statement is filed within the time prescribed by Rule 1007(c).</p>
<p>(c) CASES UNDER CHAPTER 15. A foreign representative in a proceeding recognized under § 1517 of the Code shall file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the court. The foreign representative shall transmit the report to the United States trustee, and give notice of its filing to the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in</p>	<p>(c) <b>Closing a Chapter 15 Case.</b></p> <ol style="list-style-type: none"> <li>(1) <b><i>Foreign Representative's Final Report.</i></b> In a proceeding recognized under § 1517, when the purpose of a foreign representative's appearance is completed, the representative must file a final report describing the nature and results of the representative's activities in the court.</li> <li>(2) <b><i>Giving Notice of the Report.</i></b> The representative must send a copy of the report to the United States trustee, give notice of its filing, and file a certificate</li> </ol>

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<p>the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct. The foreign representative shall file a certificate with the court that notice has been given. If no objection has been filed by the United States trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered.</p>	<p>with the court indicating that the notice has been given, to:</p> <ul style="list-style-type: none"> <li>(A) the debtor;</li> <li>(B) all persons or bodies authorized to administer the debtor’s foreign proceedings;</li> <li>(C) all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and</li> <li>(D) any other entity the court designates.</li> </ul> <p><b>(3) <i>Presumption of Full Administration.</i></b> If the United States trustee or a party in interest does not file an objection within 30 days after the certificate is filed, the case is presumed to have been fully administered.</p>
<p>(d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter 13 case, if a claim that was secured by property of the estate is subject to a lien under applicable nonbankruptcy law, the debtor may request entry of an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan. The request shall be made by motion and shall be served on the holder of the claim and any other entity the court designates in the manner provided by Rule 7004 for service of a summons and complaint.</p>	<p><b>(d) Order Declaring a Lien Satisfied.</b> This rule (d) applies in a Chapter 12 or 13 case when a claim secured by property of the estate is subject to a lien under applicable nonbankruptcy law. The debtor may move for an order declaring that the secured claim has been satisfied and the lien has been released under the terms of the confirmed plan. The motion must be served—in the manner provided by Rule 7004 for serving a summons and complaint—on the claim holder and any other entity the court designates.</p>

**Committee Note**

The language of Rule 5009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<b>Rule 5010. Reopening Cases</b>	<b>Rule 5010. Reopening a Case</b>
A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.	On the debtor's or another party in interest's motion, the court may, under § 350(b), reopen a case. In a reopened Chapter 7, 12, or 13 case, the United States trustee must not appoint a trustee unless the court determines that one is needed to protect the interests of the creditors and the debtor, or to ensure that the reopened case is efficiently administered.

#### Committee Note

The language of Rule 5010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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ORIGINAL	REVISION
<b>Rule 5011. Withdrawal and Abstention from Hearing a Proceeding</b>	<b>Rule 5011. Motion to Withdraw a Case or Proceeding or to Abstain from Hearing a Proceeding; Staying a Proceeding</b>
(a) WITHDRAWAL. A motion for withdrawal of a case or proceeding shall be heard by a district judge.	<b>(a) Withdrawing a Case or Proceeding.</b> A motion to withdraw a case or proceeding under 28 U.S.C. § 157(d) must be heard by a district judge.
(b) ABSTENTION FROM HEARING A PROCEEDING. A motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding.	<b>(b) Abstaining from Hearing a Proceeding.</b> A motion requesting the court to abstain from hearing a proceeding under 28 U.S.C. § 1334(c) is governed by Rule 9014. The motion must be served on all parties to the proceeding.
(c) EFFECT OF FILING OF MOTION FOR WITHDRAWAL OR ABSTENTION. The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper.	<p><b>(c) Staying a Proceeding After a Motion to Withdraw or Abstain.</b> A motion filed under (a) or (b) does not stay proceedings in a case or affect its administration. But a bankruptcy judge may, on proper terms and conditions, stay a proceeding until the motion is decided.</p> <p><b>(d) Motion to Stay a Proceeding.</b> A motion to stay a proceeding must ordinarily be submitted first to the bankruptcy judge. If it—or a motion for relief from a stay—is filed in the district court, the motion must state why it has not been first presented to or obtained from the bankruptcy judge. The district judge may grant relief on terms and conditions the judge considers proper.</p>

#### Committee Note

The language of Rule 5011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

ORIGINAL	REVISION
<b>Rule 5012. Agreements Concerning Coordination of Proceedings in Chapter 15 Cases</b>	<b>Rule 5012. Chapter 15—Agreement to Coordinate Proceedings</b>
<p>Approval of an agreement under § 1527(4) of the Code shall be sought by motion. The movant shall attach to the motion a copy of the proposed agreement or protocol and, unless the court directs otherwise, give at least 30 days' notice of any hearing on the motion by transmitting the motion to the United States trustee, and serving it on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct.</p>	<p>An agreement to coordinate proceedings under § 1527(4) may be approved on motion with an attached copy of the agreement or protocol. Unless the court orders otherwise, the movant must give at least 30 days' notice of any hearing on the motion by sending a copy to the United States trustee and serving it on:</p> <ul style="list-style-type: none"> <li>• the debtor;</li> <li>• all persons or bodies authorized to administer the debtor's foreign proceedings;</li> <li>• all entities against whom provisional relief is sought under § 1519;</li> <li>• all parties to litigation pending in the United States in which the debtor was a party when the petition was filed; and</li> <li>• any other entity the court designates.</li> </ul>

#### Committee Note

The language of Rule 5012 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

# **Bankruptcy Rules Restyling**

## **6000 Series**

### **Preface**

This revision is a restyling of the Federal Rules of Bankruptcy Procedure to provide greater clarity, consistency, and conciseness without changing practice and procedure.

ORIGINAL	REVISION
PART VI—COLLECTION AND LIQUIDATION OF THE ESTATE	<b>PART VI. COLLECTING AND LIQUIDATING PROPERTY OF THE ESTATE</b>
<b>Rule 6001. Burden of Proof As to Validity of Postpetition Transfer</b>	<b>Rule 6001. Burden of Proving the Validity of a Postpetition Transfer</b>
Any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof.	An entity that asserts the validity of a postpetition transfer under § 549 has the burden of proof.

**Committee Note**

The language of Rule 6001 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6002. Accounting by Prior Custodian of Property of the Estate</b></p>	<p><b>Rule 6002. Custodian’s Report to the United States Trustee</b></p>
<p>(a) ACCOUNTING REQUIRED. Any custodian required by the Code to deliver property in the custodian’s possession or control to the trustee shall promptly file and transmit to the United States trustee a report and account with respect to the property of the estate and the administration thereof.</p>	<p><b>(a) Custodian’s Report and Account.</b> A custodian required by § 543 to deliver property to the trustee must promptly file and send to the United States trustee a report and account about the property of the estate and its administration.</p>
<p>(b) EXAMINATION OF ADMINISTRATION. On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, the court shall determine the propriety of the administration, including the reasonableness of all disbursements.</p>	<p><b>(b) Examining the Administration.</b> After the custodian’s report and account has been filed and the superseded administration has been examined, the court must, after notice and a hearing, determine whether the custodian’s administration has been proper and disbursements have been reasonable.</p>

**Committee Note**

The language of Rule 6002 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case— Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts</b></p>	<p><b>Rule 6003. Delay in Granting Certain Applications and Motions Made Immediately After the Petition Is Filed</b></p>
<p>Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following:</p> <ul style="list-style-type: none"> <li>(a) an application under Rule 2014;</li> <li>(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; or</li> <li>(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.</li> </ul>	<p><b>(a) In General.</b> Unless relief is needed to avoid immediate and irreparable harm, the court must not, within 21 days after the petition is filed, grant an application or motion to:</p> <ul style="list-style-type: none"> <li>(1) employ a professional person under Rule 2014;</li> <li>(2) use, sell, or lease property of the estate, including a motion to pay all or a part of a claim that arose before the petition was filed;</li> <li>(3) incur any other obligation regarding the property of the estate; or</li> <li>(4) assume or assign an executory contract or unexpired lease under § 365.</li> </ul> <p><b>(b) Exception.</b> This rule does not apply to a motion under Rule 4001.</p>

**Committee Note**

The language of Rule 6003 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6004. Use, Sale, or Lease of Property</b></p>	<p><b>Rule 6004. Use, Sale, or Lease of Property</b></p>
<p>(a) NOTICE OF PROPOSED USE, SALE, OR LEASE OF PROPERTY. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code.</p>	<p>(a) <b>Notice.</b></p> <p>(1) <i>In General.</i> Notice of a proposed use, sale, or lease of property that is not in the ordinary course of business must be given:</p> <p>(A) under Rule 2002(a)(2), (c)(1), (i), and (k); and</p> <p>(B) in accordance with § 363(b)(2), if applicable.</p> <p>(2) <i>Exceptions.</i> Notice under (a) is not required if (d) applies or the proposal involves cash collateral only.</p>
<p>(b) OBJECTION TO PROPOSAL. Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.</p>	<p>(b) <b>Objection.</b> Except as provided in (c) and (d), an objection to a proposed use, sale, or lease of property must be filed and served at least 7 days before the date set for the proposed action or within the time set by the court. Rule 9014 governs the objection.</p>
<p>(c) SALE FREE AND CLEAR OF LIENS AND OTHER INTERESTS. A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.</p>	<p>(c) <b>Motion to Sell Property Free and Clear of Liens and Other Interests; Objection.</b> A motion for authority to sell property free and clear of liens or other interests must be made in accordance with Rule 9014 and served on the parties who have the liens or other interests. The notice required by (a) must include:</p> <p>(1) the date of the hearing on the motion; and</p> <p>(2) the time to file and serve an objection on the debtor in possession or trustee.</p>
<p>(d) SALE OF PROPERTY UNDER \$2,500. Notwithstanding subdivision (a) of this rule, when all of the nonexempt</p>	<p>(d) <b>Notice of an Intent to Sell Property Valued at Less Than \$2500; Objection.</b> If all the nonexempt property of the estate</p>

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<p>property of the estate has an aggregate gross value less than \$2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 14 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.</p>	<p>—in the aggregate—has a gross value less than \$2500, a notice of an intent to sell the property that is not in the ordinary course of business must be served on:</p> <ul style="list-style-type: none"> <li>• creditors;</li> <li>• indenture trustees;</li> <li>• any committees elected under § 705 or appointed under § 1102;</li> <li>• the United States trustee; and</li> <li>• other persons as the court orders.</li> </ul> <p>A party in interest may file and serve an objection within 14 days after the notice is mailed or within the time set by the court. Rule 9014 governs the objection.</p>
<p>(e) HEARING. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.</p>	<p><b>(e) Notice of a Hearing on an Objection.</b> The date of a hearing on an objection under (b) or (d) may be set in the notice under (a).</p>
<p>(f) CONDUCT OF SALE NOT IN THE ORDINARY COURSE OF BUSINESS.</p> <p>(1) <i>Public or Private Sale.</i> All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, transmit a copy thereof to the United States trustee, and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy</p>	<p><b>(f) Conducting a Sale That Is Not in the Ordinary Course of Business.</b></p> <p><b>(1) <i>Public Auction or Private Sale.</i></b></p> <p>(A) <i>Itemized Statement Required.</i> A sale that is not in the ordinary course of business may be made by public auction or private sale. Unless it is impracticable, when the sale is completed, an itemized statement must be filed that shows:</p> <ul style="list-style-type: none"> <li>• the property sold;</li> <li>• the name of each purchaser; and</li> <li>• the amount paid for each item or lot, or if sold in bulk, for the entire property.</li> </ul> <p>(B) <i>If by Auction.</i> If the property is sold by auction, the auctioneer must file</p>



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<p>thereof to the United States trustee.</p> <p>(2) <i>Execution of Instruments.</i> After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.</p>	<p>the itemized statement and send a copy to the United States trustee and to either the trustee, debtor in possession, or Chapter 13 debtor.</p> <p>(C) <i>If by Private Sale.</i> If the property is not sold by auction, the trustee, debtor in possession, or Chapter 13 debtor must file the itemized statement and send a copy to the United States trustee.</p> <p>(2) <i>Signing the Sale Documents.</i> When a sale is complete, the debtor, trustee, or debtor in possession must sign any document that is necessary or court-ordered to transfer the property to the purchaser.</p>
<p>(g) SALE OF PERSONALLY IDENTIFIABLE INFORMATION.</p> <p>(1) <i>Motion.</i> A motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) shall include a request for an order directing the United States trustee to appoint a consumer privacy ombudsman under § 332. Rule 9014 governs the motion which shall be served on: any committee elected under § 705 or appointed under § 1102 of the Code, or if the case is a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list of creditors filed under Rule 1007(d); and on such other entities as the court may direct. The motion shall be transmitted to the United States trustee.</p> <p>(2) <i>Appointment.</i> If a consumer privacy ombudsman is appointed under § 332, no later than seven days before the hearing on the motion under § 363(b)(1)(B), the United States trustee shall file a notice of the appointment,</p>	<p>(g) <b>Selling Personally Identifiable Information.</b></p> <p>(1) <i>Request for a Consumer-Privacy Ombudsman.</i> A motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) must include a request for an order directing the United States trustee to appoint a consumer-privacy ombudsman under § 332. Rule 9014 governs the motion. It must be sent to the United States trustee and served on:</p> <ul style="list-style-type: none"> <li>• any committee elected under § 705 or appointed under § 1102;</li> <li>• in a Chapter 11 case in which no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and</li> <li>• other entities as the court orders.</li> </ul> <p>(2) <i>Notice That an Ombudsman Has Been Appointed.</i> If a consumer-privacy ombudsman is appointed, the United States trustee must give notice of the appointment at least 7 days</p>

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<p>including the name and address of the person appointed. The United States trustee’s notice shall be accompanied by a verified statement of the person appointed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.</p>	<p>before the hearing on any motion under § 363(b)(1)(B). The notice must give the name and address of the person appointed and include the person’s verified statement that sets forth any connection with:</p> <ul style="list-style-type: none"> <li>• the debtor, creditors, or any other party in interest;</li> <li>• their respective attorneys and accountants;</li> <li>• the United States trustee; and</li> <li>• any person employed in the United States trustee’s office.</li> </ul>
<p>(h) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.</p>	<p><b>(h) Staying an Order Authorizing the Use, Sale, or Lease of Property.</b> Unless the court orders otherwise, an order authorizing the use, sale, or lease of property (other than cash collateral) is stayed for 14 days after the order is entered.</p>

**Committee Note**

The language of Rule 6004 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 6005. Appraisers and Auctioneers</b>	<b>Rule 6005. Employing an Appraiser or Auctioneer</b>
The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.	A court order approving the employment of an appraiser or auctioneer must set the amount or rate of compensation. An officer or employee of the United States judiciary or United States Department of Justice is not eligible to act as an appraiser or auctioneer. No residence or licensing requirement disqualifies a person from being employed.

**Committee Note**

The language of Rule 6005 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease</b></p>	<p><b>Rule 6006. Assuming, Rejecting, or Assigning an Executory Contract or Unexpired Lease</b></p>
<p>(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.</p>	<p>(a) <b>Procedure in General.</b> A proceeding to assume, reject, or assign an executory contract or unexpired lease—other than as part of a plan—is governed by Rule 9014.</p>
<p>(b) PROCEEDING TO REQUIRE TRUSTEE TO ACT. A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer’s debt adjustment case, or chapter 13 individual’s debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.</p>	<p>(b) <b>Requiring a Trustee, Debtor in Possession, or Debtor to Assume or Reject a Contract or Lease.</b> In a Chapter 9, 11, 12, or 13 case, Rule 9014 governs a proceeding by a party to an executory contract or unexpired lease to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease.</p>
<p>(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.</p>	<p>(c) <b>Notice of a Motion.</b> Notice of a motion under (a) or (b) must be given to:</p> <ul style="list-style-type: none"> <li>• the other party to the contract or lease;</li> <li>• other parties in interest as the court orders; and</li> <li>• except in a Chapter 9 case, the United States trustee.</li> </ul>
<p>(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.</p>	<p>(d) <b>Staying an Order Authorizing an Assignment.</b> Unless the court orders otherwise, an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed for 14 days after the order is entered.</p>

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<p>(e) LIMITATIONS. The trustee shall not seek authority to assume or assign multiple executory contracts or unexpired leases in one motion unless:</p> <p>(1) all executory contracts or unexpired leases to be assumed or assigned are between the same parties or are to be assigned to the same assignee; (2) the trustee seeks to assume, but not assign to more than one assignee, unexpired leases of real property; or (3) the court otherwise authorizes the motion to be filed. Subject to subdivision (f), the trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one motion.</p>	<p><b>(e) Combining in One Motion a Request Involving Multiple Contracts or Leases.</b></p> <p><b>(1) <i>Limitations.</i></b> The trustee must not seek authority to assume or assign multiple executory contracts or unexpired leases in one omnibus motion unless:</p> <p>(A) they are all between the same parties or are to be assigned to the same assignee;</p> <p>(B) the trustee seeks to assume, but not assign to more than one assignee, unexpired leases of real property; or</p> <p>(C) the court allows the motion to be filed.</p> <p><b>(2) <i>Exception for Authority to Reject.</i></b> Subject to (f), a trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one omnibus motion.</p>
<p>(f) OMNIBUS MOTIONS. A motion to reject or, if permitted under subdivision (e), a motion to assume or assign multiple executory contracts or unexpired leases that are not between the same parties shall:</p> <p>(1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;</p> <p>(2) list parties alphabetically and identify the corresponding contract or lease;</p> <p>(3) specify the terms, including the curing of defaults, for each requested assumption or assignment;</p> <p>(4) specify the terms, including the identity of each assignee and the</p>	<p><b>(f) Content of an Omnibus Motion.</b> A motion to reject—or, if permitted under (e), a motion to assume or assign—multiple executory contracts or unexpired leases that are not between the same parties must:</p> <p>(1) state in a conspicuous place that the parties’ names and their contracts or leases are listed in the motion;</p> <p>(2) list the parties alphabetically and identify the corresponding contract or lease;</p> <p>(3) specify the terms, including how a default will be cured, for each requested assumption or assignment;</p> <p>(4) specify the terms, including the assignee’s identity and the adequate assurance of future performance by each assignee, for each requested assignment;</p>

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<p>adequate assurance of future performance by each assignee, for each requested assignment;</p> <p>(5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and</p> <p>(6) be limited to no more than 100 executory contracts or unexpired leases.</p>	<p>(5) be numbered consecutively with other omnibus motions to reject, assume, or assign executory contracts or unexpired leases; and</p> <p>(6) be limited to no more than 100 executory contracts or unexpired leases.</p>
<p>(g) FINALITY OF DETERMINATION. The finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion.</p>	<p><b>(g) Determining the Finality of an Order Regarding an Omnibus Motion.</b> The finality of an order regarding any executory contract or unexpired lease included in an omnibus motion must be determined as though the contract or lease were the subject of a separate motion.</p>

**Committee Note**

The language of Rule 6006 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6007. Abandonment or Disposition of Property</b></p>	<p><b>Rule 6007. Abandoning or Disposing of Property; Objections</b></p>
<p>(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.</p>	<p>(a) <b>Notice by the Trustee or Debtor in Possession.</b></p> <p>(1) <b>Notice.</b> Unless the court orders otherwise, the trustee or debtor in possession must give notice of a proposed abandonment or disposition of property to:</p> <ul style="list-style-type: none"> <li>• the United States trustee;</li> <li>• creditors;</li> <li>• indenture trustees; and</li> <li>• any committees elected under § 705 or appointed under § 1102.</li> </ul> <p>(2) <b>Objection.</b> A party in interest may file and serve an objection within 14 days after the notice is mailed or within the time set by the court. If a timely objection is filed, the court must set a hearing on notice to the United States trustee and other entities as the court orders.</p>
<p>(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other</p>	<p>(b) <b>Motion by a Party in Interest.</b></p> <p>(1) <b>Service.</b> A party in interest may file and serve a motion to require the trustee or debtor in possession to abandon property of the estate. Unless the court orders otherwise, the motion (and any notice of the motion) must be served on:</p> <ul style="list-style-type: none"> <li>• the trustee or debtor in possession;</li> <li>• the United States trustee;</li> <li>• creditors;</li> <li>• indenture trustees; and</li> <li>• any committees elected under § 705 or appointed under § 1102.</li> </ul>

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<p>entities as the court may direct. If the court grants the motion, the order effects the trustee’s or debtor in possession’s abandonment without further notice, unless otherwise directed by the court.</p>	<p>(2) <b>Objection.</b> A party in interest may file and serve an objection within 14 days after service or within the time set by the court. If a timely objection is filed, the court must set a hearing on notice to the United States trustee and other entities as the court orders.</p> <p>(3) <b>Order.</b> If the court grants the motion to abandon property, the order effects the trustee’s or debtor in possession’s abandonment without further notice—unless the court orders otherwise.</p>
<p>[(c) HEARING]</p>	

**Committee Note**

The language of Rule 6007 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6008. Redemption of Property from Lien or Sale</b></p>	<p><b>Rule 6008. Redeeming Property from a Lien or a Sale to Enforce a Lien</b></p>
<p>On motion by the debtor, trustee, or debtor in possession and after hearing on notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.</p>	<p>On motion by the debtor, trustee, or debtor in possession and after a hearing on notice as the court may order, the court may authorize property to be redeemed from a lien or from a sale to enforce a lien under applicable law.</p>

**Committee Note**

The language of Rule 6008 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 6009. Prosecution and Defense of Proceedings by Trustee or Debtor in Possession</b>	<b>Rule 6009. Prosecuting and Defending the Debtor’s Interests</b>
With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.	With or without court approval, the trustee or debtor in possession may: <ul style="list-style-type: none"> <li>(a) appear in any action or proceeding by or against the debtor and act on the debtor’s behalf; or</li> <li>(b) commence and prosecute in any tribunal an action or proceeding on the estate’s behalf.</li> </ul>

**Committee Note**

The language of Rule 6009 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<b>Rule 6010. Proceeding to Avoid Indemnifying Lien or Transfer to Surety</b>	<b>Rule 6010. Avoiding an Indemnifying Lien or a Transfer to a Surety</b>
If a lien voidable under § 547 of the Code has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the debtor, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by the rules in Part VII.	This rule applies if a lien voidable under § 547 has been dissolved by furnishing a bond or other obligation and the surety has been indemnified by the transfer or creation of a lien on the debtor’s nonexempt property. The surety must be joined as a defendant in any proceeding to avoid that transfer or lien. The proceeding is governed by the rules in Part VII.

**Committee Note**

The language of Rule 6010 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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<p><b>Rule 6011. Disposal of Patient Records in Health Care Business Case</b></p>	<p><b>Rule 6011. Claiming Patient Records Scheduled for Destruction in a Health-Care-Business Case</b></p>
<p>(a) NOTICE BY PUBLICATION UNDER § 351(1)(A). A notice regarding the claiming or disposing of patient records under § 351(1)(A) shall not identify any patient by name or other identifying information, but shall:</p> <p style="padding-left: 40px;">(1) identify with particularity the health care facility whose patient records the trustee proposes to destroy;</p> <p style="padding-left: 40px;">(2) state the name, address, telephone number, email address, and website, if any, of a person from whom information about the patient records may be obtained;</p> <p style="padding-left: 40px;">(3) state how to claim the patient records; and</p> <p style="padding-left: 40px;">(4) state the date by which patient records must be claimed, and that if they are not so claimed the records will be destroyed.</p>	<p>(a) <b>Notice by Publication About the Records.</b> A notice by publication about destroying or claiming patient records under § 351(1)(A) must not identify any patient by name or contain other identifying information. The notice must:</p> <p style="padding-left: 40px;">(1) identify with particularity the health-care facility whose patient records the trustee proposes to destroy;</p> <p style="padding-left: 40px;">(2) state the name, address, telephone number, e-mail address, and website (if any) of the person from whom information about the records may be obtained;</p> <p style="padding-left: 40px;">(3) state how to claim the records and the final date for doing so; and</p> <p style="padding-left: 40px;">(4) state that if they are not claimed by that date, they will be destroyed.</p>
<p>(b) NOTICE BY MAIL UNDER § 351(1)(B). Subject to applicable nonbankruptcy law relating to patient privacy, a notice regarding the claiming or disposing of patient records under § 351(1)(B) shall, in addition to including the information in subdivision (a), direct that a patient’s family member or other representative who receives the notice inform the patient of the notice. Any notice under this subdivision shall be mailed to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient’s health care, to the Attorney General of the State where the health care facility is located, and to any</p>	<p>(b) <b>Notice by Mail About the Records.</b></p> <p style="padding-left: 40px;">(1) <b>Required Information.</b> Subject to applicable nonbankruptcy law relating to patient privacy, a notice by mail about destroying or claiming patient records under § 351(1)(B) must:</p> <p style="padding-left: 80px;">(A) include the information described in (a); and</p> <p style="padding-left: 80px;">(B) direct a family member or other representative who receives the notice to tell the patient about it.</p> <p style="padding-left: 40px;">(2) <b>Mailing.</b> The notice must be mailed to:</p> <ul style="list-style-type: none"> <li>• the patient;</li> </ul>

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<p>insurance company known to have provided health care insurance to the patient.</p>	<ul style="list-style-type: none"> <li>• any family member or other contact person whose name and address have been given to the trustee or debtor for providing information about the patient’s health care;</li> <li>• the Attorney General of the State where the health-care facility is located; and</li> <li>• any insurance company known to have provided health-care insurance to the patient.</li> </ul>
<p>(c) PROOF OF COMPLIANCE WITH NOTICE REQUIREMENT. Unless the court orders the trustee to file proof of compliance with § 351(1)(B) under seal, the trustee shall not file, but shall maintain, the proof of compliance for a reasonable time.</p>	<p>(c) <b>Proof of Compliance with Notice Requirements.</b> Unless the court orders the trustee to file a proof of compliance with § 351(1)(B) under seal, the trustee must keep proof of compliance for a reasonable time, but not file it.</p>
<p>(d) REPORT OF DESTRUCTION OF RECORDS. The trustee shall file, no later than 30 days after the destruction of patient records under § 351(3), a report certifying that the unclaimed records have been destroyed and explaining the method used to effect the destruction. The report shall not identify any patient by name or other identifying information.</p>	<p>(d) <b>Report on the Destruction of Unclaimed Records.</b> Within 30 days after a patient’s unclaimed records have been destroyed under § 351(3), the trustee must file a report that certifies the destruction and explains the method used. The report must not identify any patient by name or by other identifying information.</p>

**Committee Note**

The language of Rule 6011 has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

1 **Rule 3002.1. Chapter 13—~~Notice Relating to Claims~~**  
2 **Secured by a Security Interest in the Debtor’s Principal**  
3 **Residence**

4 (a) IN GENERAL. This rule applies in a chapter  
5 13 case to a claims ~~(1)~~ that ~~are~~ is secured by a security  
6 interest in the debtor’s principal residence; and ~~(2)~~ for which  
7 the plan ~~provides that either~~ requires the trustee or debtor  
8 ~~will~~ to make contractual ~~installment~~ payments. Unless the  
9 court orders otherwise, the ~~notice~~ requirements of this rule  
10 cease ~~to apply~~ when an order terminating or annulling the  
11 automatic stay related to that residence becomes effective  
12 ~~with respect to the residence that secures the claim.~~

13 (b) NOTICE OF A PAYMENT CHANGES;  
14 EFFECT OF AN UNTIMELY NOTICE; HOME-EQUITY  
15 LINE OF CREDIT; OBJECTION.

---

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

Appendix B-2

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

16 (1) *Notice by the Claim Holder*. The  
17 claim holder ~~of the claim shall file and serve on the~~  
18 ~~debtor, debtor's counsel, and the trustee~~ a notice of  
19 any change in the payment amount, ~~including any~~  
20 change ~~that results~~ resulting from an interest-rate or  
21 escrow-account adjustment, ~~no later than 21 days~~  
22 ~~before a payment in the new amount is due. If the~~  
23 ~~claim arises from a home equity line of credit, this~~  
24 ~~requirement may be modified by court order. At~~  
25 least 21 days before the new payment is due, the  
26 notice must be filed and served on:

- 27 • the debtor;
- 28 • the debtor's attorney; and
- 29 • the trustee.

30 (2) *Effect of an Untimely Notice. If the*  
31 claim holder does not timely file and serve the notice  
32 required by (b)(1), the effective date of the new  
33 payment is as follows:

34 (A) when the notice concerns a  
35 payment increase, on the first payment due  
36 date that is at least 21 days after the untimely  
37 notice was filed and served, or

38 (B) when the notice concerns a  
39 payment decrease, on the date stated in the  
40 untimely notice.

41 (3) Notice of a Change in a Home-Equity  
42 Line of Credit.

43 (A) Deadline. If the claim arises  
44 from a home-equity line of credit, the notice  
45 of a payment change shall be filed and served  
46 within one year after the bankruptcy petition  
47 was filed and then at least annually.

48 (B) Contents of the Annual  
49 Notice. The annual notice shall:



4 FEDERAL RULES OF BANKRUPTCY PROCEDURE

50 (1) state the payment  
51 amount due for the month when the  
52 notice is filed; and

53 (2) include a  
54 reconciliation amount to account for  
55 any overpayment or underpayment  
56 during the prior year.

57 (C) Amount of the Next Payment.  
58 The first payment due after the effective date  
59 of the annual notice shall be increased or  
60 decreased by the reconciliation amount.

61 (D) Effective Date. The new  
62 payment amount stated in the annual notice  
63 (disregarding the reconciliation amount)  
64 shall be effective on the first payment due  
65 date that is at least 21 days after the annual  
66 notice is filed and served and shall remain

67 effective until a new notice becomes  
68 effective.

69 (E) *Payment Changes Greater*  
70 *Than \$10.* If the monthly payment increases  
71 or decreases by more than \$10 in any month,  
72 the claim holder shall file and serve (in  
73 addition to the annual notice) a notice under  
74 (b)(1) for that month.

75 ~~(24)~~ *Party in Interest's Objection.* A party  
76 in interest who objects to ~~the a~~ payment change may  
77 file a motion to determine whether the change is  
78 required to maintain payments ~~in accordance with~~  
79 under § 1322(b)(5) of the Code. ~~If~~ Unless the court  
80 orders otherwise, if no motion is filed ~~by~~ before the  
81 day the new ~~amount~~ payment is due, the change goes  
82 into effect; immediately ~~unless the court orders~~  
83 ~~otherwise.~~

84 (c) ~~NOTICE OF FEES, EXPENSES, AND~~  
85 CHARGES INCURRED AFTER THE CASE WAS FILED;  
86 NOTICE BY THE CLAIM HOLDER. The claim holder of  
87 ~~the claim shall file and serve on the debtor, debtor's counsel,~~  
88 ~~and the trustee~~ a notice itemizing all fees, expenses, ~~or~~ and  
89 charges ~~(1) that were~~ the claim holder has incurred in  
90 ~~connection with the claim~~ or imposed after the bankruptcy  
91 case was filed, ~~and (2) that the~~ claim holder asserts are  
92 recoverable against the debtor or ~~against~~ the debtor's  
93 principal residence. ~~The notice shall be served within~~  
94 Within 180 days after ~~the date on which~~ the fees, expenses,  
95 or charges are incurred or imposed, the notice shall be served  
96 on:

- 97 • the debtor;  
98 • the debtor's attorney; and  
99 • the trustee.
- 100 (d) ~~FORM AND CONTENT~~ FILING NOTICE  
101 AS A SUPPLEMENT TO A PROOF OF CLAIM. A notice  
102 ~~filed and served under subdivision (b) or (c) of this rule shall~~

103 be prepared as prescribed by the appropriate Official Form,  
104 and filed as a supplement to the holder's a proof of claim and  
105 be prepared using the appropriate Official Form. The notice  
106 is not subject to Rule 3001(f).

107 (e) ~~DETERMINATION OF~~ DETERMINING  
108 FEES, EXPENSES, OR CHARGES. On ~~motion of~~ a party  
109 in interest interest's motion filed ~~within one year after~~  
110 ~~service of a notice under subdivision (c) of this rule,~~ the court  
111 shall, after notice and a hearing, determine whether ~~payment~~  
112 ~~of~~ paying any claimed fee, expense, or charge is required by  
113 the underlying agreement and applicable nonbankruptcy law  
114 to cure a default or maintain payments ~~in accordance with~~  
115 under § 1322(b)(5) of the Code. The motion shall be filed  
116 within one year after the notice under (c) was served, unless  
117 the party has requested and the court orders a shorter period.

118 (f) ~~NOTICE OF FINAL CURE PAYMENT.~~  
119 ~~Within 30 days after the debtor completes all payments~~  
120 ~~under the plan, the trustee shall file and serve on the holder~~

121 ~~of the claim, the debtor, and debtor's counsel a notice stating~~  
122 ~~that the debtor has paid in full the amount required to cure~~  
123 ~~any default on the claim. The notice shall also inform the~~  
124 ~~holder of its obligation to file and serve a response under~~  
125 ~~subdivision (g). If the debtor contends that final cure~~  
126 ~~payment has been made and all plan payments have been~~  
127 ~~completed, and the trustee does not timely file and serve the~~  
128 ~~notice required by this subdivision, the debtor may file and~~  
129 ~~serve the notice.~~

130 (f) TRUSTEE'S MIDCASE NOTICE OF THE  
131 STATUS OF A MORTGAGE CLAIM.

132 (1) *Timing; Content and Service.*

133 Between 18 and 24 months after the bankruptcy  
134 petition was filed, the trustee shall file a notice about  
135 the status of any mortgage claim. The notice shall be  
136 prepared using the appropriate Official Form and be  
137 served on:

- 138
  - the debtor;

- 139                   • the debtor’s attorney; and
- 140                   • the claim holder.
- 141                   (2) Response; Motion to Compel a
- 142                   Response; Objection to the Response; Court
- 143                   Determination.
- 144                   (A) Deadline; Content and
- 145                   Service. The claim holder shall file a response
- 146                   to the trustee’s notice within 21 days after it is
- 147                   served. The response shall be prepared using the
- 148                   appropriate Official Form and be served on:
- 149                   • the debtor;
- 150                   • debtor’s counsel; and
- 151                   • the trustee.
- 152                   (B) Motion for an Order
- 153                   Compelling a Response. If the claim holder
- 154                   does not timely file a response, a party in
- 155                   interest may move for an order compelling one.

156 (C) Objection. A party in interest  
157 may file an objection to the claim holder's  
158 response.

159 (D) Court Determination. If a  
160 party in interest objects to the response, the  
161 court shall, after notice and a hearing, determine  
162 the status of the mortgage claim and enter an  
163 appropriate order.

164 ~~(g) — RESPONSE TO NOTICE OF FINAL CURE~~  
165 ~~PAYMENT. Within 21 days after service of the notice under~~  
166 ~~subdivision (f) of this rule, the holder shall file and serve on~~  
167 ~~the debtor, debtor's counsel, and the trustee a statement~~  
168 ~~indicating (1) whether it agrees that the debtor has paid in~~  
169 ~~full the amount required to cure the default on the claim, and~~  
170 ~~(2) whether the debtor is otherwise current on all payments~~  
171 ~~consistent with § 1322(b)(5) of the Code. The statement shall~~  
172 ~~itemize the required cure or postpetition amounts, if any, that~~  
173 ~~the holder contends remain unpaid as of the date of the~~

174 ~~statement. The statement shall be filed as a supplement to the~~  
175 ~~holder's proof of claim and is not subject to Rule 3001(f).~~

176 (g) TRUSTEE'S END-OF-CASE MOTION TO  
177 DETERMINE THE STATUS OF A MORTGAGE CLAIM.

178 (1) *Timing; Content and Service.* Within  
179 45 days after the debtor completes all payments  
180 under a chapter 13 plan, the trustee shall file a motion  
181 to determine the status of a mortgage claim,  
182 including whether any prepetition arrearage has been  
183 cured. The motion shall be prepared using the  
184 appropriate Official Form and be served on:

- 185 • the claim holder;
- 186 • the debtor; and
- 187 • debtor's counsel.

188 (2) *Response; Motion to Compel a*  
189 *Response; Objection to the Response.*

190 (A) *Deadline; Content and*  
191 *Service.* The claim holder shall file a



192 response to the motion within 28 days after  
193 service of the motion. The response shall be  
194 prepared using the appropriate Official Form  
195 and be served on:

- 196 • the debtor;
- 197 • debtor’s counsel; and
- 198 • the trustee.

199 (B) Motion for an Order  
200 Compelling a Response. If the claim holder  
201 does not timely file a response, a party in  
202 interest may move for an order compelling  
203 one.

204 (C) Objection. Within 14 days  
205 after service of a response, a party in interest  
206 may file an objection to the response.

207 ~~(h) DETERMINATION OF FINAL CURE~~  
208 ~~AND PAYMENT. On motion of the debtor or trustee filed~~  
209 ~~within 21 days after service of the statement under~~

210 ~~subdivision (g) of this rule, the court shall, after notice and~~  
211 ~~hearing, determine whether the debtor has cured the default~~  
212 ~~and paid all required postpetition amounts.~~

213 (h) ORDER DETERMINING THE STATUS  
214 OF A MORTGAGE CLAIM.

215 (1) No Response. If the claim holder fails  
216 to comply with an order under (g)(2)(B) to respond  
217 to the trustee’s motion, the court may enter an order  
218 determining that:

219 (A) as of the date of the motion,  
220 the debtor is current on all payments that the  
221 plan requires to be paid to the claim  
222 holder—including all escrow amounts; and

223 (B) all postpetition legal fees,  
224 expenses, and charges incurred or imposed  
225 by the claim holder have been satisfied in  
226 full.

227 (2) No Objection. If the claim holder  
228 timely responds and no objection is filed, the court  
229 may, by order, determine that the amounts stated in  
230 the claim holder's response reflect the status of the  
231 claim as of the date the response was filed.

232 (3) Contested Motion. If an objection is  
233 filed, the court shall, after notice and a hearing,  
234 determine the status of the mortgage claim and issue  
235 an appropriate order.

236 (4) Contents of the Order.

237 (A) Issued Under (h)(2) or (h)(3).  
238 An order issued under (h)(2) or (h)(3) shall  
239 include the following information, current as  
240 of the date of the claim holder's response or  
241 such other date that the court may determine:

242 (i) the principal balance  
243 owed;

244 (ii) the date that the  
245 debtor's next payment is due;

246 (iii) the amount of the next  
247 payment—separately identifying the  
248 amount due for principal, interest,  
249 mortgage insurance, taxes, and other  
250 escrow amounts, as applicable;

251 (iv) the amounts held in  
252 any escrow, suspense, unapplied-  
253 funds, or similar account; and

254 (v) the amount of any  
255 fees, expenses or charges properly  
256 noticed under (c) that remain unpaid.

257 (B) Issued Under (h)(1). An order  
258 issued under (h)(1) may include any of the  
259 information described in (A) and may  
260 address the treatment of any payment that

261 becomes delinquent before the court grants  
262 the debtor a discharge.

263 (i) CLAIM HOLDER'S FAILURE TO  
264 ~~NOTIFY~~ GIVE NOTICE OR RESPOND. If the holder of a  
265 claim holder fails to provide any information as required by  
266 ~~subdivision (b), (c), or (g)~~ of this rule, the court may, after  
267 notice and a hearing, ~~take either or both~~ do one or more of  
268 the following actions:

269 (1) preclude the holder from presenting  
270 the omitted information, in any form, as evidence in  
271 any contested matter or adversary proceeding in the  
272 case; ~~—~~ unless the court determines that the failure  
273 was substantially justified or is harmless; ~~or~~

274 (2) award other appropriate relief,  
275 including reasonable expenses and attorney's fees  
276 caused by the failure; and

277 (3) take any other action authorized by  
278 this rule.

### **Committee Note**

The rule is amended to encourage a greater degree of compliance with its provisions and to provide a more straight-forward and familiar procedure for determining the status of a mortgage claim at the end of a chapter 13 case. It also provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred.

Subdivision (a), which describes the rule's applicability, remains largely unchanged. However, the word "installment" in the phrase "contractual installment payment" was deleted here and throughout the rule in order to clarify the rule's applicability to reverse mortgages, which are not paid in installments.

In addition to stylistic changes, subdivision (b) is amended to add provisions about the effective date of late payment change notices and to provide more detailed provisions about notice of payment changes for home-equity lines of credit ("HELOCs"). Subdivision (b)(2) now provides that late notices of a payment increase do not go into effect until the required notice period (at least 21 days) expires. There is no delay, however, in the effective date of an untimely notice of a payment decrease.

The treatment of HELOCs presents a special issue under this rule because the amount owed changes frequently, often in small amounts. Requiring a notice for each change can be overly burdensome. Under new subdivision (b)(3), a HELOC claimant only needs to file annual payment change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month is for more than \$10. This

provision also ensures at least 21 days' notice before a payment change takes effect.

Only stylistic changes are made to subdivisions (c) and (d). Stylistic changes are also made to subdivision (e). In addition, the court is given authority, upon motion of a party in interest, to shorten the time for seeking a determination of the fees, expenses, or charges owed. Such a shortening, for example, might be appropriate in the later stages of a chapter 13 case.

Subdivision (f) is new. It provides the procedure for a midcase assessment of the status of the mortgage, which allows the debtor to be informed of any deficiencies in payment while there is still time in the chapter 13 case to become current before the case is closed. The procedure begins with the trustee providing notice of the status of the mortgage. An Official Form has been adopted for this purpose. The mortgage claim holder then has to respond, again using an Official Form to provide the required information. If the claim holder fails to respond, a party in interest may seek an order compelling a response. A party in interest may also object to the claim holder's response. If an objection is made, the court determines the status of the mortgage claim.

As under the former rule, there is an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure is changed, however, from a notice to a motion procedure that results in a binding order, and time periods for the trustee and claim holder to act have been lengthened.

Under subdivision (g), the trustee begins the procedure by filing—within 45 days after the last plan

payment is made—a motion to determine the status of the mortgage. An Official Form has been adopted for this purpose. The claim holder then must respond within 28 days after service of the motion, again using an Official Form to provide the required information. If the claim holder fails to respond, a party in interest may seek an order compelling a response. A party in interest may also object to the response.

This process ends with a court order detailing the status of the mortgage (subdivision (h)). If the claim holder fails to respond to an order compelling a response, the court may enter an order stating that the debtor is current on the mortgage. If there is a response and no objection to it is made, the order may accept as accurate the amounts stated in the response. If there is both a response and an objection, the court must determine the status of the mortgage. Subdivision (h)(4) specifies the contents of the order.

Subdivision (i) has been amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes have also been made to the subdivision.



**Fill in this information to identify your case:**

United States Bankruptcy Court for the:

\_\_\_\_\_ District of \_\_\_\_\_  
(State)

Case number (if known): \_\_\_\_\_ Chapter you are filing under:

Chapter 7

Chapter 11

Chapter 12

Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/22

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p><b>1. Your full name</b></p> <p>Write the name that is on your government-issued picture identification (for example, your driver's license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Suffix (Sr., Jr., II, III) _____</p>
<p><b>2. All other names you have used in the last 8 years</b></p> <p>Include your married or maiden names and any assumed, trade names and <i>doing business as</i> names.</p> <p>Do NOT list the name of any separate legal entity such as a corporation, partnership, or LLC that is not filing this petition.</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>	<p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>First name _____</p> <p>Middle name _____</p> <p>Last name _____</p> <p>Business name (if applicable) _____</p> <p>Business name (if applicable) _____</p>
<p><b>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</b></p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>

Appendix B-3

Debtor 1

First Name Middle Name Last Name

Case number (if known)

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

4. Your Employer Identification Number (EIN), if any.

EIN - - - - -
EIN - - - - -

EIN - - - - -
EIN - - - - -

5. Where you live

If Debtor 2 lives at a different address:

Number Street
City State ZIP Code
County

Number Street
City State ZIP Code
County

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street
P.O. Box
City State ZIP Code

Number Street
P.O. Box
City State ZIP Code

6. Why you are choosing this district to file for bankruptcy

Check one:

- Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.
I have another reason. Explain. (See 28 U.S.C. § 1408.)

Check one:

- Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.
I have another reason. Explain. (See 28 U.S.C. § 1408.)

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
Chapter 11
Chapter 12
Chapter 13

8. How you will pay the fee

- I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
I need to pay the fee in installments. If you choose this option, sign and attach the Application for Individuals to Pay The Filing Fee in Installments (Official Form 103A).
I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- No
Yes. District When Case number
District When Case number
District When Case number

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
Yes. Debtor Relationship to you
District When Case number, if known
Debtor Relationship to you
District When Case number, if known

11. Do you rent your residence?

- No. Go to line 12.
Yes. Has your landlord obtained an eviction judgment against you?
No. Go to line 12.
Yes. Fill out Initial Statement About an Eviction Judgment Against You (Form 101A) and file it as part of this bankruptcy petition.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- No. Go to Part 4.
Yes. Name and location of business

Name of business, if any
Number Street
City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
Stockbroker (as defined in 11 U.S.C. § 101(53A))
Commodity Broker (as defined in 11 U.S.C. § 101(6))
None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

For a definition of small business debtor, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- No. I am not filing under Chapter 11.
No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- No
Yes. What is the hazard?

If immediate attention is needed, why is it needed?

Where is the property? Number Street

City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1

First Name Middle Name Last Name

Case number (if known)

**Part 6:** Answer These Questions for Reporting Purposes

**16. What kind of debts do you have?**

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.”

- No. Go to line 16b.
- Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- No. Go to line 16c.
- Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

**17. Are you filing under Chapter 7?**

No. I am not filing under Chapter 7. Go to line 18.

Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

- No
- Yes

**Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?**

**18. How many creditors do you estimate that you owe?**

- |                                  |  |  |
|----------------------------------|--|--|
| <input type="checkbox"/> 1-49    | <input type="checkbox"/> 1,000-5,000   | <input type="checkbox"/> 25,001-50,000     |
| <input type="checkbox"/> 50-99   | <input type="checkbox"/> 5,001-10,000  | <input type="checkbox"/> 50,001-100,000    |
| <input type="checkbox"/> 100-199 | <input type="checkbox"/> 10,001-25,000 | <input type="checkbox"/> More than 100,000 |
| <input type="checkbox"/> 200-999 |  |  |

**19. How much do you estimate your assets to be worth?**

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000          | <input type="checkbox"/> \$1,000,001-\$10 million    | <input type="checkbox"/> \$500,000,001-\$1 billion     |
| <input type="checkbox"/> \$50,001-\$100,000    | <input type="checkbox"/> \$10,000,001-\$50 million   | <input type="checkbox"/> \$1,000,000,001-\$10 billion  |
| <input type="checkbox"/> \$100,001-\$500,000   | <input type="checkbox"/> \$50,000,001-\$100 million  | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion        |

**20. How much do you estimate your liabilities to be?**

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000          | <input type="checkbox"/> \$1,000,001-\$10 million    | <input type="checkbox"/> \$500,000,001-\$1 billion     |
| <input type="checkbox"/> \$50,001-\$100,000    | <input type="checkbox"/> \$10,000,001-\$50 million   | <input type="checkbox"/> \$1,000,000,001-\$10 billion  |
| <input type="checkbox"/> \$100,001-\$500,000   | <input type="checkbox"/> \$50,000,001-\$100 million  | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion        |

Appendix B-3

Debtor 1

First Name Middle Name Last Name

Case number (if known)

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

X

Signature of Debtor 1

Executed on MM / DD / YYYY

X

Signature of Debtor 2

Executed on MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

X

Signature of Attorney for Debtor

Date

MM / DD / YYYY

Printed name

Firm name

Number Street

City

State

ZIP Code

Contact phone

Email address

Bar number

State

Debtor 1

First Name Middle Name Last Name

Case number (if known)

**For you if you are filing this bankruptcy without an attorney**

**If you are represented by an attorney, you do not need to file this page.**

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- No
- Yes. Name of Person \_\_\_\_\_

Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

**x**

**x**

Signature of Debtor 1

Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

Contact phone \_\_\_\_\_

Contact phone \_\_\_\_\_

Cell phone \_\_\_\_\_

Cell phone \_\_\_\_\_

Email address \_\_\_\_\_

Email address \_\_\_\_\_



### **Committee Note**

Official Form 101 is amended to eliminate language in former Part 1, Question 4, which asked for “any business names . . . you have used in the last 8 years.” Instead, Part 1, Question 2, is modified to add to the direction with respect to “other names you have used in the last 8 years”—which currently directs the debtor to “Include your married and maiden names”—to ask the debtor to include “any assumed, trade names, or *doing business as* names,” and to direct that the debtor should not include the names of separate legal entities that are not filing the petition. Many individual debtors erroneously believed that Question 4 was asking for the names of corporations or limited liability corporations in which they held any interest in the past 8 years, and any names listed in response were then treated as additional debtors for purposes of noticing and reporting. By asking for the information in Question 2, the form now makes it clearer that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. This amendment also conforms Official Form 101 to Official Forms 105, 201, and 205 with respect to the same information.

<b>Information to identify the case:</b>		
Debtor 1	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
Debtor 2 (Spouse, if filing)	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
United States Bankruptcy Court for the: _____	District of _____	[Date case filed for chapter 11 _____] OR
	(State)	MM / DD / YYYY
Case number: _____		[Date case filed in chapter _____] OR
		MM / DD / YYYY
		Date case converted to chapter 11 _____] OR
		MM / DD / YYYY

Official Form 309E1 (For Individuals or Joint Debtors)  
 Notice of Chapter 11 Bankruptcy Case

12/22

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at <https://pacer.uscourts.gov>).

**The staff of the bankruptcy clerk's office cannot give legal advice.**

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. Debtor's full name		
2. All other names used in the last 8 years		
3. Address		If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address		Contact phone _____ Email _____
5. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at <a href="https://pacer.uscourts.gov">https://pacer.uscourts.gov</a> .		Hours open _____ Contact phone _____

For more information, see page 2 ▶

<p><b>6. Meeting of creditors</b></p> <p>Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.</p> <p>Creditors may attend, but are not required to do so.</p>	<p>Meeting of creditors _____ at _____ Location: _____</p> <p>Date _____ Time _____</p> <p>The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.</p>
<p><b>7. Deadlines</b></p> <p>The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.</p>	<p><b>Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 10 for more information):</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.</li> <li><input type="checkbox"/> if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6) the deadline is: _____</li> </ul> <hr/> <p><b>Deadline for filing proof of claim:</b> _____ [Not yet set. If a deadline is set, the court will send you another notice.] or _____ [date, if set by the court]</p> <p>A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at <a href="http://www.uscourts.gov">www.uscourts.gov</a> or any bankruptcy clerk's office.</p> <p>Your claim will be allowed in the amount scheduled unless:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> your claim is designated as <i>disputed, contingent, or unliquidated</i>;</li> <li><input type="checkbox"/> you file a proof of claim in a different amount; or</li> <li><input type="checkbox"/> you receive another notice.</li> </ul> <p>If your claim is not scheduled or if your claim is designated as <i>disputed, contingent, or unliquidated</i>, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.</p> <p>You may review the schedules at the bankruptcy clerk's office or online at <a href="https://pacer.uscourts.gov">https://pacer.uscourts.gov</a>.</p> <p>Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.</p> <hr/> <p><b>Deadline to object to exemptions:</b> _____ <b>Filing deadline:</b> 30 days after the <i>conclusion</i> of the meeting of creditors</p> <p>The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.</p>
<p><b>8. Creditors with a foreign address</b></p>	<p>If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.</p>
<p><b>9. Filing a Chapter 11 bankruptcy case</b></p>	<p>Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.</p>
<p><b>10. Discharge of debts</b></p>	<p>Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.</p>
<p><b>11. Exempt property</b></p>	<p>The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at <a href="https://pacer.uscourts.gov">https://pacer.uscourts.gov</a>. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.</p>

<b>Information to identify the case:</b>		
Debtor 1	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
Debtor 2 (Spouse, if filing)	_____	Last 4 digits of Social Security number or ITIN _____
	First Name Middle Name Last Name	EIN _____
United States Bankruptcy Court for the: _____	District of _____	[Date case filed for chapter 11 _____] OR
	(State)	MM / DD / YYYY
Case number: _____		[Date case filed in chapter _____] OR
		MM / DD / YYYY
		Date case converted to chapter 11 _____] OR
		MM / DD / YYYY

Official Form 309E2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

12/22

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read all pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at <https://pacer.uscourts.gov>).

**The staff of the bankruptcy clerk's office cannot give legal advice.**

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	
3. Address	If Debtor 2 lives at a different address:
4. Debtor's attorney Name and address	Contact phone _____ Email _____
5. Bankruptcy trustee Name and address	Contact phone _____ Email _____

For more information, see page 2 ►

Appendix B-3

6. Bankruptcy clerk's office

Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at <https://pacer.uscourts.gov>.

Hours open \_\_\_\_\_  
Contact phone \_\_\_\_\_

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.

\_\_\_\_\_ at \_\_\_\_\_ Location:  
Date Time

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

**Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 11 for more information):**

if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.

if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6) the deadline is: \_\_\_\_\_

**Deadline for filing proof of claim:**

[Not yet set. If a deadline is set, the court will send you another notice.] or  
[date, if set by the court]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at [www.uscourts.gov](http://www.uscourts.gov) or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

**Deadline to object to exemptions:**

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

**Filing deadline:**

30 days after the conclusion of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.

For more information, see page 3 ►

## Appendix B-3

### 11. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

### 12. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at <https://pacer.uscourts.gov>. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

**Committee Note**

Official Form 309E1, line 7, and Official Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.

**Fill in this information to identify the case:**

Debtor 1 \_\_\_\_\_

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
(State)

Case number \_\_\_\_\_

**Official Form 410C13-1N**  
**Trustee's Midcase Notice of the Status of the Mortgage Claim**

The trustee must file this notice in a chapter 13 case between 18 and 24 months after the petition was filed. Rule 3002.1(f)(1).

**Part 1: Mortgage Information**

**Name of claim holder:** \_\_\_\_\_ **Court claim no. (if known):** \_\_\_\_\_

**Last 4 digits** of any number you use to identify the debtor's account: \_\_\_\_\_

**Property address:**

Number \_\_\_\_\_ Street \_\_\_\_\_

\_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

**Part 2: Cure Amount**

	Amount
a. Allowed amount of prepetition arrearage, if any:	(a) \$ _____
b. Total prepetition arrearage paid by the trustee as of date of notice:	(b) \$ _____
c. Remaining balance of the prepetition arrearage:	(c) \$ _____

**Part 3: Postpetition Mortgage Payment**

Check one:

Ongoing postpetition mortgage payments are made by the debtor.

Ongoing postpetition mortgage payments are paid through the trustee.

Current monthly payment: \_\_\_\_\_ \$ \_\_\_\_\_

Next mortgage payment due: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
MM / DD / YYYY



**Part 4:** A Response Is Required by Bankruptcy Rule 3002.1(f)(2)

Within 21 days after service of this notice, **the holder of the claim must file a response using Official Form 410C13-R.**

**X** \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
Signature

Trustee  
\_\_\_\_\_  
First Name Middle Name Last Name

Address  
\_\_\_\_\_  
Number Street  
  
\_\_\_\_\_  
City State ZIP Code

Contact phone (\_\_\_\_) \_\_\_\_-\_\_\_\_ Email \_\_\_\_\_

**Fill in this information to identify the case:**

Debtor 1 \_\_\_\_\_

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
(State)

Case number \_\_\_\_\_

Official Form 410C13-1R

Response to Trustee’s Midcase Notice of the Status of the Mortgage Claim

12/23

The claim holder must respond to the Trustee’s Midcase Notice of the Status of the Mortgage Claim within 21 days after it was served. Rule 3002.1(f)(2).

Part 1: Mortgage Information

**Name of claim holder:** \_\_\_\_\_ **Court claim no. (if known):** \_\_\_\_\_

**Last 4 digits** of any number you use to identify the debtor’s account: \_\_\_\_\_

**Property address:**

Number \_\_\_\_\_ Street \_\_\_\_\_

\_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

Part 2: Cure Amount

Check all that are applicable:

- Claim holder agrees with the allowed amount of the prepetition arrearage and the arrearage balance set forth in the Trustee’s Notice.
- Claim holder disagrees with the allowed amount of the prepetition arrearage set forth in the Trustee’s Notice. Claim holder asserts that the allowed amount of the prepetition arrearage is \$ \_\_\_\_\_.
- Claim holder disagrees with the prepetition arrearage balance set forth in the Trustee’s Notice. Claim holder asserts that the prepetition balance as of the date of the Trustee’s Notice is \$ \_\_\_\_\_.

Part 3: Postpetition Mortgage Payment

The status of the ongoing postpetition mortgage payments as of the date of the Trustee’s Notice is:

Current postpetition monthly payment: \$ \_\_\_\_\_

Appendix B-3

Date next postpetition mortgage payment due:

\_\_\_\_/\_\_\_\_/\_\_\_\_  
MM / DD / YYYY

Total ongoing postpetition payments due and unpaid:

\$ \_\_\_\_\_

Check one:

- The debtor is current on the ongoing postpetition mortgage payments.
- Claim holder asserts that the debtor is not current on the ongoing postpetition mortgage payments.

**Part 4:** Itemized Payment History

If the claim holder disagrees in Part 2 with the prepetition arrearage balance listed in the Trustee's Notice or states in Part 3 that the debtor is not current on ongoing postpetition payments as of the date of the Trustee's Notice, the claim holder must attach an itemized payment history listing:

- all payments received during the period from the filing of the bankruptcy petition through the date of this response; and
- how the payments were applied to principal, interest, and escrow from the filing of the bankruptcy petition through the date of this response.

**Part 5:** Sign Here

The person completing this response must sign it. Check the appropriate box:

- I am the claim holder.
- I am the claim holder's authorized agent.

**I declare under penalty of perjury that the information provided in this response is true and correct to the best of my knowledge, information, and reasonable belief.**

**X**

\_\_\_\_\_  
Signature

Date \_\_\_\_/\_\_\_\_/\_\_\_\_

\_\_\_\_\_  
First Name Middle Name Last Name

\_\_\_\_\_  
Number Street

\_\_\_\_\_  
City State ZIP Code

Contact phone (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_

Email \_\_\_\_\_

United States Bankruptcy Court

\_\_\_\_\_ District of \_\_\_\_\_

In re \_\_\_\_\_, Debtor

Case No. \_\_\_\_\_

Chapter 13

**Motion to Determine the Status of the Mortgage Claim (conduit)**

(The trustee should use this form if the trustee made the ongoing postpetition mortgage payments.)

The trustee states as follows:

1. On \_\_\_\_\_, debtor completed all payments under the chapter 13 plan. A copy of the trustee's disbursement ledger for all payments to the claim holder is attached.

2. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:** \_\_\_\_\_ **Court claim no.** (if known): \_\_\_\_\_

**Last 4 digits** of any number used to identify the debtor's account: \_\_\_\_\_

**Property address:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. The trustee disbursed payments to cure arrearages as follows:

a. Allowed amount of the prepetition arrearage, if any: \$ \_\_\_\_\_

b. Total amount of the prepetition arrearage paid by the trustee: \$ \_\_\_\_\_

c. Allowed amount of postpetition arrearage, if any: \$ \_\_\_\_\_

d. Postpetition arrearage paid by the trustee: \$ \_\_\_\_\_

e. Total: (Add lines b. and d.): \$ \_\_\_\_\_

4. The trustee disbursed payments for postpetition fees, expenses, and charges as follows:

a. Amount of postpetition fees, expenses, and charges recoverable under Rule 3002.1(c): \$ \_\_\_\_\_

b. Amount of postpetition fees, expenses, and charges listed in a. and paid through the trustee: \$ \_\_\_\_\_

5. The ongoing postpetition mortgage payments were paid through the trustee.

Total postpetition ongoing mortgage payments paid	\$ _____
Current monthly payment	\$ _____
Date of next mortgage payment due	____/____/____

6. Therefore, I ask the court for an order under Rule 3002.1(h) determining that, as of the date of this motion, the debtor is current on all payments required by the plan and § 1322(b)(5) to be paid to the holder of the mortgage claim—including all escrow amounts—and that all postpetition fees, expenses, and charges are satisfied in full.

Signed: \_\_\_\_\_  
(Trustee)

Date: \_\_\_\_\_

United States Bankruptcy Court
District of \_\_\_\_\_

In re \_\_\_\_\_, Debtor

Case No. \_\_\_\_\_
Chapter 13

Motion to Determine the Status of the Mortgage Claim (nonconduit)

(The trustee should use this form if the debtor made the ongoing postpetition mortgage payments directly to the claim holder.)

The trustee states as follows:

1. On \_\_\_\_\_, debtor completed all payments under the chapter 13 plan. A copy of the trustee's disbursement ledger for all payments to the claim holder is attached.

2. The following information relates to the mortgage claim at issue:

Name of Claim Holder: \_\_\_\_\_ Court claim no. (if known): \_\_\_\_\_

Last 4 digits of any number used to identify the debtor's account: \_\_\_\_\_

Property address: \_\_\_\_\_

City State ZIP Code

3. The trustee disbursed payments to cure arrearages as follows:

- a. Allowed amount of the prepetition arrearage, if any: \$ \_\_\_\_\_
b. Total amount of the prepetition arrearage paid by the trustee: \$ \_\_\_\_\_
c. Allowed amount of postpetition arrearage, if any: \$ \_\_\_\_\_
d. Postpetition arrearage paid by the trustee: \$ \_\_\_\_\_
e. Total: (Add lines b. and d.): \$ \_\_\_\_\_

4. The trustee disbursed payments for postpetition fees, expenses, and charges as follows:

- a. Amount of postpetition fees, expenses, and charges recoverable under Rule 3002.1(c): \$ \_\_\_\_\_
b. Amount of postpetition fees, expenses, and charges listed in a. and paid through the trustee: \$ \_\_\_\_\_

5. The debtor's chapter 13 plan provided that ongoing postpetition mortgage payments were to be paid by the debtor directly to the claim holder.

6. Therefore, I ask the court for an order under Rule 3002.1(h) determining that, as of the date of this motion, the debtor has cured the prepetition arrearage on the mortgage and that all postpetition fees, expenses, and charges are satisfied in full. Unless the claim holder responds to this motion with an allegation that the debtor is not current on the ongoing postpetition mortgage payments, I also ask the court to determine that the debtor is current on all postpetition payments required by the plan and § 1322(b)(5) to be paid to the holder of the mortgage claim—including all escrow amounts.

Signed: \_\_\_\_\_  
(Trustee)

Date: \_\_\_\_\_

United States Bankruptcy Court  
District of \_\_\_\_\_

In re \_\_\_\_\_, Debtor

Case No. \_\_\_\_\_  
Chapter 13

**Response to Trustee’s Motion to Determine the Status of the Mortgage Claim**

\_\_\_\_\_ (claim holder) states as follows:

1. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:** \_\_\_\_\_ **Court claim no.** (if known): \_\_\_\_\_

**Last 4 digits** of any number used to identify the debtor’s account: \_\_\_\_\_

**Property address:** \_\_\_\_\_

\_\_\_\_\_

City

State

ZIP Code

2. Prepetition Arrearage

Check one:

- Debtor has paid in full the amount required to cure any prepetition arrearage on this mortgage claim.
- Debtor has not paid in full the amount required to cure any prepetition arrearage on this mortgage claim. The claim holder asserts that the total prepetition arrearage amount remaining unpaid as of the date of this response is: \$ \_\_\_\_\_.

3. Ongoing Postpetition Mortgage Payments

Check all that apply:

- Debtor is current on all ongoing postpetition mortgage payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs. The claim holder attaches a payoff statement and provides the following information as of the date of this response:

Date last payment was received on the mortgage: \_\_\_\_\_

Date next postpetition payment from the debtor is due: \_\_\_\_\_

Amount of the next postpetition payment that is due: \$ \_\_\_\_\_



Unpaid principal balance of the loan: \$ \_\_\_\_\_

Additional amounts due for any deferred or accrued interest: \$ \_\_\_\_\_

Balance of the escrow account: \$ \_\_\_\_\_

Balance of unapplied funds or funds held in a suspense account: \$ \_\_\_\_\_

Debtor is not current on all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code. The claim holder asserts that the debtor is obligated for the postpetition payment(s) that first became due on: \_\_\_\_/\_\_\_\_/\_\_\_\_.  
MM / DD / YYYY

Debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing. The claim holder asserts that the total amount remaining unpaid as of the date of this response is \$ \_\_\_\_\_.

4. Itemized Payment History

Include if applicable:

Because the claim holder disagrees that the prepetition arrearage has been paid in full or states that the debtor is not current on all postpetition payments or that fees, charges, expenses, escrow, and costs are due and owing, the claim holder attaches an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all prepetition and postpetition payments received;
- the application of all payments received;
- all fees, costs, escrow, and expenses assessed to the mortgage; and
- all amounts the creditor contends remain unpaid.

\_\_\_\_\_  
Signature Date \_\_\_\_/\_\_\_\_/\_\_\_\_

Print \_\_\_\_\_ Title \_\_\_\_\_  
First Name Middle Name Last Name

Company \_\_\_\_\_

If different from the notice address listed on the proof of claim to which this response applies:

Address

Number \_\_\_\_\_ Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

Contact phone (\_\_\_\_\_) \_\_\_\_\_ – \_\_\_\_\_ Email \_\_\_\_\_

The person completing this response must sign it. Check the appropriate box:

- I am the claim holder.
- I am the claim holder's authorized agent.

### **Committee Note**

Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R are new. They are adopted to implement new provisions of Rule 3002.1 that prescribe procedures for determining the status of a home mortgage claim in a chapter 13 case.

Official Form 410C13-1N is to be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using Official Form 410C13-1R. *See* Rule 3002.1(f)(2). The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments. If the claim holder disagrees with the trustee or states that the debtor is not current on postpetition mortgage payments, it must attach an itemized payment history for the postpetition period.

Official Forms 410C13-10C and 410C13-10NC implement Rule 3002.1(g)(1). Form 410C13-10C is used if the trustee made the ongoing postpetition mortgage payments (as a conduit), and Form 410C13-10NC is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has

completed all plan payments, and it seeks a court order determining the status of the mortgage claim. The trustee informs the court about the payments the trustee has made to the claim holder for the cure of any pre- and postpetition arrearages and for any postpetition fees, expenses, and charges. If the trustee made the ongoing postpetition mortgage payments, the trustee must also state the total amount paid and the amount and date of the next mortgage payment.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments. If the claim holder disagrees with the trustee or states that the debtor is not current on postpetition mortgage payments, it must attach an itemized payment history for the postpetition period. If it asserts that the debtor is current on all postpetition payments, it must attach a payoff statement and provide the information listed in paragraph 3 of the form.

# TAB 4B

ADVISORY COMMITTEE ON BANKRUPTCY RULES  
Meeting of April 8, 2021  
Held Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Bankruptcy Judge Dennis R. Dow, Chair  
Circuit Judge Thomas L. Ambro  
Bankruptcy Judge Rebecca Buehler Connelly  
Circuit Judge Bernice Bouie Donald  
Bankruptcy Judge Melvin S. Hoffman  
Bankruptcy Judge Catherine Peek McEwen  
Debra L. Miller, Esq.  
District Judge J. Paul Oetken  
Jeremy L. Retherford, Esq.  
Damian S. Schaible, Esq.  
Professor David A. Skeel  
Tara Twomey, Esq.  
District Judge George H. Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter  
Professor Laura B. Bartell, associate reporter  
District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)  
Professor Daniel R. Coquillette, consultant to the Standing Committee  
Professor Catherine T. Struve, reporter to the Standing Committee  
Professor Daniel J. Capra, liaison to the Emergency Rules Subcommittee  
Bankruptcy Judge A. Benjamin Goldgar as liaison to the Restyling Subcommittee  
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee  
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees  
David A. Hubbert, Department of Justice  
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado  
Brittany Bunting, Administrative Office  
Bridget M. Healy, Esq., Administrative Office  
S. Scott Myers, Esq., Administrative Office  
Julie Wilson, Esq., Administrative Office  
Shelly Cox, Administrative Office

David A. Levine, Administrative Office  
Dana Yankowitz Elliott, Administrative Office  
Daniel J. Isaacs-Smith, Administrative Office  
Kevin Crenny, Rules Law Clerk  
Molly T. Johnson, Federal Judicial Center  
Nancy Whaley, National Association of Chapter 13 Trustees  
John Hawkinson, freelance journalist  
Sai, pro se litigant  
Teri E. Johnson, attorney  
Connor D. McMullan, attorney  
S. Kenneth Lee, Federal Judicial Center  
District Judge Laurel M. Isicoff

### **Discussion Agenda**

#### **1. Greetings and introductions**

Judge Dennis Dow welcomed the group and thanked them for joining this meeting remotely. He first discussed logistical matters for the remote meeting. He thanked outgoing member of the Advisory Committee, Judge Melvin Hoffman, and introduced the new members, Judge Rebecca Buehler Connelly, Judge Catherine Peek McEwen, Damian S. Schaible, Esq. and Tara Twomey, Esq.

#### **2. Approval of minutes of remote meeting held on Sept. 22, 2020.**

The minutes were approved by motion and vote after a correction in the name and title of Dana Elliott.

#### **3. Oral reports on meetings of other committees**

##### **(A) *Jan. 5, 2021 Standing Committee meeting***

Judge Dow gave the report.

##### **(1) Joint Committee Business.**

(a) ***Emergency Rules.*** Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. 116-136, which required that “the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule

amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)” Each of the Advisory Committees for the Civil, Criminal, Appellate and Bankruptcy Rules participated in a discussion before the Standing Committee about the efforts to develop a relatively uniform version of an emergency rule. Professor Dan Capra provided a side-by-side comparison of the rules and discussed the outstanding differences between them. The Standing Committee provided its reactions to those outstanding issues.

(2) **Bankruptcy Committee Business.**

The Advisory Committee presented for retroactive approval amendments to Official Forms 309A-I to make a technical amendment with respect to the new web address of PACER. The Standing Committee gave retroactive approval to those amendments and undertook to inform the Judicial Conference.

The Advisory Committee also presented for publication proposed amendments to (1) Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases); (2) Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal); and (3) Official Form 417A (Notice of Appeal and Statement of Election). The Standing Committee voted to publish those rules and form.

Judge Dow also reported to the Standing Committee on the approval of a change in the instructions for Official Form 410A (Proof of Claim, Attachment A) and on the status of the restyling project.

(B) ***April 7, 2021 Meeting of the Advisory Committee on Appellate Rules***

Judge Donald made the report. The Appellate Committee met April 7, 2021. It approved amendments to Appellate Rule 42 (Voluntary Dismissal) and 25 (Filing and Service) which were published for public comment in August 2020. Bankruptcy Rule 8023 is being amended to conform to amended Appellate Rule 42(b). Appellate Rule 25(a)(5) is being amended to make applicable provisions on remote access in Civil Rule 5.2(c)(1) and (2), and the Appellate Committee examined the rule to ensure that it was consistent with other rules. There was discussion of amicus briefs and what should be disclosed, and the Appellate Committee will return to that issue in the future. The Appellate Committee approved for publication amendments to Appellate Rules 35 and 40 dealing with hearings and rehearing en banc and panel rehearing, which will fold them into a single Rule 40.

The next meeting of the Appellate Committee is Oct. 7, 2021.



Professor Struve mentioned that the Appellate Committee is amending Rule 4(a)(4)(A)(vi) to contemplate the applicability of the new emergency rule to extensions of Civil Rule 51/52/59/60 motions. She asked if Bankruptcy Rule 8002(b)(1) should be amended in a parallel way.

(C) ***October 16, 2020 Meeting of the Advisory Committee on Civil Rules***

Judge Goldgar provided a report on the Oct. 16, 2020 meeting. The meeting was conducted virtually because of the COVID-19 health emergency.

**1. CARES Act – Rules Emergency.** The subcommittee addressing Rule 87, the rules emergency proposal, reported on its work. Prof. Capra made a cameo appearance and described the proposals from the different advisory committees. Some uncertainty was expressed about (1) whether Rule 87 was needed, given its limited scope and the flexibility of the civil rules (which have worked well during the pandemic, members said); and (2) when Rule 87 should be published if indeed it is needed. Despite these uncertainties, it appears the Committee at least intends to send the proposed rule to the Standing Committee.

**2. Appeal Finality after Consolidation.** The joint subcommittee that has been addressing whether rules amendments are necessary to address the effects of *Hall v. Hall*, 138 S. Ct. 1118 (2018), reported on its work. The subcommittee had asked the FJC to study whether *Hall* was causing problems that might warrant amendments. The FJC completed its work and found no problems, but its investigation only covered actions filed between 2015 and 2017. The subcommittee is considering whether data might be gathered in other ways, either informally from the courts of appeals or from bar groups. Since there appears to be no immediate need for rule-making, no decision has been made on a possible amendment.

**3. Rule 17(d) – Official Capacity.** The Civil Committee has been studying a proposed amendment that would require a public officer who sues or is sued in the officer's official capacity to be designated by official title rather than by name. (The current rule is permissive rather than mandatory.) The Department of Justice expressed its opposition to the amendment, and the sense was that the current rule works satisfactorily. The item was removed from the agenda.

**4. Rule 5(d)(3) – E-filing by Unrepresented Litigants.** Rule 5(d)(3) currently allows pro se litigants to file electronically only if a court order or local rule permits. The proposal is to allow all pro se litigants to file electronically. The Committee is continuing to gather information and study the question.

Judge Dow commented that the Bankruptcy Advisory Committee is very interested in the issue of electronic filing.

**5. IFP Disclosures.** The Committee considered a suggestion to change the IFP forms to require only the party seeking IFP status to disclose financial information. The forms currently require

information not only about the party's own finances but also finances of the party's spouse, and the suggestion said that raised privacy concerns. The Committee concluded that since these are Administrative Office forms, the decision on changing them is up to the AO. There was no action for the Committee to take.

**6. E-Filing Deadline.** A joint subcommittee continues to consider whether the e-filing deadline should be moved from midnight to the time when the clerk's office closes. The Federal Judicial Center is still examining the issue.

**7. Rule 9(b).** The Committee considered as an information item a suggestion from Dean Spencer (William & Mary) to amend Rule 9(b). The amendment would change the sentence that allows state of mind to be pled "generally" by deleting that word and saying instead that state of mind may be pled "without setting forth the facts or circumstances from which the condition may be inferred." The goal is to undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged "with particularity," the allegation must still satisfy Rule 8(a) – meaning some facts must be pled. Spencer's view is set out at length in a Cardozo Law Review article.

This is a question of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy because section 523(a)(2)(A) is one of the most commonly invoked exceptions to discharge. Judge Goldgar also said that he was a fan of *Iqbal*. Many creditors having contract claims bring adversary proceedings under section 523(a)(2)(A), contorting their claims into fraud claims and alleging intent only as a conclusion. *Iqbal* allows a judge to dispose of those quickly. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

**8. Privilege Logs – Rules 26(b)(5)(A) and 45(e)(2).** The Committee considered as an information item a proposal to amend Rules 26(b)(5)(A) and 45(e)(2). The amendments would require parties to add specific details about materials withheld from production on privilege grounds. Prof. Cooper expressed skepticism about the proposal, saying it was unclear an amendment would solve the problem. But the lawyer members of the Committee countered that the problem was a serious one. The Committee concluded that the proposal warranted further study. Since these rules apply in bankruptcy, and since privilege problems also arise in bankruptcy cases, we will want to keep an eye on this one as well.

**9. Sealing Court Records.** The Committee considered as an information item a proposal from Prof. Volokh on behalf of the Reporters Committee for Freedom of the Press for a national rule on sealing court records. The rule would override local practices and rules. The matter was continued for further discussion. Another one we will want to watch.

**10. Rule 15(a).** The Committee took up a proposal to change the word "within" in Rule 15(a)(1) to "no later than." The change, Prof. Cooper said, would avoid an apparent gap that results from a literal, "if not common-sense," reading of the rule. The Committee found the amendment both sensible and innocuous and will move ahead with it.

Judge Catherine Peeks McEwen provided the report on the agenda for the next Civil Rules Committee to be held virtually on April 23, 2021. The Civil Committee will be looking at suggestions regarding Rule 4(f)(2) on Hague Convention service, Rule 65(e)(2) on preliminary injunctions in interpleader actions, Rules 6 and 60 on times for filing, and will be revisiting in forma pauperis standards.

**(D) *Dec. 8-9, 2020 meeting of the Committee on the Administration of the Bankruptcy System (the “Bankruptcy Committee”)***

Judge Isicoff provided the report.

The Bankruptcy Committee met by videoconference on Dec. 8-9, 2020. The next meeting is June 22-23, 2021. Before the last meeting, the Committee took action to address the impact of the COVID-19 pandemic on the bankruptcy system. Following the enactment in March 2020 of the CARES Act, and based on the possibility at the time that Congress might quickly move forward with further legislation in response to COVID-19, the Bankruptcy Committee recommended a legislative proposal that was included in the judiciary’s package of legislative proposals transmitted to Congress in April 2020.

That proposal would authorize bankruptcy courts to extend statutory deadlines and toll statutory time periods under title 11 and chapter 6 of title 28 of the United States Code during the COVID-19 national emergency, upon a finding that the emergency conditions materially affect the functioning of a particular bankruptcy court of the United States. The authorization would expire 30 days after the date that the COVID-19 national emergency declaration terminates, or upon a finding that emergency conditions no longer materially affect the functioning of the particular bankruptcy court, whichever is earlier. Unfortunately, since the legislative proposal was transmitted to Congress in April, Congress has taken no action on it and it has not been included in any of the COVID-19 stimulus legislation introduced to date.

The Bankruptcy Committee recommended that the legislative proposal be withdrawn because of the existence of the local emergency rules that have been enacted in the meantime, and the fact that the legislation might call these into question. The Judicial Conference withdrew the legislation.

The Bankruptcy Committee is considering whether to recommend a permanent grant of authority during an ongoing emergency, which could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. The Committee deferred making any recommendation until the COVID-19 emergency has subsided or ended and courts have resumed normal operations, and to evaluate the potential impact of any Bankruptcy Rule changes under consideration by the Bankruptcy Rules Committee that would impact or overlap with the

proposal. As drafted, the permanent grant of authority under consideration would not extend to the Bankruptcy Rules.

The Bankruptcy Committee was grateful for the work of the Advisory Committee on Rule 3011 dealing with unclaimed funds.

The Bankruptcy Committee, jointly with CACM, decided not to pursue a proposal to allow parties to access the BNC electronic data base of addresses for service of process and notice.

## **Subcommittee Reports and Other Action Items**

### **4. Report of the Emergency Rule Subcommittee**

Judge Hoffman and Professor Gibson provided the report. The Subcommittee has been working in response to the directive of Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. 116-136, which required that “the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).” At the direction of the Standing Committee, the Advisory Committees on Civil Rules, Criminal Rules, Appellate Rules and Bankruptcy Rules, working through Dan Capra who was appointed by the Standing Committee to be the liaison to the Advisory Committees on this issue, worked to prepare their own emergency rules with the goal of achieving uniformity to the extent possible.

Initial drafts of a proposed Rule 9038 and the other proposed emergency rules were presented to the Standing Committee at its January meeting, and they were the subject to extensive discussions there. Although no formal votes were taken, the Standing Committee provided views on some of the key elements of the rules and Rule 9038 was revised accordingly. The Subcommittee worked to achieve as much uniformity as possible with the other Advisory Committees, and approved the revised rule and presented it to the Advisory Committee for approval and publication. Professor Gibson discussed some of the key elements of the rule.

(a) The biggest difference from the prior version reviewed by the Advisory Committee is with respect to who may declare a rules emergency. The Standing Committee indicated that they thought only the Judicial Conference of the United States should have the authority to declare an emergency, and the draft rule was therefore revised to follow the Civil and Criminal Rules model.

(b) A second issue was the standard for an emergency. The Subcommittee did not include the additional requirement – included in the Criminal emergency rule -- that there be no other feasible means of complying with the existing rules, and the Standing Committee indicated that the Criminal Rules could differ in that respect.

(c) The third change was the use of the word “court.” The word “bankruptcy” was added before the word “court” throughout, to avoid using the Rule 9001-defined word “court.”

(d) The Criminal Rules committee is proposing to remove the words “to modify the rules” in (b)(1)(B), and we may conform to that proposal because the rules are not really modified.

(e) In part (b)(4), all Committees now make termination permissive, not mandatory.

(f) Bankruptcy Rule, Part (c) is different from other sets of emergency rules, because unlike the other emergency rules the bankruptcy emergency rule only provides for an extension of time limits, and therefore it seems appropriate that it can be ordered on a district-wide level or by an individual judge. Circumstances can differ between districts, and the Judicial Conference likely does not want to be in the business of deciding what extensions should be adopted.

The style consultants have suggested modifications to (c)(1)(A) that removed one illustration of the types of actions that might be affected.

Professor Struve raised an issue regarding further extensions in (c)(4). She believes that as written the “good cause” requirement might be read to apply only to motions made by a party in interest and not to decisions by the judge sua sponte, and it should apply to both. She suggested revised text to make that clear.

(g) Professor Struve also suggested that the committee Note should address Subdivision (c)(5), and Professor Gibson agreed to draft a new paragraph for that purpose.

Judge Dow then opened the floor for discussion. Professor Capra said that the Bankruptcy Rules Committee has been very cooperative in this process.

Judge Bates congratulated the Subcommittee. He raised a question as to why bankruptcy was different with respect to (c) as to who decides what extensions should be granted. He also asked if an individual bankruptcy judge should be able to extend time limits even if the chief bankruptcy judge for the district has not made that decision for the entire district. Judge Dow said that this is indeed allowed and appropriate. That authority exists in most circumstances

anyway. Prof. Capra said that this is not a declaration of the emergency, but just responding to it – not a “rear-guard action” trying to move the authority to declare an emergency away from the Judicial Conference – and this should be made clear. Judge Hoffman stated that there are some bankruptcy cases involving large numbers of participants nationally (mega-cases) that are different from other cases in the district that therefore require unique treatment. That justifies giving the authority to particular bankruptcy judges. Judge Bates said that this is an area that just may require differences between the various emergency rules.

Judge Bates also suggested that line 45 should be “presiding judge” rather than “bankruptcy judge” like in line 59. Tara Twomey supported use of the term “presiding judge” because of the possibility of withdrawal of the reference.

Judge Isicoff supported using extra verbiage rather than the style consultants’ suggestion of “take any other action” in subdivision (c)(1)(A). Judge Bates noted that the only eliminated language is “commence an action.” Professor Gibson thought perhaps that language should be returned.

Judge McEwen pointed out that “court” is used in some places without “bankruptcy” before it. For district-wide determinations, what about divisions of the district? Could (c)(1) be amended to say in any district or division?

Judge Isicoff pointed out that when the entire S.D. Florida was shut down by a hurricane she was reversed when she tried to extend deadlines. She would support using all the language of (c)(1)(A).

Judge Kayatta asked why (c)(2) is different from (c)(4) in terms of good cause and notice and hearing. Professor Gibson says that changing the status quo may require more formality in (c)(4).

Judge Goldgar said that the rule only provides for the extension of deadlines. He fears that local districts might be held not to have the power to do anything else, like suspend local rules, by negative implication given that the rule does not address those actions. Judge Dow said that this rule is addressed only to matters for which the courts do not already have authority; it does not preclude other emergency actions. Professor Gibson pointed out the first paragraph of the Committee Note that should eliminate that worry. Professor Capra said that it was intended not to include in the emergency rules anything that was already flexible under the existing rules.

Professor Gibson said the elimination of “bankruptcy” before “court” came from the style consultants. As for “presiding judge” she assumed it was whoever was on the bench at the time.

Judge Dow identified the issues to be discussed:

1. (b)(1)(B) – delete the words “to modify the rules.” The Advisory Committee agreed to deletion.

2. (c)(1)(A) -- add back “commence a proceeding” to all the various actions. The Advisory Committee agreed.

3. good cause requirement in (c)(4) – revise the language to read “the judge may do so only for good cause after notice and a hearing and only on the judge’s own motion or motion of a party in interest or the United States trustee.” The Advisory Committee agreed.

Professor Struve said that the judge does not need to have notice and a hearing for a sua sponte decision. She was concerned only about ambiguity. Judge Hoffman pointed out that “notice and a hearing” does not actually require a hearing. Judge Dow thought no alteration was required.

4. revision to committee note to reference (c)(5) – Advisory Committee approved.

Professor Struve asked how that note deals with the time for taking an appeal? Professor Gibson says that Rule 8002 deals with the time for appeal, so it is not a time limit set by statute. Judge Dow agreed. Professor Struve suggested mentioning it in the Committee Note. Judge McEwen thought that mentioning one and not others would be troubling. Professor Struve feared that a statute that mentions a rule might be deemed to make the rule unalterable. Judge Donald said that the fact we are discussing this issue suggests it should be addressed in the Committee Note. Judge Dow wants to avoid mentioning any specific examples. Professor Struve suggested defining what “imposed by statute” means in (c)(5). Professor Gibson will revise the Committee Note with these comments in mind.

5. (c)(1) caption and text – reference “district or division” instead of just district. Advisory Committee approved.

6. use of the term “a presiding judge” in (c)(2) instead of “any bankruptcy judge in the district” – Advisory Committee approved.

7. standards in (c)(2) v. (c)(4) – Judge Connelly suggested that good cause is appropriate in (c)(4) but not needed in (c)(2) because the circumstances are different. Judge Dow proposed that we leave the draft as is. Advisory Committee approved.

Judge Bates asked whether (c)(3) and (c)(4) should be reversed in order. Judge Connelly suggested leaving it as is, because the extension could come after the termination. Judge Dow agreed. The Advisory Committee decided to make no change.

Judge Dow inquired whether the Advisory Committee was concerned to the extent the Bankruptcy Rule is not uniform. No one expressed concern.

Professor Capra suggested that the Advisory Committee approve the rule for publication. It was agreed to send the revised draft and Committee Note around after the meeting and provide for an electronic vote next week to send the rule to the Standing Committee for publication in August.

The Advisory Committee subsequently voted by email to approve the draft for publication.

#### **5. Report by Appeals, Privacy, and Public Access Subcommittee**

##### **(A) *Comments on amendments to Bankruptcy Rule 8023 to conform to proposed amendments to FRAP 42(b)***

Judge Ambro introduced the issue and Professor Bartell provided the report. Proposed amendments to Bankruptcy Rule 8023 (Voluntary Dismissal) were published in August 2020 that would conform the rule to proposed amendments to Fed. R. App. P. 42(b) dealing with voluntary dismissals. The amendments are intended to clarify that a court order is required for any action other than a simple dismissal.

No comments were submitted in response to publication of the proposed amendments. The Advisory Committee approved the amended rule and recommended the amended rule to the Standing Committee for final approval.

#### **6. Report by the Business Subcommittee**

##### **(A) *Consider comments on SBRA Rules – Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, new Rule 3017.2, 3018, and 3019***

Professor Gibson provided the report. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act (“SBRA”) took effect as local rules or standing orders on Feb. 19, 2020, the effective date of the SBRA. The amended and new rules were published for comment last summer, along with the SBRA form amendments. No comments were submitted in response to publication of the amendments to



Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, or 3019, or new Rule 3017.2. There was only one stylistic change from the existing interim rules.

Rule 1020 has subsequently been amended on an interim basis in response to the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) which took effect on March 27, 2020. The CARES Act modified provisions allowing more debtors to elect treatment under subchapter V of chapter 11, and necessitated amending Interim Rule 1020 to add references to the debtors allowed to elect such treatment under the CARES Act. Even after the extension of the CARES Act provisions to March 27, 2022 by the Bankruptcy Relief Extension Act of 2021, Pub. L. 117-5, 135 Stat. 249, the CARES Act amendments are anticipated to sunset before the amended Rule 1020 becomes effective Dec. 1, 2022. Therefore, the published version of Rule 1020 is the appropriate one for final approval.

Ramona Elliot suggested deleting the last line in the Committee Note to Rule 3019 which seems to be a mistake. Professor Gibson agreed.

With that change, the Advisory Committee approved the rules as published and directed they be submitted to the Standing Committee for final approval.

**(B) *Review comments on Rule 7004(i) addressing Suggestion 19-BK-D***

Professor Bartell provided the report. Amendments to Rule 7004 (Process; Service of Summons, Complaint) to add a new paragraph (i) were published in August 2020. The amendments would make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names.

No comments were submitted in response to publication of the proposed amendments.

Judge McEwen suggested deleting the comma after “7004(b)(3).” The Advisory Committee agreed to do so.

Judge Wu asked whether the term “Agent” was sufficient as an addressee, as the Committee Note suggested. The Advisory Committee approved modifying the Committee Note to change “Agent” to “Agent for Receiving Service of Process.” The Advisory Committee approved the amended rule and Committee Note and recommended it to the Standing Committee for final approval.

(C) ***Review comments on Rule 5005***

Professor Bartell provided the report. Amendments to Rule 5005 (Filing and Transmittal of Papers) were published in August 2020. The amendments allow transmission of papers required to be transmitted to the United States trustee to be done electronically, and eliminate the requirement for filing a verified statement for papers transmitted other than electronically.

The only comment submitted in response to publication was one that noted an error in the redlining of the published version, but recognized that the comment clarified the intended language.

The Advisory Committee approved the amended rule and recommended it to the Standing Committee for final approval.

7. **Report by the Consumer Subcommittee**

(A) ***Recommendation Concerning Suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1***

Judge Connelly provided an introduction to the three items from the Subcommittee.

Professor Gibson provided the report. As was discussed at the last four Advisory Committee meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees (NACTT) and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). These suggestions are intended to increase compliance with the rule and make sure the debtor and trustee get the appropriate information.

The Advisory Committee provided feedback on a preliminary draft at its meeting in September 2020, and after several further meetings, the Subcommittee prepared draft amendments for approval for publication. (The Forms Subcommittee prepared related forms for publication – discussed at 8(B)).

Professor Gibson described the proposed changes to Rule 3002.1, which are intended to accomplish two goals. First, they would provide a more straight-forward and familiar procedure for determining the status of a mortgage claim at the end of a chapter 13 case. Second, they would provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred.

Professor Gibson described the changes in the Rule. Subdivision (a) would be modified only to make it applicable to reverse mortgages that do not have regular payments made in installments.

Subdivision (b) is intended to provide the debtor and the trustee notice of any changes in the home mortgage payment amount during the course of a chapter 13 case so that the debtor can remain current on the mortgage. The two main changes to this subdivision are the addition of provisions about the effect of late payment change notices and detailed provisions about notice of payment changes for home equity lines of credit (HELOCs). Proposed subdivision (b)(2) would provide that late notices of a payment increase would not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease.

Professor Struve questioned why the payment increase begins on the first due date that is at least 21 days after the date when the notice is filed as opposed to when it is served. Professor Gibson suggested adding the words “and served” after “is filed” on line 38 and line 61.

Professor Gibson described the new subdivision (b)(3) which would replace language added to the rule in 2018 and would provide that a HELOC claimant would only file annual payment change notices—which would include a reconciliation figure (net over- or underpayment for the past year)—unless the payment change in a single month was for more than \$10. This provision, too, would ensure at least 21 days’ notice before a payment change took effect.

There were mostly stylistic changes to Subdivision (c) and (d), many to conform to the changes made in the ongoing restyling project. Subdivision (e) now allows a party in interest to shorten the time for seeking a determination of the fees, expense, or charges owed.

Subdivisions (f) and (g) are new and implement a new midcase assessment of the status of the mortgage. The procedure would begin with the trustee providing notice of the status of the mortgage. An Official Form has been proposed for this purpose. The mortgage lender would then have to respond (subdivision (g)), again by using an Official Form to provide the required information. If the claim holder failed to respond, a party in interest could seek an order compelling a response. A party in interest could also object to the response. If an objection was made, the court would determine the status of the mortgage claim.

Subdivisions (h)–(j) provide for an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure that would result in a binding order, and time periods for the trustee and claim holder to act would be lengthened. Under

subdivision (h), the trustee would begin the process by filing – within 45 days after the last plan payments was made – a motion to determine the status of the mortgage. Two Official Forms have been created for this purpose, one for cases in which the trustee made ongoing postpetition payments to the claim holder and one for cases in which the debtor made those payments directly to the claim holder. The claim holder would have to respond within 28 days after service of the motion, again using an Official Form to provide the required information (subdivision (i)). If the claim holder failed to respond, a party in interest could seek an order compelling a response. A party in interest could also object to the response. This process would end with a court order detailing the status of the mortgage (subdivision (j)). If the claim holder failed to respond to an order compelling a response, the court could enter an order stating that the debtor was current on the mortgage. If there was a response and no objection to it was made, the order could accept as accurate the amounts stated in the response. If there was both a response and an objection, the court would determine the status of the mortgage. Subdivision (j)(4) specifies the contents of the order.

Subdivision (k) was previously subdivision (i) and is the sanctions provision. The provision would be amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes were also made.

Judge Dow opened the floor to comments from the Advisory Committee.

Deb Miller said that the mortgage holders were part of the group making these recommendations through NACTT and will not be surprised by the changes.

Judge Hoffman asked about the impact of the proposed rule on districts that have tremendous chapter 13 dockets, and whether those judges have had input. Deb Miller said that the motion described in the rule will probably not trigger an actual hearing on most cases, so it will not take a lot of court time. Although there may be an opportunity for a motion to compel, most parties will be satisfied with an order that the debtor is current.

Judge McEwen asked about the midterm report. What happens if the servicer does not respond? Does failure to respond to the midcase notice merely preclude them from bringing up evidence on something they should have revealed later in the case? Professor Gibson said that is correct, and perhaps the court could sanction the servicer for not responding if it wished to do so.

Judge McEwen also expressed concern about fees, and how to make sure the fees are reasonable. Deb Miller says that her office objects to fees under Section 330 of the Code. The amended rule did not change much with respect to fees and charges for that reason. Tara Twomey also said that the rule was not trying to change the underlying contractual provisions

relating to fees and charges. Judge Dow said that the court has authorization to consider reasonableness if the underlying contract required the fees and charges to be reasonable. Judge McEwen said she thought the court had inherent power to judge the reasonableness of the fees. Professor Gibson said that the fee language has not been changed from the existing rule.

Professor Gibson said that the style consultants have extensive comments on the rule, and the subcommittee will have to deal with those before this rule goes to the Standing Committee.

The Advisory Committee approved inserting the words “and served” in lines 38 and 61.

Judge Dow asked whether the midcase review should indeed be mandatory. Judge Connelly said the advantage of not being mandatory would provide for the new provisions to be tested. If it is mandatory, how is it enforced? Deb Miller said that the US trustee will enforce it.

Judge Dow concluded that it is time to see what others think of the proposal by publishing it and then deal with the comments.

The Advisory Committee approved amended Rule 3002.1, subject to further stylistic changes approved by the Subcommittee, and recommended it to the Standing Committee for publication.

**(B) *Review Comments on Rule 3002 regarding Suggestion 19-BK-F***

Professor Bartell provided the report. Proposed amendments to Rule 3002 (Filing Proof of Claim or Interest) were published in August 2020. The amendments would make uniform the standard for seeking bar date extensions between domestic and foreign creditors. There were no comments on the proposed amendments.

The Advisory Committee approved the amended rule and recommended it to the Standing Committee for final approval.

**(C) *Consideration of City of Chicago v. Fulton, 141 S. Ct. 585, and Suggestions 21-BK-B and 21-BK-C for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceedings***

Professor Gibson provided the report. On Jan. 14, 2021, the Supreme Court decided in *City of Chicago v. Fulton*, 141 S. Ct. 585, that a creditor’s continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). The Court concluded that a contrary reading would render largely superfluous the provisions of § 542(a) providing for turnover of property of the estate. In a concurring opinion Justice

Sotomayor noted that turnover proceedings “can be quite slow” because they must be pursued by adversary proceedings, *id.* at 594, and stated that “[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors’ requests for turnover under § 542(a), especially where debtors’ vehicles are concerned.” *Id.* at 595.

Since the decision in *Fulton*, we received suggestion 21-BK-B from 45 law professors for rules amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding for all chapters and all types of property. Another suggestion, 21-BK-C, submitted by three of those law professors proposed amended language from that offered in the original suggestion.

The Subcommittee began considering these suggestions during its Feb. 19, 2021 meeting and seeks input from the Advisory Committee on three issues. First, is any change needed to the existing turnover procedure under Rule 7001(1) requiring an adversary proceeding? The Subcommittee was inclined to believe an amendment would be appropriate. Second, if so, should an amendment to Rule 7001(1) apply to all types of property and all types of debtors, or should it be more limited? The Subcommittee tended to think the amendment should be more limited, but had no recommendation on whether it should be limited to certain types of property (e.g., cars, property necessary for an effective reorganization, tangible personal property, or some other characterization) or certain bankruptcy chapters (e.g., chapters 11, 12, and 13), or certain types of debtors (e.g., consumers), or property having a certain value (small v. large).

Because a number of bankruptcy courts already allow turnover by motion in certain situations, the Subcommittee asked Ken Gardner to solicit information about local practices from court clerks, and Deb Miller sought information from chapter 13 trustees. A number of respondents favor a national rule on this issue.

David Skeel said that coming up with a narrowing principle is very difficult. Therefore, there should probably be a broad change or no change. Judge Dow noted that the ABI Consumer Bankruptcy Commission proposed a different time period for chapter 13 as opposed to other bankruptcy cases and therefore endorsed a narrowing principle. Judge Dow said he was not persuaded of the need to extend the procedure to non-chapter 13 cases.

Ramona Elliott said that the government was concerned about extending turnover by motion to all types of property, like cash held by the government. There does not seem to be a need to go beyond tangible property, or consumer cases. There are also due process issues. The government really cannot deal with the turnover motion on seven days’ notice.

David Hubbert agreed with Ramona Elliott. If a new rule is limited to § 542(a), that eliminates a lot of concerns the government may have. There are a myriad of statutes under which the government may be holding payments. He thinks this should apply only to tangible assets in chapter 13 cases.

Judge Dow said that it seems the Advisory Committee supports a rule, limited to chapter 13 and tangible property. Judge McEwen suggested limiting it to personal property that is used for personal, family or household purposes. Judge Dow said perhaps it should be personal property necessary for an effective reorganization. Judge Ambro suggested sending it back to let the Subcommittee craft a proposal. Judge McEwen wants to eliminate § 542(b) from the equation. Ramona Elliott asks how far we should go beyond the situation in *Fulton*.

The Subcommittee will be reviewing any local rules, but a lot of courts have not yet acted but are contemplating local rules in the wake of *Fulton*.

Judge McEwen would include chapter 7 cases because of the exemption issue. She would also not limit it to cars.

Judge Dow said that the Subcommittee is not bound by the suggested rule proposed by the law professors, but it can be used as a starting point.

## 8. Report by the Forms Subcommittee

### (A) *Review comments on SBRA Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A*

Professor Gibson provided the report. The new and amended forms promulgated in response to the enactment of the Small Business Reorganization Act (“SBRA”) took effect on Feb. 19, 2020. Although publication was not required, the Advisory Committee chose to publish the forms for comment last August, along with the SBRA rule amendments. One additional amended form was published, Official Form 122B (Chapter 11 Statement of Your Current Monthly Income) in order to correct an instruction at the beginning of the form.

No comments were submitted on the SBRA forms in response to publication. The Advisory Committee gave final approval to Official Form 122B and made no changes to the other Official Forms that are already in effect.

Ramona Elliott noted that we do not have a form for an individual subchapter V debtor like Official Form 122B. This may be something the Subcommittee should consider. Judge McEwen pointed out that Form 122C-2 is not required for a chapter 13 debtor who is under

median and whose expenses are measured with reference to the same statutory limits (in 1325(b)) as those stated in 1191(d).

**(B) Consider forms to implement proposed amendments to Rule 3002.1**

Professor Gibson provided the report. The Consumer Subcommittee recommended for publication amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). The amended rule provides for new Official Forms. The five new forms do the following:

(1) Form 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim) – used by the trustee to provide the notice required by amended Rule 3002.1(f)

(2) Form 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim) – used by the claim holder to indicate whether it agrees with the trustee's statements about the status of the mortgage claim under amended Rule 3002.1(g)(1)

(3) Form 410C13-10C (Motion to Determine the Status of the Mortgage Claim) – used by the trustee who made ongoing postpetition mortgage payments in a conduit district at the end of a chapter 13 case under amended Rule 3002.1(h)

(4) Form 410C13-10NC (Motion to Determine the Status of the Mortgage Claim) – used by the trustee if ongoing postpetition mortgage payments were made by the debtor in a nonconduit district at the end of a chapter 13 case under amended Rule 3002.1(h)

(5) Form 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim) – used by the claim holder to indicate whether it agreed with the trustee's statements about the status of the mortgage claim under amended Rule 3002.1(i)(1) and (2)

Judge Dow suggested that in Form 410C13-1R, Part III, it should say “as of the date of the Trustee's Notice” instead of “as of the Trustee's Notice.” And in the signature block, the word “Trustee” should be eliminated. He also suggested that, on Form 410C13-10R, paragraphs 2, 3 and 4 need headings.

The Advisory Committee approved the proposed forms with the proposed amendments and directed they be submitted to the Standing Committee for publication.

**(C) Consider Suggestions 20-BK-I from Judge Callaway and 21-BK-A from Judge Surratt-States concerning Official Form 101, line 4**



Professor Bartell provided the report. The Advisory Committee received suggestions from two different bankruptcy judges suggesting that consumer debtors are confused by Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy), Part 1, line 4, which asks the debtor to list “any business names and Employer Identification Numbers you have used in the last 8 years.” Both judges have reported that consumer debtors are listing the names of limited liability companies or corporations through which the debtors have conducted business in the past 8 years, not realizing that the question seeks only names that the debtor individually has used during that period. Because the debtors list those LLC and corporate names, those names appear as names of additional debtors on the notice of bankruptcy on the applicable version of Form 309 even though those LLCs and corporations have not filed for bankruptcy protection.

The proposed amendment to Form 101 eliminates the portion of line 4 that asks for any business names the debtor has used in the last 8 years, and instead asks for additional similar information in Question 2, which is consistent with the treatment of that information in Form 105, 201, and 205. There is also new language in the margin of Form 101, Part 1, Question 2, directing the debtor NOT to insert the names of LLCs, corporations or partnerships that are not filing for bankruptcy.

The Advisory Committee approved the amended form and recommended it be submitted to the Standing Committee for publication.

**(D) *Consider Suggestion 21-BK-E from Judge Dore***

Professor Bartell provided the report. Bankruptcy Judge Timothy W. Dore of the W.D. Wash. suggested that the language in line 7 of Official Form 309E1 (Notice of Chapter 11 Bankruptcy Case for Individuals or Joint Debtors) (line 8 in Official Form 309E2 (Notice of Chapter 11 Bankruptcy Case for Individuals or Joint Debtors under Subchapter V)) is not clear about when the deadline is for objecting to discharge, as opposed to seeking to have a debt excepted from discharge. The Subcommittee agreed, and recommends amended forms for approval and publication.

The Advisory Committee decided to change the line that says “the court will send you notice of that date later” to add the words “or its designee” after “the court.”

The Advisory Committee approved the amended forms with the additional amendments and recommended them to be submitted to the Standing Committee for publication.

**9. Report by Technology and Cross Border Insolvency Subcommittee**

Professor Gibson presented the report. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management (“CACM”), submitted a suggestion based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM “requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules.” That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ’s opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig’s letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in pursuing the issues. The matter was assigned to this Subcommittee.

The use of electronic signatures by debtors and others without a CM/ECF account is a matter that the Advisory Committee spent several years considering (2012-2014), only to abandon the proposed rule after reviewing the comments received following publication, in large part because of opposition from the Department of Justice. The Subcommittee identified several questions that should be addressed in considering whether to pursue a new e-signature rule:

- (1) is there a problem that needs fixing?
- (2) what is the Department of Justice’s current view regarding the use of e-signatures by debtors without retention of documents with wet signatures?
- (3) what e-signature products are available, and what safeguards to assure authenticity do they possess?
- (4) should a new e-signature rule specify needed safeguards for e-signatures or just refer to standards to be developed by the Administrative Office of the Courts?
- (5) rather than creating a new rule for e-signatures, can debtors and pro se litigants be given CM/ECF accounts so that they come within Rule 5005(a)(2)(C)’s provision for e-signatures?

The Subcommittee is being assisted in gathering information by Drs. Molly Johnson and Ken Lee of the Federal Judicial Center, and Nicole Eallonardo, a staff member in the District

Court for the Northern District of New York who is a member of the subgroup of the COVID-19 Judiciary Task Force that is focusing on using virtual technology for court proceedings and other meetings with detainees.

The Subcommittee intends to seek input from such groups as court clerks, the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter Thirteen Trustees, and the National Association of Bankruptcy Trustees. The Department of Justice will be seeking input from U.S. trustees, U.S. attorneys, and the FBI. The Subcommittee also plans to gather information about e-signature products currently on the market, as well as procedures used by bankruptcy courts that allow electronic filing by pro se debtors.

Molly Johnson said that the FJC has begun a survey of courts about what procedures they have put in place, especially during the pandemic, an update of the FJC's prior investigation. They will be trying to get a group sense of whether the rules should be changed.

Dave Hubbert is surveying the prosecutors on how the issue has been addressed, to see if the Department's position has changed since the last inquiry. Law enforcement agencies are distinguishing between digital signatures that have authenticated identity v. electronic signatures.

Professor Gibson asked whether there are any issues that should be explored or resources the Subcommittee should pursue that have not been described. Tara Twomey suggested that pro se litigants are not going to be able to use digital signatures with authenticated identity. That means there has to be a balance. Ken Gardner said that it would be a burden to teach all pro se litigants to use CM/ECF. If electronic signatures are too complicated, they will not be useful.

Judge Connelly suggested that signatures are always verified at the 341 meeting, whether the debtors are pro se or not. Therefore, why should we require something more onerous for a pro se litigant than one prepared with a petition preparer? Ken Gardner said that petition preparers do not use electronic filing, so there is a wet signature. Judge Dow said that the problem is a bigger one than merely the signatures on the petition. Scott Myers said the consumer bar thinks it is easier to work with clients if they can apply the electronic signature after the petition is finalized with last minute changes, and when the client cannot meet in person with the lawyers. Judge Dow pointed out that electronic signatures are used in tax filings and other contexts, and there is no reason they should not be used in bankruptcy filings. Although the 341 meeting can take care of the signature on the petition, subsequent documents will never be examined for the signature.

Judge Bates says it is a very complicated issue in bankruptcy. But it can impact other advisory committees as well. Has there been any outreach to other committees? Professor

Gibson said that it has not happened yet because there is nothing concrete to show them. Judge Bates suggested that the FJC might want to look beyond bankruptcy.

Judge McEwen said that we should make use of current technology, even if some cannot use it. Eventually people will catch up. Bankruptcy should not be the “dinosaur.” Judge Donald agreed.

Dave Hubbert noted that there is a statute that governs the filing of tax returns. They will look at other statutes governing filings with governmental agencies.

Tara Twomey suggested looking at eSign, and the commercial world for guidance going forward.

## 10. Report by the Restyling Subcommittee

### (A) *Consider comments on, and recommendation for final approval of, the 1000 and 2000 series of Restyled Rules*

Judge Melvin Hoffman, member of the Subcommittee, and Professor Bartell provided the report.

The first two parts of the Restyled Bankruptcy Rules, Parts I and II, were published for comments in August 2020. The Advisory Committee received extensive comments from the National Bankruptcy Conference, each of which was considered, shared with the style consultants, and either incorporated or rejected, as discussed in the memo included in the agenda book.

Judge McEwen asked about the capitalization issue, and Professor Bartell and Judge Goldgar explained how the style consultants have the final word on matters of style.

The Advisory Committee gave final approval to Parts I and II of the Restyled Bankruptcy Rules and recommended them to the Standing Committee for final approval, with the suggestion that they not be submitted to the Judicial Conference until all other parts of the Bankruptcy Rules have been restyled, published, and given final approval.

### (B) *Consider recommendation to publish the 3000 through 6000 series of Restyled Rules*

Professor Bartell provided the report. The Restyling Subcommittee has completed its work on the restyled versions of the next four parts of the Bankruptcy Rules, Parts III, IV, V and VI and presents them to the Advisory Committee for approval for publication.

The Advisory Committee approved the Restyled Rules in Parts III, IV, V and VI and recommended them to the Standing Committee for publication.

Judge Bates expressed his congratulations to the Restyling Subcommittee and the style consultants for their work on this project.

## 11. Information Items

***(A) By an email vote closing February 3, 2021, with all members voting in favor, the Advisory Committee recommended Director’s Form 4100S to address provisions of the Consolidated Appropriations Act of 2021.***

Professor Gibson provided the report. The Consolidated Appropriations Act of 2021 (“CAA”) contains provisions that address the treatment of amounts that are deferred on Federally backed mortgage claims under the CARES Act. The CAA allows an eligible creditor to file a supplemental proof a claim for a CARES Act forbearance claim in a chapter 13 case. Director’s Form 4100S is a new proof of claim form for these CARES Act forbearance claims. The applicable provisions of the CAA are scheduled to sunset one year from the date of enactment, on Dec. 27, 2021. Therefore the Forms Subcommittee concluded that a Director’s Form was the best means of providing a form that could be easily adjusted and withdrawn while the CAA provisions are in effect. The Advisory Committee approved the new form by email vote closing Feb. 3, 2021.

***(B) By an email vote closing January 28, 2021, with all members voting in favor, the Advisory committee recommended Interim Rule 4001(c) for distribution to the courts to be adopted as a local rule if and after the Administrator of the Small Business Association takes certain actions authorized under the Consolidated Appropriations Act of 2021***

Professor Bartell provided the report. The Consolidated Appropriations Act of 2021 included a provision amending Section 364 of the Code to provide for certain loans under the Small Business Act, and to specify that the court hold a hearing on such a loan within 7 days after the filing and service of a motion to obtain such a loan. The CAA also states that the court may grant final relief at such a hearing “notwithstanding the Federal Rules of Bankruptcy Procedure.” This provision of the CAA is to take effect on the date on which the Administrator of the Small Business Administration submits to the Director of the Executive Office of the United States Trustees a written determination that certain debtors in possession or trustees

would be eligible for the specified loans. If that determination were submitted, amendments to Rule 4001(c)(2) (dealing with hearings on motions to obtain credit) would be necessary to reflect the new CAA directions. As it was not clear when the Administrator might submit that determination, the Advisory Committee approved by email vote an interim rule to be adopted as a local rule if and after that declaration is submitted.

Ramona Elliott said that the Administrator of the SBA has the matter under consideration. The SBA posted updated information FAQs about what it means to be involved in a bankruptcy case for purposes of PPP loans, and allows reorganized debtors to apply for PPP loans.

12. **Future meetings**

The fall 2021 meeting has been scheduled for September 14, 2021.

11. **New Business**

There was no new business.

12. **Adjournment**

The meeting was adjourned at 3:25 p.m.

## Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Business Subcommittee.

A. Recommendation of no action regarding Suggestion 21-BK-D from former member Thomas Mayer concerning Rule 3007(c)-(e) (Professor Bartell).

2. Consumer Subcommittee.

A. Recommendation of no action regarding Suggestion 20-BK-I from Judge Calloway for an amendment to Rule 3001(c) to require last transaction information for claims that may have a statute of limitations defense (Professor Bartell).

3. Forms Subcommittee.

A. Recommendation of no action regarding Suggestion 20-BK-H from Trustee Aguilar to include a question on official Form 410 requiring the filing creditor to assert whether it believes its claim is protected by the anti-modification provisions of 11 U.S.C. § 1325(a), and to include instructions on how to compute the secured amount of such a claim (Professor Bartell).

# TAB 5



# TAB 5A

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE  
APPELLATE RULES

DENNIS R. DOW  
BANKRUPTCY RULES

ROBERT M. DOW, JR.  
CIVIL RULES

RAYMOND M. KETHLEDGE  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Robert M. Dow, Jr., Chair  
Advisory Committee on Civil Rules

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

**DATE:** May 21, 2021

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1 *Introduction*

2 The Civil Rules Advisory Committee met on a teleconference platform that included public  
3 access on April 23, 2021. Draft minutes of the meeting are attached.

4 Part I of this report presents three items for action. The first recommends approval for  
5 adoption of Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g).  
6 The second recommends approval for adoption of an amendment of Rule 12(a)(4). The third  
7 recommends approval for publication of a new Rule 87, as reported with the joint report on  
8 emergency rules for the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

9 Part II of this report provides information about ongoing subcommittee projects. The MDL  
10 Subcommittee is actively exploring a draft rule that would establish provisions similar to the class  
11 action provisions that address the court's role in settlement, and appointment and compensation of

12 lead counsel, as well as alternatives that would simply focus attention on these issues by the court  
13 and the parties. The Discovery Subcommittee is preparing to study suggestions that amendments  
14 should be made to Rule 26(b)(5)(A) on what have come to be called “privilege logs,” and to create  
15 a new rule to address standards and procedures for sealing matters filed with the court. The work  
16 of these two subcommittees is described in parts IIA and IIB. There is no need for further  
17 description of the work of two other subcommittees. A joint subcommittee with the Appellate  
18 Rules Committee has explored possible amendments to address the effects of Rule 42  
19 consolidation in determining when a judgment becomes final for purposes of appeal. That work is  
20 quiet for the moment, and it may be appropriate to consider dissolving the subcommittee. Another  
21 joint subcommittee continues to consider the time when the last day for electronic filing ends.  
22 Work to support further deliberations continues, but it may be some time before enough  
23 information has been gathered to support renewed deliberations.

24 Part III describes continuing work on two topics carried forward on the agenda for further  
25 study. One reflects a series of proposals that seek a rule to establish uniform national standards to  
26 qualify for *in forma pauperis* status and prescribe the information that must be provided to support  
27 the determination. A second is Rule 12(a), which seems to recognize that a statute may alter the  
28 time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by  
29 Rule 12(a)(2) or (3). This proposal remains on the agenda after failing of adoption by an even vote  
30 at the October 2020 meeting and in light of additional relevant information received just prior to  
31 the April 2021 meeting.

32 Part III omits two other topics carried forward on the agenda but not discussed at this  
33 meeting. One arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure for  
34 ordering a United States marshal to serve process in an *in forma pauperis* or seaman case. Another  
35 is the Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties.

36 Part IV describes a new item that is being carried forward for further work. This item is a  
37 proposal to amend the Rule 9(b) provisions for pleading malice, intent, knowledge, and other  
38 conditions of a person’s mind. The amendment would supplant the Supreme Court’s interpretation  
39 of this rule in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2000).

40 Part V describes five proposals that are not being pursued further. One addressed the fit  
41 between the provisions in Rule 4(f)(1) and (2) for service abroad under an international convention.  
42 A second asked why Rule 65(e)(2) refers only to preliminary injunctions in statutory interpleader  
43 actions, but not to permanent injunctions. The third, suggested by a pro se litigant, sought extra  
44 time for post-judgment motions when the clerk serves notice of entry of judgment by mail, and  
45 also addition to Rule 60(c)(1) of a cross-reference to the provision of Appellate Rule 4(a)(4)(a)(vi)  
46 that governs the effect of a Rule 60(b) motion on appeal time. Two others, removed from the  
47 agenda on recommendation of the Discovery Subcommittee, would address attorney fees as  
48 sanctions for failure to preserve electronically stored information, and create a new independent  
49 action to preserve testimony.

50 **I. Action Items**

51 **A. Social Security Rules (for Final Approval)**

52 The Rules. The Advisory Committee recommends adoption of the proposed Supplemental  
53 Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) that were published for  
54 comment in August 2020. The proposed Supplemental Rules and a summary of public comments  
55 are included in the appendix to this report.

56 As compared to many published proposals to amend one of the general Civil Rules, there  
57 were only a modest number of comments, and only two witnesses at a single hearing. Most of the  
58 comments and testimony reiterated themes made familiar during the conferences held by the Social  
59 Security Review Subcommittee and in its many exchanges with interested organizations and  
60 practitioners through the formal conferences and less formal exchanges. Those who participated  
61 included the Administrative Conference of the United States, which initially proposed that special  
62 social security rules be adopted; the Social Security Administration (SSA); the National  
63 Organization of Social Security Claimants' Representatives; the American Association for Justice;  
64 federal district judges and magistrate judges; individual claimants' attorneys; and academics,  
65 including one of the coauthors of the exhaustive survey of current practices that stimulated the  
66 Administrative Conference to propose new rules. Two changes were made in the published rules  
67 texts, as noted below. Summaries of the comments and testimony are attached.

68 Much of what emerged from the comments and testimony was anticipated in discussion at  
69 the Standing Committee meeting on June 23, 2020, that approved publication. There is widespread,  
70 essentially universal agreement that the rules themselves establish an effective and nationally  
71 uniform procedure for these cases. They are appeals on an administrative record, little suited for  
72 disposition under civil rules designed for cases that are shaped for trial through motions to dismiss,  
73 scheduling orders, discovery, motions for summary judgment, and occasionally for actual trial on  
74 the merits. The extensive and painstaking work that developed these rules has produced a  
75 procedure as good as can be developed.

76 This approval of the rules themselves led to widespread support for their adoption. District  
77 judges and the Federal Magistrate Judges Association support adoption, including the chief judges  
78 of two districts that are among the three districts that entertain the greatest number of social  
79 security review actions. These two districts already follow local procedures similar to the proposed  
80 national rules, as do several others that have become dissatisfied with attempts to provide an  
81 efficient review procedure under the general civil rules. Support is provided by other organizations,  
82 including vigorous support grounded on the belief that these rules will be a great help to pro se  
83 claimants.

84 Despite agreement on the quality of the proposed rules, some opposition remains.  
85 Claimants' representatives are comfortable with the widely diverse range of practices they  
86 confront now. Even those who practice across two or more districts say they can comfortably  
87 conform to local differences. They think there is no pressing need to establish a uniform national  
88 practice. And they fear that judges who now provide efficient review under accustomed local

89 procedures will not be as efficient if forced to conform to a different national procedure. Some  
90 also predict that the effort to achieve uniformity will be thwarted by the insistence of some judges  
91 on adhering to their own preferred practices.

92 A distinctive ground of opposition has been offered by the Department of Justice. Although  
93 the Department has promoted adoption of a model local rule drawn along lines proposed by earlier  
94 drafts of the supplemental rules, it fears that adopting a set of supplemental rules for these cases  
95 will encourage efforts to promote distinctive rules for other substantive areas and for purposes less  
96 aligned with the public interest. That concern ties to the broader questions about adopting  
97 transsubstantive rules that are discussed below.

98 Given the general agreement that the proposed rules are well suited to the task, they can be  
99 summarized briefly.

100 Supplemental Rule 1(a) defines the scope of the rules. They apply to § 405(g) actions  
101 brought against the Commissioner of Social Security for review on the administrative record of an  
102 individual claim. More complicated actions are governed only by the general Civil Rules.  
103 Supplemental Rule 1(b) confirms that the general Civil Rules also apply, “except to the extent that  
104 they are inconsistent with these rules.”

105 Supplemental Rule 2(a) provides for commencing the action by filing a complaint.  
106 Supplemental Rule 2(b)(1) provides the elements that must be stated in the complaint: identifying  
107 the action as a § 405(g) action and the final decision to be reviewed, the person for whom benefits  
108 are claimed, the person on whose wage record benefits are claimed, and the type of benefits  
109 claimed. Subdivisions (b)(1)(B) and (C) are one of the parts of the rules modified in response to  
110 public comment and testimony. As published, they required that the complaint include the last four  
111 digits of the social security number of the person for whom, and the person on whose wage record,  
112 benefits are claimed. This feature drew steady fire during the period leading up to publication and  
113 after publication, but was retained because the SSA maintained that it resolves so many claims that  
114 often it could not identify the administrative proceeding and record by name alone. The comments  
115 and testimony revealed that the SSA is in the process of implementing a practice of assigning a  
116 unique 13-character alphanumeric identification, now called the Beneficiary Notice Control  
117 Number, for each notice it sends. This process is expected to be adopted for all proceedings by the  
118 time the Supplemental Rules could become effective. The amended rule text requires the plaintiff  
119 to “includ[e] any identifying designation provided by the Commissioner with the final decision.”  
120 The final part of Supplemental Rule 2, subdivision (b)(2), permits – but does not require – the  
121 plaintiff to add a short and plain statement of the grounds for relief. One of the reasons this  
122 provision is supported by claimants’ representatives is that it can be used to inform the SSA of  
123 reasons that may lead it to request a voluntary remand.

124 Supplemental Rule 3 dispenses with service of summons and complaint under Civil Rule 4.  
125 Instead, the court is directed to notify the Commissioner of the action by transmitting a notice of  
126 electronic filing to the appropriate the SSA office and to the United States Attorney for the district.  
127 This rule is modeled on practices established in a few districts. It has been welcomed on all sides.

128 Supplemental Rule 4(a) and (b) set the time to answer and provide that the answer may be  
129 limited to a certified copy of the administrative record and any affirmative defenses under Civil  
130 Rule 8(c). “Civil Rule 8(b) does not apply,” leaving the Commissioner free to decide whether to  
131 respond to the allegations in the complaint. Claimants’ representatives would prefer that Rule 8(b)  
132 apply, but framing the dispute through the briefs is more in keeping with the appellate nature of  
133 these actions. Supplemental Rule 4(c) and (d) address motions, incorporating Civil Rule 12 as a  
134 convenient cross-reference for the parties.

135 Supplemental Rule 5 is the heart of the new procedure. “The action is presented for decision  
136 by the parties’ briefs,” which must support assertions of fact by citations to particular parts of the  
137 record. Briefs establish a suitable procedure for appellate review on a closed administrative record.

138 Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days  
139 for the plaintiff’s brief, 30 days for the Commissioner’s brief, and 14 days for a reply brief by the  
140 plaintiff. Supplemental Rule 6 includes the other change made in response to a comment,  
141 incorporating language making it clear that the 30 days for the plaintiff’s brief run from entry of  
142 an order disposing of the last remaining motion filed under Rule 4(c) if that is later than 30 days  
143 from filing the answer. From the beginning, these periods have been challenged as too short.  
144 Administrative records are long, and plaintiffs’ attorneys often practice in small firms without the  
145 resources to manage occasional excessive workloads. The SSA attorneys also may be  
146 overburdened. Experience in courts that set similarly tight times for briefs shows that extensions  
147 are regularly requested and routinely granted. Why not, it is urged, set the periods at 60 days, 60  
148 days, and 21 days? The Advisory Committee has resisted these arguments, believing that shorter  
149 times can be met in many cases, and that setting them in the rule will encourage prompt briefing,  
150 and perhaps prompt decision. Claimants commonly have had to engage with the administrative  
151 process for at least a few years, and often are in urgent need of benefits. The Civil Rule 6(b)(1)  
152 authority to extend time remains available.

153 Transsubstantivity Widespread agreement that the Supplemental Rules establish a strong,  
154 sensible, and nationally uniform procedure for resolving appeals on the administrative record  
155 moves the question to concerns about adopting rules for a specific substantive subject. These  
156 concerns have accompanied the project from the beginning. They were discussed during the June  
157 23, 2020, Standing Committee meeting that approved publication. The discussion is summarized  
158 at pages 20-22 of the meeting minutes, pages 48-50 of the agenda materials for the January 5, 2021  
159 meeting. The discussion was valuable, but the vote to approve publication was not intended to  
160 conclude the matter. “Transsubstantivity” remains to be considered as the only ground for  
161 reluctance to recommend the rules for adoption.

162 The discussion last June, and at earlier meetings, has made the issues familiar. The  
163 theoretical issues may be summarized first, followed by an evaluation of the more pragmatic and  
164 more difficult issues.

165 The theoretical issue is regularly framed around the word in the Rules Enabling Act, 28  
166 U.S.C. § 2072(a), that authorizes the Supreme Court to prescribe “general” rules of practice and  
167 procedure. It is common ground that the Civil Rules must be general in the sense that they apply

168 to all district courts. At the same time, multiple familiar examples demonstrate the adoption of  
169 rules that address specific subject matter. Rule 71.1(a) directs that “These rules govern proceedings  
170 to condemn real and personal property by eminent domain, except as this rule provides otherwise.”  
171 Rule A(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture  
172 Actions directs that “The Federal Rules of Civil Procedure also apply \* \* \* except to the extent  
173 that they are inconsistent with these Supplemental Rules.” Rule G of those rules, adopted at the  
174 urgent request of the Department of Justice, focuses only on “a forfeiture action in rem arising  
175 under a federal statute.” Special rules have been adopted for § 2254 proceedings, and for § 2255  
176 proceedings as well; each of those sets of rules concludes with a similar Rule 12, applying the  
177 Civil Rules – and for the § 2255 rules the Criminal Rules as well – “to the extent that they are not  
178 inconsistent with any statutory provisions or these rules.” Civil Rule 65(f) provides a much more  
179 focused example: “This rule applies to copyright impoundment proceedings.” The 2001 committee  
180 note explains that this rule was adopted in tandem with “abrogation of the antiquated Copyright  
181 Rules of Practice for proceedings under the 1909 Copyright Act.” An even more modest  
182 illustration is provided by Appellate Rule 15.1, which supplements the general Appellate Rule 15  
183 procedures for petitions to review agency orders by setting the order of briefing and argument in  
184 an enforcement or review proceeding that involves the National Labor Relations Board. The 1986  
185 committee note explains that the rule “simply confirms the existing practice in most circuits.”

186           These examples provide powerful support for the proposition that rules aimed at a specific  
187 subject matter come within the authority to prescribe “general” rules of practice and procedure.

188           Powerful support also exists in the pragmatic grounds for adopting the Supplemental Rules  
189 for Review of Social Security Decisions under 42 U.S.C. § 405(g). They began, not with a  
190 suggestion advanced to promote private interests, however worthy, but with a suggestion advanced  
191 by the United States Administrative Conference and based on a comprehensive survey performed  
192 by two prominent law professors that showed wide and often deep differences in practice in  
193 different districts. This suggestion, advanced to promote a view of the public interest formed by a  
194 body deeply immersed in the relationships between administrative agencies and the courts, has  
195 been enthusiastically embraced by the Social Security Administration, support that has been  
196 strongly maintained even as the drafting process continually whittled away more detailed versions  
197 proposed by the Administration.

198           The opportunity to improve the procedures for review in these actions is particularly  
199 attractive because they are brought in great numbers. For several years, the annual average has run  
200 from 17,000 to 18,000 review actions, and more recently has surpassed 19,000 actions. Much can  
201 be gained by a nationally uniform and good procedure adapted to the needs of appeals to the district  
202 courts that raise only questions of law and review for substantial evidence to support the  
203 Commissioner’s final decision. As noted earlier, the district judges and magistrate judges who  
204 explored and commented on these rules became strong supporters.

205           The initial drafting stages considered the possibility of moving away from this specific  
206 subject matter to draft a more general rule for actions brought in a district court for review of other  
207 kinds of administrative action. The possibility was put aside. A major problem is presented by the  
208 wide variety of actions that challenge administrative action. Some prove, either in theory or in

209 application, to be equally pure examples of review on a closed administrative record. Others,  
210 however, provide reasons to resort to ordinary civil procedure, including discovery and perhaps  
211 summary judgment. And it likely would prove difficult to establish an appropriate scope for any  
212 such rule, drawing lines to exclude actions aimed at executive actions that follow procedures  
213 perhaps more, and perhaps less, like administrative procedure. Even if a workable scope provision  
214 could be adopted, developing a suitable procedure for all these actions would be truly difficult.  
215 Nor is there any reason to suppose that the total number of actions that might be reached would  
216 approach the number of social security review actions.

217 Several concerns have been advanced to counter these favorable considerations, drawing  
218 not from these specific rules but from more general issues that surround subject-specific rules.  
219 They deserve consideration, even if they do not prove persuasive.

220 One concern is that subject-specific rules may favor plaintiffs or defendants on a regular  
221 basis. The social security rules were developed in close consultation with claimants'  
222 representatives as well as with the SSA. Many proposals by the SSA were rejected, and many  
223 suggestions by claimants were adopted. Comments and testimony after publication recognize these  
224 elements of neutrality. The rules, as a whole, are designed to advance alike the interests of  
225 claimants, the SSA, and the courts. They offer no sound ground even for a perception that they  
226 favor the SSA, despite some lingering protests on that score, including a perception that the rules  
227 are designed to reduce burdens on the SSA staff attorneys as they work to comply with different  
228 local procedures.

229 Another concern is that subject-specific rules can be developed only on the basis of deep  
230 familiarity with the realities of litigating the subject. That is a serious concern. The years of work  
231 undertaken by the subcommittee in collaboration with experts on all sides of social security review  
232 appeals, however, have supported development of rules that all agree are well shaped for these  
233 actions.

234 Perhaps the most serious concern might be described as the weakened levee concern. The  
235 fear is that adding one more substance-specific set of rules to those that have already been adopted  
236 will undercut resistance to self-interested pleas and pressure to develop still more substance-  
237 specific rules. Little optimism is needed to predict that the several entities engaged in the Rules  
238 Enabling Act process will resist such pressures, supporting subject-specific rules only when  
239 strongly justified. There may be better reason to fear that advocates in Congress will argue that  
240 their favorite procedures can be adopted because the Supreme Court has prescribed other subject-  
241 specific rules and Congress has accepted them. That fear must be considered, but it should not  
242 deter adoption of good rules that will improve litigation practices, and at times improve outcomes,  
243 to the benefit of claimants, the SSA, and the courts themselves.

244 The draft minutes of the April 23, 2021, Civil Rules Committee meeting describe the  
245 deliberations that led the Advisory Committee to recommend adoption, with one member  
246 abstaining because absent from the meeting up to the moment of the vote, and over the dissent of  
247 the Department of Justice based on the fear of reducing the ability to resist pressures to adopt other  
248 and less well executed and designed substance-specific rules. The Advisory Committee has



249 debated the Department’s concern repeatedly during the years-long development of these rules.  
250 The concern has been recognized as valid, but the conclusion is that these Supplemental Rules  
251 serve party-neutral and important purposes so well that they should be adopted.

252 **B. Rule 12(a)(4) (for Final Approval)**

253 The Advisory Committee recommends for adoption the proposal to amend  
254 Rule 12(a)(4)(A) that was published last August. The proposed rule and a summary of public  
255 comments are included in the appendix to this report.

256 The proposed amendment was brought to the committee by the Department of Justice. It  
257 rests on experience with the difficulties the Department has encountered in one class of cases with  
258 the provision in Rule 12(a)(4)(A) that, unless the court sets a different time, directs that a  
259 responsive pleading must be served within 14 days after the court denies a motion under Rule 12  
260 or postpones its disposition until trial. These are cases brought against “a United States officer or  
261 employee sued in an individual capacity for an act or omission occurring in connection with duties  
262 performed on the United States’ behalf.” The Department often provides representation in such  
263 cases.

264 The difficulty in responding within 14 days rests in part on the need for more time than  
265 most litigants need, at times in deciding whether to provide representation, and more generally in  
266 providing representation. And the need is aggravated by an additional factor. The individual  
267 defendant often raises an official immunity defense. Denial of a motion to dismiss based on an  
268 official immunity defense can be appealed as a collateral order in many circumstances. Time is  
269 needed both to decide whether appeal is available and wise, and then to secure approval by the  
270 Solicitor General. Allowing 60 days is consistent with the recognition of similar needs in  
271 Rule 12(a)(3), which provides a 60-day time to answer in such cases, and in Appellate  
272 Rule 4(a)(1)(B)(iv), which sets appeal time at 60 days.

273 There were only three comments on the proposal. The New York City Bar supports it. The  
274 American Association for Justice and the NAACP Legal Defense Fund oppose it. The reasons for  
275 opposition reflect concern that plaintiffs in these actions often are involved in situations that call  
276 for significant police reforms, parallel concerns about established qualified immunity doctrine, the  
277 general issues arising from delay in resolving these actions, and the breadth of the proposal in  
278 applying to actions in which there is no immunity defense.

279 The proposed amendment was discussed at length. Doubts were expressed about the need  
280 for more time than 14 days, particularly when the motion to dismiss does not rely on an official  
281 immunity defense. This doubt in turn led to the suggestion that the amendment is overbroad – at  
282 most it should be limited to cases with an immunity defense. In turn, that led to a request for  
283 information on actual experience: In how many cases does a motion to dismiss raise an official  
284 immunity defense? How often does the Department consider an appeal from denial of the motion?  
285 How often does the Department request an extension of the present 14-day period to respond, and  
286 how often is the request denied?

287           These questions were met initially by framing the question as one of competing burdens:  
288           The court can set a different time, whether the rule sets it a 14 days or 60 days. Should the burden  
289           lie on the government to show reasons that justify an extension beyond 14 days, or on the plaintiff  
290           to show needs for speed that justify a restriction below 60 days? Or, in somewhat different terms,  
291           how likely is it that the court will deny a government motion to extend beyond 14 days?

292           The Department responded by emphasizing that it needs more than 14 days in cases that  
293           do not present the prospect of an immunity appeal as well as in cases that do. These needs were  
294           recognized in the 2000 amendment of Rule 12(a)(3) that set the time to answer in these individual-  
295           capacity cases at 60 days, and the 2011 amendment of Appellate Rule 4(a)(1)(B)(iv) that embraced  
296           the reasoning of the Rule 12(a)(3) amendment by bringing these cases into the 60-day appeal time  
297           provisions for actions in which the United States, its agency, or its officer sued in an official  
298           capacity is a party.

299           The need for 60 days is enhanced when there is a prospect of a collateral-order immunity  
300           appeal. Time is needed to decide whether an appeal is available within the sometimes murky  
301           contours of this corner of appeal doctrine, and whether it is wise to appeal even when appeal  
302           jurisdiction seems relatively clear. Once a determination to appeal is made, it must be approved  
303           by the Solicitor General, a careful process that takes time.

304           Nor is seeking an extension of the 14-day time to respond a sufficient safeguard. The  
305           motion must be filed quickly, and the Department must proceed with preparing a response until it  
306           knows whether an extension will be granted. In some cases it also has been forced to proceed  
307           toward the merits by a scheduling conference, or even the start of discovery.

308           The empirical questions were renewed. The Department recognized that it does not have  
309           clear data to quantify its actual experience. It believes that immunity defenses are raised in most  
310           of these cases, but cannot provide a count. Nor can it enumerate the frequency of motions to extend  
311           the 14-day period or how often they are denied. It can say that extensions are sometimes denied,  
312           and that sometimes it cannot even win a stay of discovery pending a decision whether to appeal.  
313           If a notice of appeal is filed, however, further proceedings are stayed.

314           These responses led to renewed suggestions that providing a 60-day response time in all  
315           these cases is too broad. At most, it  
316           should be available only in cases in which an immunity defense is raised.

317           The suggestion that only cases with an immunity defense should be provided extra time  
318           prompted renewal of the question where to allocate the burden of moving for a response time  
319           different from the time presumed by the rule. Motions to extend or reduce the time command the  
320           court's attention, commonly on an expedited basis. If government motions to extend are regularly  
321           granted, these are waste motions. Significant amounts of court time can be saved by setting the  
322           presumed time at 60 days.

323           A further complication arises when an action includes two or more defendants, and not all  
324           of them raise an immunity defense. Should there be a different time to respond when some are

325 represented by the government, while others are not? And there may be cases in which an  
326 immunity appeal cannot be taken because the motion to dismiss does not rest on the immunity  
327 defense or disposes of it on terms that do not appear to deny further pretrial consideration.

328 At the end of Advisory Committee discussion, a motion was made to limit the 60-day  
329 period to cases in which “a defense of immunity has been postponed to trial or denied.” The motion  
330 was defeated, six votes for and nine votes against.

331 A motion to recommend approval for adoption of the amendment as published passed, ten  
332 votes for and five votes against.

### 333 C. New Rule 87 (for Publication)

334 The Advisory Committee’s report on Rule 87 is included in the joint report recommending  
335 publication of proposed Appellate, Bankruptcy, Civil, and Criminal Rules that would authorize the  
336 Judicial Conference to declare rules emergencies.

337 Only one point is repeated here. The recommendation to publish draft Rule 87 for comment  
338 does not rest on an Advisory Committee conclusion, even provisional, that it will recommend  
339 adoption of any general rules emergency provision in the Civil Rules. The Advisory Committee  
340 has identified only a narrow range of Civil Rules that may be appropriate for revision in a rules  
341 emergency. If no more are identified by comments and testimony during the publication process,  
342 it may prove better to amend the regular rules or even to do nothing. The proposed Emergency  
343 Rules 4 might be revised to add new methods to the regular rules for serving summons and  
344 complaint that are desirable in ordinary, nonemergency circumstances and sufficient in times of  
345 emergency. The Rule 6(b)(2) prohibition on extending the times for post-judgment motions might  
346 be amended to provide a narrow but adequate authority to order an extension that does not require  
347 the elaborate structure that Rule 87 would establish. Or Rule 6(b)(2) might be left as it is, at least  
348 if publication does not lead to any illustrations of opportunities to move or appeal thwarted by the  
349 COVID-19 pandemic.

## 350 II. Subcommittee Work

### 351 A. MDL Subcommittee

352 As reported during the Standing Committee’s January meeting, the MDL Subcommittee  
353 reached a consensus that further consideration of a rule expanding interlocutory review in some or  
354 all MDLs was not warranted. The Advisory Committee accepted that recommendation.

355 This means that the subcommittee still has pending before it another issue that remains  
356 somewhat in abeyance. Originally it was presented as “vetting” claims in MDL proceedings, based  
357 on reports that often a significant proportion of claims turn out to be unsupportable. One reaction  
358 to this concern has been to call for early completion of a plaintiff fact sheet (PFS) by each claimant,  
359 showing at least that the claimant had used the product in question and manifested the harmful  
360 condition alleged to have resulted from use of the product. (This issue seems frequently to be raised

361 in product liability cases premised on personal injury due to use of a product.) Research by the  
362 FJC showed that in nearly 90% of large MDLs a PFS is already employed, and that these  
363 questionnaires are often tailored to the specific issues of the MDL proceeding, so that a uniform  
364 rule on contents did not seem promising. It also appeared that drafting a PFS is often challenging  
365 and time-consuming, so a uniform rule on time limits could cause difficulties.

366 Instead, a new concept of a “census,” which might be regarded as an abbreviated version  
367 of a PFS, emerged as a possible solution. This new idea has been used in three ongoing MDLs.  
368 One of those is the Zantac MDL, which is pending before Judge Rosenberg, the new chair of this  
369 subcommittee. Early reports indicate that this method holds promise both in identifying claims that  
370 lack support and in organizing the litigation for more efficient handling in court. It may be valuable  
371 in making appointment decisions for leadership counsel. So this idea remains under study, though  
372 if it offers promise it may not be a suitable focus for a rule provision, but more appropriately  
373 included in a manual or instructional material from the Judicial Panel on Multidistrict Litigation.

374 The main topic under active study at this time is the remaining issue the subcommittee has  
375 identified – rule provisions addressing judicial appointment and oversight of leadership counsel  
376 and supervision of certain settlement activities. This set of issues has long seemed the most  
377 challenging for the subcommittee. It involves a potpourri of topics partly addressed by the *Manual*  
378 *for Complex Litigation*, such as appointment of leadership counsel and creation of common benefit  
379 funds to compensate leadership counsel for the work they do organizing and preparing the  
380 centralized cases. Largely since the most recent edition of the *Manual* appeared in 2004, there has  
381 also emerged the possibility that the transferee judge may “cap” the compensation to non-  
382 leadership counsel at an amount lower than the percentage specified in their retention agreements,  
383 and a judicial role in supervising some settlements, sometimes under the label “quasi class action.”

384 On March 24, all members of the subcommittee participated in a conference organized by  
385 the Emory Law School Institute for Complex Litigation and Mass Claims. This event involved  
386 many very experienced lawyers on both the defense and the plaintiff side, and a number of  
387 experienced judges, including members of the Standing Committee. This event was extremely  
388 informative, but did not necessarily make the path forward clear.

389 For one thing, it presently appears that there is little enthusiasm among counsel on either  
390 side of the “v” for adoption of a rule. And it also appears that most MDL transferee judges do not  
391 favor adoption of rules. At the same time, it may be important for the rules to recognize that MDL  
392 proceedings – and particularly mass tort MDLs – account for a very significant proportion of the  
393 federal courts’ civil docket.

394 In that portion of the civil docket, things do not proceed in exactly the same way they  
395 proceed in ordinary civil litigation, to a considerable extent because the cases are in an MDL. In  
396 ordinary individual litigation plaintiffs could instruct their attorneys on conduct of the case, and  
397 the lawyers would be free to file motions and pursue discovery. And defendants could initiate  
398 discovery from individual plaintiffs and, perhaps, move for summary judgment.

399 But that is not how things often work in mass tort MDL proceedings. Defendants may be  
400 limited in their ability to initiate discovery about the claims of individual plaintiffs, and the court

401 may sometimes focus discovery on “common” issues, which may largely be those relating to  
402 defendants’ overall liability rather than the claims of individual plaintiffs. Often non-leadership  
403 counsel are forbidden to do, or constrained in doing, such things as pursuing discovery or making  
404 motions. These limitations on counsel often result from the court’s early order appointing  
405 leadership counsel, which ordinarily puts those lawyers selected by the judge in charge of the  
406 management and development of the litigation from the plaintiffs’ side. And the fee entitlements  
407 of those non-leadership lawyers are often “taxed” to create a common benefit fund used to  
408 compensate leadership counsel, at least as to settlements achieved by those non-leadership  
409 lawyers.

410 Those appointment orders may also confer on lead counsel authority to discuss settlement  
411 with defendants, sometimes subject to review by the court. In addition, experience has shown that  
412 there may be significant advantages to careful preparation of a detailed appointment order. But  
413 *Manual for Complex Litigation (4th)* § 10.222 (2004) says that “it is usually impractical or unwise  
414 for the court to spell out in detail the functions assigned or to specify the particular decisions that  
415 designated counsel may make unilaterally and those that require an affected party’s concurrence.”  
416 That may have been more appropriate in 2004, and something more may be appropriate now. It  
417 does not appear that the Civil Rules presently offer any guidance on this topic.

418 Several academic critics of MDL practice urge that procedures in MDLs should be modeled  
419 on Rule 23. Because MDLs are sometimes settled using the class action vehicle, Rule 23 may  
420 come into play eventually, but ordinarily not at the beginning. Under Rule 23(g), of course, the  
421 court must appoint class counsel upon certifying a class, and may appoint “interim class counsel”  
422 to act on behalf of the class before certification is decided. That appointment by the court  
423 empowers class counsel to conduct the litigation and conduct settlement negotiations, which may  
424 lead to a package deal – class certification only for purposes of presenting the proposed settlement  
425 for judicial review.

426 Rule 23(e) requires the court to determine whether a class settlement is fair, reasonable,  
427 and adequate. Since the 2018 amendments to that rule, it has provided additional detail about  
428 factors courts should consider in making that determination. As the committee note to the 2018  
429 amendments to Rule 23(e) explained, those factors focus on both the “procedural” and the  
430 “substantive” aspects of proposed class settlements:

431 “Procedural” scrutiny under Rules 23(e)(2)(A) and (B) asks whether class counsel  
432 has adequately represented the class and whether the proposal was negotiated at  
433 arm’s length.

434 “Substantive” scrutiny under Rules 23(e)(2)(C) and (D) asks whether the relief  
435 provided class members under the settlement is adequate, and whether the  
436 settlement treats class members equitably relative to each other.

437 In performing this review in class actions, courts are undertaking what some courts say is  
438 a “fiduciary” responsibility to the members of the class. That responsibility could be said to derive

439 from the facts that (a) the court, not the class members, selected class counsel, and (b) the court  
440 may approve the settlement over the objections of class members.

441 MDLs may have some features that appear like class actions, particularly to claimants  
442 whose lawyers are not selected for leadership roles. Those lawyers may not be permitted to engage  
443 in active litigation because the court has appointed leadership counsel and directed that non-  
444 leadership lawyers not undertake ordinary litigation activities unless those activities are approved  
445 by leadership counsel.

446 But it is not clear what obligations, if any, leadership counsel owe to the clients of other  
447 lawyers. In class actions, Rule 23(g)(4) directs class counsel to “fairly and adequately represent  
448 the interests of the class.” Even in the pre-certification stage, if attorneys are appointed as interim  
449 class counsel they are bound by the duty to fairly represent the interests of the class, not just the  
450 class representatives. In the MDL mass tort setting, one might expect that leadership counsel,  
451 empowered by the court at least to manage the litigation and perhaps also to discuss settlement,  
452 could also have some obligation, perhaps specified in the order of appointment, to those other  
453 claimants whose lawyers are disabled from ordinary litigation activities under the court’s order.

454 So one way to look at the issue of the court’s role in an MDL is to consider that the court  
455 may properly regard itself as having responsibilities to the many claimants before it to ensure that  
456 they are treated fairly. As in a class action, the court’s appointment orders may significantly affect  
457 the conduct of the litigation and the settlement terms these claimants confront. It may be that there  
458 is ground for something akin to a “fiduciary” obligation from the court to these claimants.

459 Against this theoretical background, the very informative March 24 conference suggested  
460 some complications for the MDL Subcommittee to consider going forward. As of this time, it  
461 should be emphasized that the subcommittee is far from a consensus on these matters, and also on  
462 whether any rule amendment (as opposed, for example, to a manual or JPML education materials)  
463 is in order. The March 24 Emory conference was extremely informative, but it did not produce an  
464 “epiphany” about the right way forward.

465 One thing that became clear is that settlements in MDL proceedings have many different  
466 attributes. We are all familiar with the idea of a “global” settlement including all claimants. The  
467 March 24 event introduced the concept of “continental” settlements and the more familiar  
468 “inventory” settlements. And, of course, there are also “individual” settlements.

469 One point repeatedly made during the March 24 conference was that in MDL proceedings  
470 claimants may be situated differently depending in part on who represents them. Some lawyers  
471 reportedly do much more thorough workups of their clients’ cases (medical records, proof of  
472 exposure, proof of losses, etc.) than other lawyers. Indeed, it appears that some plaintiff-side  
473 lawyers would be receptive to some sort of “vetting” process that screens out unsupported claims.  
474 In addition, it seems that some plaintiff counsel worry (perhaps one could say “scare”) defendants  
475 more than other plaintiff counsel, in terms of track records or other indicia that going to trial against  
476 these lawyers puts defendants at considerable risk of facing a high verdict.

477 Other lawyers may not be equally prepared with details on each of their cases, and may not  
478 have a “profile” that worries defendants as much.

479 Taken together, these insights suggest that a judicial role in making a “substantive” review  
480 of proposed settlements would not be easy to do. To take “inventory” settlements as an example,  
481 it could be very difficult for a judge to appreciate why a defendant might be willing to make what  
482 appears to be a significantly better offer to the clients of Lawyer A than to the clients of Lawyer  
483 B. It would be particularly difficult for the judge to feel obliged to try to ensure that (in keeping  
484 with Rule 23(e)(2)(D)) all these claimants (the clients of Lawyer A and Lawyer B) are treated  
485 “equitably relative to each other.”

486 But it might be possible for a rule to direct a judge to consider the “procedural”  
487 underpinnings of a settlement, and thereby perhaps to satisfy something akin to a “fiduciary” role  
488 vis-a-vis the claimants. Of course, the judge could not forbid or require claimants to accept a  
489 proffered settlement. But perhaps the court could direct that claimants be apprised of the judge’s  
490 assessment – positive or negative – of the process that led to the settlement. That could be  
491 analogized to the notice to the class required by Rule 23(e) in connection with proposed class  
492 action settlements.

493 Another abiding point to keep in mind is that not all MDL proceedings are the same. The  
494 range of matters involved in such proceedings is quite large. Data breach MDLs, for example, may  
495 be very different from MDLs involving product liability claims against pharmaceutical  
496 manufacturers. Beyond that, it appears that even in somewhat similar MDLs the issues involved  
497 may be quite case specific. Moreover, there is a significant range among MDLs in terms of the  
498 number of cases centralized by the Panel, ranging from under ten to tens of thousands.

499 But the potential importance of the initial orders in MDL proceedings during the entire  
500 course of those proceedings may make it particularly important to call attention to them in the  
501 rules. And doing so might be particularly important for judges and lawyers who are not already  
502 “insiders” to the MDL process.

503 One possible place to put such rule provisions would be in Rule 16. That rule (substantially  
504 recast in 1983 to emphasize the importance of case management in most cases) has grown longer  
505 over time. Adding to it should be done cautiously, but this may be time to “update” Rule 16, at  
506 least as it can be employed in MDL proceedings. Possible topics to consider include:

- 507 (1) Gathering details early about individual claims: This idea resembles the “vetting”  
508 originally proposed, but might be more effectively accomplished using some sort  
509 of “census” approach. Rather than serving only as a method for identifying and  
510 removing unsupportable claims, it might serve as well to “jump start” discovery.  
511 These topics might also justify some inclusion in Rule 26(f) of attention to the  
512 possibility.
- 513 (2) Appointment of leadership counsel: This judicial activity is not unique to MDL  
514 proceedings, but is most predominant in them. The value of early attention to  
515 various matters such as (a) latitude accorded non-leadership plaintiff counsel to

516 engage in litigation activities; (b) authority of leadership counsel to discuss “global”  
517 settlements potentially involving claimants with whom they have no formal  
518 attorney-client relationship; (c) the obligations of leadership counsel towards  
519 claimants not formally their clients, particularly in regard to possible settlements;  
520 and (d) other matters suitable to early regulation by the court that might benefit  
521 from early judicial guidance to avoid problems later on.

522 (3) A judicial role in supervising settlement: It may be that this topic could be taken up  
523 without rule provisions about topic (2) above, but that could prove difficult. Free  
524 standing judicial authority to “review” or supervise settlement not tethered to  
525 appointment of leadership counsel might be hard to justify, though under Rule 16  
526 the court is understood to have authority to promote settlement in all cases. And it  
527 does seem that any review ought to focus on “process” issues, perhaps including  
528 “adequate representation” of claimants who are not direct clients of leadership  
529 counsel, rather than the “merits” of the settlement itself.

530 (4) Common benefit funds: The use of such devices was upheld in case law in the  
531 1970s. It is recognized in the *Manual for Complex Litigation*. But there are no rule  
532 provisions that address either authority to employ these funds or provide guidance  
533 on using them. And there are a number of specifics that might be considered, such  
534 as (a) whether the court should be concerned with the overall amount of  
535 compensation leadership counsel will receive; (b) whether there is an upper limit  
536 to the percentage contribution required by non-leadership lawyers; (c) whether  
537 settlements of cases in state court should lead to a duty to contribute to the fund;  
538 and (d) the method by which the court determines the amount to be awarded  
539 individual lawyers or firms from such funds. It may be that some directions could  
540 be developed, and also that authority in the rules would be more secure than the  
541 current reliance on case law. At present, it appears that all these things are regarded  
542 as matters of contract law based on contracts entered into by “participating”  
543 lawyers, but one could say that leadership counsel might have overweening  
544 negotiating power in negotiating such contracts with non-leadership counsel due to  
545 the court’s appointment order.

546 The subcommittee’s discussions remain at a preliminary point, and it hopes to gather more  
547 information in the future. But it is presently possible to recognize that additional issues are likely  
548 to arise, similar to those identified in prior reports to the Standing Committee:

549 (1) Scope – All MDLs without regard to type of claims asserted?: As noted above,  
550 MDLs come in very different shapes and sizes. Various dividing lines have been  
551 suggested. For example, one might try to define “mass tort” MDLs. But would data  
552 breach cases fall within that definition? Would the VW Diesel MDL fall within it?

553 (2) Scope – Number of claimants as determinative?: Alternatively, one could focus on  
554 the number of claimants before the transferee court. That might seem an easy  
555 method to employ (e.g., by saying that a “mega” MDL is one with more than 1,000



556 claimants). However, the number of claimants may rise over time, and some MDLs  
557 have a large number of claims lodged in a registry rather than formally filed in the  
558 court. Should those be counted?

559 (3) Scope – Which settlements?: During the March 24 Emory Conference, the  
560 subcommittee learned that settlements in MDL proceedings come in many shapes  
561 and sizes. One is the “global” settlement (often achieved using the class action  
562 device – *see* (5) below). Another is the “inventory” settlement, involving all the  
563 clients of a given lawyer. There may be something else called a “continental”  
564 settlement that is not “global” but also not limited to the clients of one lawyer or  
565 law firm. And there surely may be “individual” settlements. Initial reactions are  
566 that judicial involvement is not appropriate for individual settlements. And it may  
567 be that the “inventory” settlements reached by some lawyers look, in the abstract,  
568 more favorable to the clients of those lawyers (Lawyer A) than those achieved by  
569 some other lawyers (Lawyer B). “Global” settlements, meanwhile, may be  
570 accompanied with rather forceful levers to prompt all claimants, or at least all  
571 clients of “participating” lawyers, to accept the settlement.

572 (4) Judicial role in implementing settlements?: It may be that the settlement agreement  
573 itself provides that the court may have a role in implementing the settlement  
574 provisions. Should such arrangements be fostered? Should there be limits on such  
575 practices?

576 (5) “Fit” with Rule 23?: With some frequency, the eventual resolution of MDL  
577 proceedings is achieved using the class action device. That brings the provisions of  
578 Rule 23(e), (g), and (h) into play, but usually that development occurs only as the  
579 MDL proceeding approaches its endpoint. If there is already a detailed order  
580 appointing leadership counsel, as discussed above, how well does that order fit with  
581 the provisions of Rule 23? Does Rule 23 supersede all that went before?

582 \* \* \* \* \*

583 As the foregoing attempts to make clear, the subcommittee has learned much and clarified  
584 its focus on this remaining topic since the Standing Committee’s last meeting. And it may return  
585 to the “vetting”/“census” topic as it moves forward from this point. For the present, then, it seeks  
586 the Standing Committee’s insights and reactions. Whether this will lead to actual amendment  
587 proposals remains uncertain.

588                   **B. Discovery Subcommittee**

589                   The Advisory Committee again has a Discovery Subcommittee, chaired by Judge David  
590 Godbey, which has a relatively full agenda. The subcommittee held a meeting via Teams on  
591 February 26, 2021, and addressed the four items on its agenda:

- 592  
593                   (1) Privilege logs  
594                   (2) Sealing of filed materials  
595                   (3) Attorney fee shifting under Rule 37(e)  
596                   (4) Amending Rule 27(c) to authorize a pre-litigation application for an order to  
597                   preserve evidence

598                   The subcommittee recommended that work continue on the first and second listed items,  
599 and that the third and fourth items be dropped from the agenda. At its April 23 meeting, the  
600 Advisory Committee accepted these recommendations.

601                   **1. Rule 26(b)(5)(A): Privilege Logs**

602                   Two suggestions (20-CV-R [Lawyers for Civil Justice] and 20-CV-DD [Jonathan  
603 Redgrave]) focus on practice under Rule 26(b)(5)(A). The subcommittee’s discussion on  
604 February 26 supported the idea behind the submissions – that that privilege logs often cost too  
605 much and nevertheless provide insufficient information.

606                   **a. Background**

607                   Rule 26(b)(5)(A) was added in 1993, to require parties withholding materials requested in  
608 discovery to disclose information about what has been withheld on privilege grounds. The rule  
609 was often interpreted to require a privilege log, modeled on practice under the Freedom of  
610 Information Act. The proposal is that the rule be amended to add specifics about how parties are  
611 to provide details about materials withheld from discovery due to claims of privilege or protection  
612 as trial-preparation materials. These submissions identify a problem that can produce waste. But  
613 it is not clear how or whether a rule change will helpfully change the current situation.

614                   Rule 26(b)(5)(A) provides:

615                   When a party withholds information otherwise discoverable by claiming that the  
616 information is privileged or subject to protection as trial-preparation material, the  
617 party must:

- 618                   (i) expressly make the claim; and  
619                   (ii) describe the nature of the documents, communications, or tangible things  
620 not produced or disclosed—and do so in a manner that, without revealing  
621 information itself privileged or protected, will enable other parties to assess the  
622 claim.

623           The committee note to the 1993 rule amendment cautioned that elaborate efforts need not  
624 be required in cases involving many documents:

625           The rule does not attempt to define for each case what information must be provided  
626 when a party asserts a claim of privilege or work product protection. Details  
627 concerning time, persons, general subject matter, etc., may be appropriate if only a  
628 few items are withheld, but may be unduly burdensome when voluminous  
629 documents are claimed to be privileged or protected, particularly if the items can  
630 be described by categories.

631           The basic difficulty is that soon after the 1993 rule amendment went into effect, many  
632 courts borrowed the idea of a “privilege log” from practice under the Freedom of Information Act  
633 and a document-by-document listing became common. These logs might be quite long, but often  
634 did not provide sufficient information for the opposing party or the court to assess the claim of  
635 privilege. Consider Judge Grimm’s comments:

636           In actuality, lawyers infrequently provide all the basic information called for in a  
637 privilege log, and if they do, it is usually so cryptic that the log falls far short of its  
638 intended goal of providing sufficient information to the reviewing court to enable  
639 a determination to be made regarding the appropriateness of the  
640 privilege/protection asserted without resorting to extrinsic evidence or in camera  
641 review of the documents themselves.

642           *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 2501, 265 (D. Md. 2008).

643           Since 1993, other rule changes have added provisions that could affect the possible burden  
644 of complying with Rule 26(b)(5)(A). In 2006, Rule 26(b)(5)(B) was added, providing that any  
645 party could “claw back” privileged material inadvertently produced, and Rule 26(f) was amended  
646 to direct that the parties’ discovery plan discuss issues about claims of privilege. Then in 2008,  
647 Evidence Rule 502 became effective by Act of Congress. In Rules 502(d) and 502(e), that rule  
648 gives effect to party agreements that production of privileged material will not constitute a waiver  
649 of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent  
650 production against privilege waiver if the producing party “took reasonable steps to prevent  
651 disclosure.”

652           So rule changes have somewhat responded to concerns about waiver risks, though perhaps  
653 not about the burdens associated with privilege logs. But technological developments in the last  
654 quarter century have magnified some of the burdens. E-Discovery, virtually unknown in 1993, is  
655 now the most challenging form of discovery.

656           Locating materials that can be withheld on grounds of privilege may be more difficult now,  
657 due to the huge increase in the amount of digital data that must be subjected to a privilege review.  
658 Technology has also reportedly provided some potential solutions to the problems of privilege  
659 review, but it is not clear that these solutions fully address the problem. It may be that the difficulty  
660 of identifying materials that are privileged is the most significant part of the process necessary to

661 comply with Rule 26(b)(5)(A), but that does not appear to be the problem that is the focus of these  
662 submissions.

663 Instead, the submissions focus on the preparation of the privilege log itself. The use of  
664 technology to do that has proven unsatisfactory in many instances, as Judge Facciola emphasized  
665 in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

666 [I]n the era of “big data,” in which storage capacity is cheap and several bankers’  
667 boxes of documents can be stored with a keystroke on a three inch thumb drive,  
668 there are simply more documents that everyone is keeping and a concomitant  
669 necessity to log more of them. This, in turn, led to the mechanically produced  
670 privilege log, in which a database is created and automatically produces entries for  
671 each of the privileged documents. \* \* \*

672 But, the descriptor in the modern database has become generic; it is not  
673 created by a human being evaluating the actual, specific contents of that particular  
674 document. Instead, the human being creates one description and the software  
675 repeats that description for all the entries for which the human being believes that  
676 description is appropriate. \* \* \* This raises the term “boilerplate” to an art form,  
677 resulting in the modern privilege log being as expensive as it is useless.

#### 678 **b. Current Submissions**

679 One submission comes from Lawyers for Civil Justice (LCJ) (20-CV-R). It stresses the  
680 difficulties of privilege logs in an era of ESI, emphasizing Judge Facciola’s views. Indeed, along  
681 with Jonathan Redgrave (who provided the other submission, 20-CV-DD), Judge Facciola  
682 proposed in 2010 that “the majority of cases should reject the traditional document-by-document  
683 privilege log in favor of a new approach that is premised on counsel’s cooperation supervised by  
684 early, careful, and rigorous judicial involvement.” Facciola & Redgrave, *Asserting and  
685 Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed.  
686 Cts. L. Rev. 19 (2010). Implementing what Judge Facciola urged by rule could be difficult,  
687 however.

688 The LCJ submission urges that a rule provide for “presumptive exclusion of certain  
689 categories” of material from privilege logs, such as communications between counsel and the  
690 client regarding the litigation after the date the complaint was served, and communications  
691 exclusively between in-house counsel or outside counsel of an organization. Invoking  
692 proportionality, it emphasizes that “flexible, iterative, and proportional” approaches are more  
693 effective and efficient than document-by-document privilege logging.

694 The specific LCJ proposal seems more limited. It is to add the following to Rule 26(b)(5)  
695 and also to Rule 45(e)(2) on subpoenas:

696 If the parties have entered an agreement regarding the handling of  
697 information subject to a claim of privilege or of protection as trial-preparation

698 material under Fed. R. Evid. 502(e), or if the court has entered an order regarding  
699 the handling of information subject to a claim of privilege or of protection as trial-  
700 preparation material under Fed. R. Evid. 502(d), such procedures shall govern in  
701 the event of any conflict with this Rule.

702 The actual proposal appears to make any court action contingent on party agreement or  
703 entry of a court order regarding material covered by a privilege. Thus, it does not propose a  
704 “categorical” approach by rule. Doing so by rule might raise concerns that such categories would  
705 have to be delineated with great care in order to ensure that they are not overbroad, including items  
706 that do not deserve privilege protection.

### 707 **c. Initial Discovery Subcommittee discussion**

708 During its February 26 conference, the subcommittee spent considerable time discussing  
709 the problem presented by privilege logs, and the ways in which the rules might be amended to  
710 ameliorate these problems while retaining the basic disclosure requirement. There was  
711 considerable agreement that preparation of privilege logs could produce unnecessary costs and few  
712 benefits. But there was concern about whether a rule change could significantly improve matters.  
713 Several members of the subcommittee reported that in most major cases the parties work these  
714 things out.

715 In particular, several members of the subcommittee stressed that early discussion of the  
716 specifics of privilege logging can avoid much difficulty when the logs are actually delivered later  
717 in the case. (They often are not delivered until after all or most Rule 34 discovery has been  
718 completed, though sometimes the logs are provided on a “rolling” basis.)

719 Discussion focused on considering revisions to Rules 26(f) and 16(b) to encourage or even  
720 mandate such early discussion. There was also discussion of whether such a mandate would be  
721 unnecessary in many smaller cases, for which document-by-document logging may work just fine.  
722 For the present, then, the subcommittee is considering ways in which the rules could be amended  
723 to improve the process of privilege review and preparation of privilege logs. It invites reactions  
724 and ideas from the Standing Committee. It presently is contemplating how to gather more  
725 information about experience under the present rule.

## 726 **2. Sealing Court Records**

727 Prof. Eugene Volokh (UCLA), the Reporters Committee for Freedom of the Press and the  
728 Electronic Frontier Foundation have submitted a proposal (20-CV-T) for adoption of a new  
729 Rule 5.3 on sealing of court records.

730 The focus of this rule proposal is sealing of materials filed in court. It emphasizes that  
731 “[e]very federal Circuit recognizes a strong presumption of public access” that is “founded on the  
732 common law and the First Amendment.” The submission also states that the proposed Rule 5.3 is  
733 in large measure drawn from existing district court local rules.

734           The Rules Law Clerk investigated whether local rules on sealed filings were uniform or  
735 relatively uniform across the nation by focusing arbitrarily (at the Reporter’s suggestion) on the  
736 local rules of the nine districts “represented” on the Advisory Committee. Though there is no  
737 reason to conclude that these nine sets of local rule provisions are “representative” of all others,  
738 the survey did show that there are significant differences among these local rule provisions. There  
739 is no such national uniformity that a national rule would simply implement what districts have  
740 already done. (One might say that was the consequence of the 2000 amendment to Rule 5(d), which  
741 directs that discovery not be filed in court unless “used in the action,” based largely on widespread  
742 adoption of that practice by local rules.)

743           Around 15 years ago, the Standing Committee appointed a subcommittee made up of  
744 representatives of all Advisory Committees that responded to concerns then that federal courts had  
745 “sealed dockets” in which all materials filed in court were kept under seal. The FJC did a very  
746 broad review of some 100,000 matters of various sorts, and found that there were not many sealed  
747 files, and that most of the ones uncovered resulted from applications for search warrants that had  
748 not been unsealed after the warrant was served.

749  
750           The Civil Rules, meanwhile, do not have many provisions about sealing court files.  
751 Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic  
752 files to protect privacy. In that context, Rule 5.2(d) says that the court “may order that a filing be  
753 made under seal without redaction.” The committee note to that provision says that it “does not  
754 limit or expand the judicially developed rules that govern sealing.” Rule 26(b)(5)(B), mentioned  
755 above in regard to privilege waiver, permits a party that receives a “claw back” notice from the  
756 opposing party to “promptly present the information to the court under seal for a determination of  
757 the claim.” And Rule 26(c)(1)(G) authorizes a protective order “requiring that a deposition be  
758 sealed and opened only on court order” (though note that depositions are not filed unless “used in  
759 the action” it may be that such orders are rare).

760           The current rule proposal urges a fairly elaborate set of procedures for decisions to seal,  
761 including such requirements as:

762           (a) posting the motion on the district’s website (presumably not just including it in  
763 the case file) or creation of a “central” website for numerous districts (or the entire  
764 nation);

765           (b) a mandatory seven-day waiting period after such posting before decision of a  
766 motion to seal;

767           (c) a requirement for particularized findings for every decision to seal;

768           (d) a 30-day limitation on sealing after “final disposition” of the case (which could  
769 impose a significant burden on the clerk’s office, particularly in cases involving an  
770 appeal); and

771 (e) an absolute right to challenge sealing for “any member of the public” without a  
772 need to intervene, but no protection for nonparty interests in having materials  
773 remain sealed, and other features.

774 The Discovery Subcommittee’s initial discussion did not indicate significant interest in developing  
775 a national rule including such specifics, which are handled in different ways in the local rules of  
776 different districts.

777 A starting point might be to consider a rule recognizing that the standard for filing under  
778 seal is higher than the standard for a Rule 26(c) protective order. At least some courts have so  
779 recognized. For example, *In re Avantia Marketing, Sales Practices and Products Liability*  
780 *Litigation*, 924 F.3d 662 (3d Cir. 2019), the issue was whether materials covered by a protective  
781 order that the parties (seemingly both sides) had filed in relation to a motion for summary judgment  
782 should be unsealed. The district court denied the motion to unseal after entering summary  
783 judgment in favor of defendant.

784 The court of appeals found this sealing decision was wrong because the district court  
785 decided the motion “by applying the rule 26 standard governing protective orders,” *id.* at 674,  
786 “equating the Rule 26 analysis with the common law right of access analysis.” *Id.* at 675. As the  
787 court explained: “Analytically distinct from the District Court’s ability to protect discovery  
788 materials under Rule 26(c), the common law presumes that the public has a right to access to  
789 judicial materials.” *Id.* at 672. It vacated the district court’s sealing order, directing reconsideration  
790 under the proper standard.

791 The question whether the rules should be amended in some way to distinguish between the  
792 “good cause” standard for Rule 26(c) protective orders and the decision to permit filing under seal  
793 remains before the Discovery Subcommittee. It may be that, as the submission suggests, this  
794 distinction is so widely appreciated that a rule change is not needed. If serious consideration of a  
795 rule amendment seems a worthwhile effort, it is likely that it will be necessary to address a number  
796 of additional questions, such as the proper articulation of the standard, the question whether the  
797 same standard applies to all filed materials (such as materials filed only with regard to discovery  
798 motions), and appropriate accommodation for situations (such as False Claims Act cases) in which  
799 a statute or rule directs filing under seal.

800 For the present, the subcommittee would welcome advice from the Standing Committee  
801 on these issues. It will continue working on this topic.

### 802 **3. Attorney’s fee shifts under Rule 37(e)**

803 A submission from Judge Iain Johnston (N.D. Ill.) (21-CV-D) raised the question whether  
804 a court may, under the 2015 amendment to Rule 37(e), direct that the party that failed to preserve  
805 electronically stored information despite having an obligation to preserve the information  
806 reimburse the victim of this failure for its attorney fees incurred due to the failure to preserve.  
807 Judge Johnston cites his opinion in *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 2021 WL  
808 185082, 2021 U.S. Dist. LEXIS 9513, \_\_\_ F. Supp. 3d \_\_\_ (N.D. Ill., Jan. 19, 2021) footnote 54

809 as addressing his concern. That is a very long opinion that mainly chronicles many years of  
810 acrimonious litigation and discovery disputes leading up to a spoliation proceeding. Footnote 54  
811 says the following:

812 Some courts have held that awards of attorneys’ fees are curative measures  
813 authorized under Rule 37(e)(1). *See, e.g., Karsch v. Blink Health Ltd.*, 17-CV-3880,  
814 2019 WL 2708125, at \*—, 2019 U.S. Dist. LEXIS 106971, at \*74 (S.D.N.Y.  
815 June 20, 2019). This view is held by ESI gurus. *Cat3, LLC v. Black Lineage, Inc.*,  
816 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016) (Francis, J.). Even knowing it is in the  
817 distinct minority on this issue, this Court is not so sure attorneys’ fees are available  
818 but is open to being convinced otherwise. *Snider*, 2017 WL 2973464, at \*— – –  
819 —, 2017 U.S. Dist. LEXIS 107591, at \*12-13 (attorneys’ fees are not identified  
820 in Rule 37(e) but are specifically identified in all other sections of Rule 37);  
821 *Newman v. Gagan, LLC*, No. 2:12-CV-248, 2016 WL 1604177, at \*6, 2016 U.S.  
822 Dist. LEXIS 123168, at \*20-21 (N.D. Ind. May 10, 2016). Because the Court is not  
823 imposing an award of attorneys’ fees under Rule 37(e), it need not conclusively  
824 address this issue now. All attorneys’ fees imposed are under other rules. Imposing  
825 attorneys’ fees as a sanction under this rule at this time would be redundant.

826

827 In his submission, Judge Johnston cited an article by Tom Allman, who provided advice  
828 about these issues to the Advisory Committee and prior Discovery Subcommittees over the years.  
829 Thomas Allman, *Dealing With Prejudice, How Amended Rule 37(e) Has Refocused ESI Spoliation*  
830 *Measures*, 26 Richmond J. Law & Tech. Issue 2, at 1 (2020). At p. 50, Allman begins by asserting  
831 that “[c]ourts routinely award monetary sanctions under Rule 37(e)(1) consisting of attorney’s fees  
832 and expenses. This permits recovery of the expenditure of time and effort necessary to bring the  
833 issue of spoliation before the court.”

834 After the agenda book for the Advisory Committee meeting was posted, Mr. Allman  
835 submitted a letter to the Advisory Committee affirming that the courts do regularly find that they  
836 may direct such reimbursement as a “curative measure” under Rule 37(e)(1). The Rules Law Clerk  
837 independently did research and reached the same conclusion – the courts do not encounter any  
838 problem with authority to direct the wrongdoer whose failure to preserve has imposed attorney  
839 fees on the victim to reimburse the victim for that cost.

840 In light of these reports, and the absence of any experience by its members with any  
841 problem under this rule, the Advisory Committee concluded without dissent that this item should  
842 be removed from the agenda.

#### 843 **4. Rule 27 preservation orders?**

844

845 A law professor submitted a proposal (20-CV-GG) to amend Rule 27(c) to authorize pre-  
846 litigation preservation orders. After considering the submission, the Advisory Committee decided  
847 that it should be dropped from the agenda.

848 The proposed change is to amend the rule as follows:



849           **(c) Perpetuation by an Action.** This rule does not limit a court’s power to entertain  
850           an action to perpetuate testimony and an action involving presuit information  
851           preservation when necessary to secure the just, speedy, and inexpensive resolution  
852           of a possible later federal civil action.

853           Rule 27(c) is not a staple of modern litigation. Indeed, it may no longer serve any purpose:

854                     Subdivision (c) makes it clear that Rule 27 is not preemptive and does not  
855           limit the power of a court to entertain an action to perpetuate testimony. However,  
856           the statutory procedure for perpetuation of testimony referred to in the Committee  
857           Note to the original rule was repealed in the 1948 revision of Title 28.

858           8A C. Wright, A. Miller & R. Marcus, Fed. Prac. & Pro. § 2071 at 387. The existing rule  
859           nonetheless still authorizes “an action to perpetuate testimony” beyond what Rules 27(a) and (b)  
860           authorize. It appears that this provision was included in the rules in 1938 only to avoid arguments  
861           that adoption of the rules superseded existing authority for an independent action to perpetuate  
862           testimony.

863           Rule 27(a) authorizes the court to enter orders for taking testimony of a witness who may  
864           become unavailable before litigation commences, when the petitioner “cannot presently bring it or  
865           cause it to be brought.” The petitioner is to give notice to “each expected adverse party” and the  
866           court may then grant the requested relief if doing so “may prevent a failure or delay of justice.”  
867           Rule 27(b) permits a similar order pending appeal when the party seeking the deposition can show  
868           that failure to take the deposition promptly could cause “a failure or delay of justice.”

869           This submission would create a wholly new “action to preserve evidence,” not limited to  
870           testimony. In doing so, it could cut against the grain of much that we learned during the Rule 37(e)  
871           drafting effort. During that study, it became clear that preservation orders are often blunt  
872           instruments, even in ongoing litigation. Rule 37(e)’s recognition that reasonable preservation must  
873           begin in many instances before litigation commences cuts against the idea of encouraging pre-  
874           litigation court orders of this sort. Indeed, the expectation was that, even after litigation is  
875           commenced, some significant showing would be necessary to justify a preservation order. So this  
876           proposal (compared to the one just discussed under (3) above) seems to point in a different  
877           direction from Rule 37(e).

878           This proposal goes beyond Rule 37(e) in another way – after considerable consideration,  
879           the Advisory Committee decided to limit that rule to ESI. This proposal is not so limited. Indeed,  
880           it might be said to come close to the line in Enabling Act authority, to the extent it creates a brand  
881           new “action” to “preserve evidence” that might be asserted against an entity not expected to be a  
882           party to the contemplated litigation. Rule 37(e) focuses on parties to eventual litigation and their  
883           preservation of potential evidence after notice of possible litigation. Rule 27(a) calls for notice to  
884           prospective parties to the litigation before an order for prelitigation testimony is entered. After  
885           litigation begins, however, any party may issue a subpoena to a nonparty, and presumably a court  
886           could enforce that subpoena on a motion to compel. But though the authority contemplated under

887 the proposed amendment does not rely on a subpoena, it could have consequences similar to a  
888 motion to compel enforcement of one, or at least to compel preservation.

889 The proposal also seems inconsistent with decisions declaring that Rule 27 does not  
890 authorize presuit discovery by a plaintiff who wants to find out whether there is actually a claim.  
891 One can debate whether such presuit discovery should ever be allowed, and whether “notice  
892 pleading” suits followed by broad discovery demands amount to more or less the same thing. But  
893 authorizing presuit preservation orders may be a step beyond that.

894 Ironically, such a rule provision might also narrow the common law preservation duty in  
895 some instances. If the court orders certain specified preservation, does that mean that the entity  
896 subject to the order is free to discard everything not covered by the order? Would that be true even  
897 if, in the absence of the order, there would be a duty to preserve? The idea of the common law  
898 obligation to preserve seems, in part, to depend on the awareness of the possessor of the evidence  
899 that it should be preserved due to the potential importance of the information. The potential litigant  
900 seeking a preservation order, whether a prospective plaintiff or defendant, may not appreciate what  
901 should be preserved, and therefore not request an order with regard to all of the things that would  
902 be subject to the common law duty absent an order. So there is a risk of under-coverage with such  
903 orders.

904 But given the likely broad initial demands for preservation, under-coverage may be less  
905 frequent than overly broad demands. Even without this added court order possibility, prospective  
906 plaintiffs reportedly often serve very broad demands for preservation. The proposal contemplates  
907 a right for the entity receiving such a preservation demand to seek immediate relief in court.  
908 Arguably there may be a value in providing a route to judicial relief for a recipient of an overbroad  
909 prelitigation preservation demand, but the prospect of such applications may not be welcomed by  
910 district courts. And the proposal also suggests that there should be appellate review of such orders,  
911 perhaps not a prospect welcomed by the appellate courts. Ordinarily, a Rule 27 order will be  
912 regarded as a final judgment subject to immediate appellate review. *See* 8 C. Wright, A. Miller &  
913 R. Marcus, *Fed. Prac. & Pro.* § 2006 at 93-94 (3d ed. 2010).

914 There is no doubt that preservation of evidence is important, and that Rule 37(e) currently  
915 requires parties to make difficult decisions about when and what preservation is required. But it  
916 does not seem that this proposal would likely be helpful, and there is a possibility that it could  
917 create rather than solve problems. Accordingly, the Advisory Committee concluded without  
918 dissent that this item should be dropped from the agenda.

### 919 **III. Continuing Projects Carried Forward**

#### 920 **A. *In Forma Pauperis* Standards and Procedures**

921 Several suggestions have been made in recent years that serious improvements should be  
922 made in the standards and procedures for granting *in forma pauperis* status. The suggestions come  
923 from sophisticated pro se litigants and from the academy. The Advisory Committee agrees that  
924 serious problems have been identified. Further work is warranted. The continuing study, however,  
925 will at the outset focus as much on identifying the appropriate institutions to work for reform as

926 on developing actual reform proposals. These topics have never been addressed in the Civil Rules,  
927 and there are strong reasons to wonder whether they are best confronted within the Rules Enabling  
928 Act process. One issue that must be considered at the outset is whether developing standards to  
929 implement a specific statute comes too close to the substance of the statutory right.

930 Professors Zachary Clopton and Andrew Hammond (21-CV-C) have done empirical work  
931 that shows wide differences in the standards different judges in the same two courts apply in ruling  
932 on petitions for i.f.p. status. The local rules committee of one court, the Northern District of Illinois,  
933 has worked with them and with a local bar organization to attempt to bring its judges together on  
934 uniform standards. But establishing uniform standards for a single court does not mean that the  
935 same standards can be exported to all districts. The most prominent question is whether a uniform  
936 nationwide standard is appropriate in the face of substantial differences in the cost of living in  
937 different districts, and whether it is feasible to craft a rule that includes an index that effectively  
938 responds to this problem. A uniform standard, moreover, would have to confront questions of what  
939 resources, responsibilities, and needs should be considered. The Rules Committees have not  
940 customarily engaged in the calculations that would be needed to establish initial standards, and  
941 then to adjust them at regular intervals.

942 Standards blend into procedures. Some of the submissions to the Advisory Committee have  
943 protested that the information requested by model forms promulgated by the Administrative  
944 Office, and by Appellate Rules Form 4, are confusing, seek irrelevant information, and even  
945 intrude on constitutionally protected privacy rights of nonparties. But what information can be  
946 required depends on what is relevant to administering an appropriate standard. As one example,  
947 how far is it appropriate to demand information about a spouse's employment, earnings, assets,  
948 and other financial information? How should "spouse" be defined for this purpose? Careful  
949 development of these issues will be a massive undertaking that, again, is quite different from the  
950 work normally undertaken by the Rules Committees.

951 Faced with these challenges, the Advisory Committee will continue to focus first on the  
952 questions whether it is appropriate to take on this work, and whether it is possible to identify other  
953 entities that may be better suited to the work and persuaded to take it up.

#### 954 **B. Rule 12(a)(2), (3): Different Statutory Times**

955 Rule 12(a)(1) establishes the time for serving a responsive pleading in most civil actions at  
956 21 days, or more if a defendant has timely waived service. This paragraph, however, begins with  
957 a condition: "Unless another time is specified by \* \* \* a federal statute." Rule 12(a)(2) establishes  
958 the time at 60 days if the defendant is the United States, an agency of the United States, or a United  
959 States officer or employee sued in an official capacity. Rule 12(a)(3) provides the same 60 days if  
960 the defendant is a United States officer or employee sued in an individual capacity for an action or  
961 omission occurring in connection with duties performed on the United States' behalf. Unlike  
962 paragraph (1), neither paragraph (2) nor paragraph (3) states any recognition of statutes that set a  
963 different time. But there are statutes that set a shorter time than 60 days for some actions against  
964 the United States; it is not clear whether any statutes set a different time for individual-capacity  
965 actions within paragraph (3).

966 The question is whether different statutory times to respond should be recognized for all of  
967 paragraphs (1), (2), and (3), not (1) alone. The rule text can readily be revised to do that. And it is  
968 agreed that there is no reason to leave open even the opportunity to argue that Rule 12 supersedes  
969 any different statutory time enacted before Rule 12(a)(2) and (3) were adopted. Nor should there  
970 be any need to research priority in time when a later-enacted statute supersedes Rule 12. There is  
971 a real advantage in having rule text that directly reflects intended meaning.

972 Two arguments have confronted the impulse to amend. One is that there is no practical  
973 need. The Department of Justice knows of the statutes that set shorter response times and either  
974 responds in time or seeks an extension. Extensions are sought mostly in cases that include both a  
975 claim within a shorter statutory time and a claim subject to the general 60-day time. A detailed  
976 survey of Freedom of Information Act cases submitted by a freelance journalist seems to support  
977 this position. The second argument is that it is better to avoid adding still more rules to what many  
978 see as a constant flow of amendments that must be mastered by bench and bar.

979 At the October 2020 meeting the Advisory Committee divided evenly on a vote to  
980 recommend publication of an amendment to bring Rule 12(a)(2) and (3) into line with conflicting  
981 statutory provisions. The question has been carried forward to the October 2021 meeting because  
982 there was not sufficient time for further deliberation at the April 2021 meeting, especially in view  
983 of the additional information brought to the Advisory Committee's attention shortly before that  
984 meeting was held.

### 985 C. Rule 9(b): Pleading Conditions of Mind

986 Dean Spencer, a member of the Advisory Committee, has submitted a suggestion (20-CV-  
987 Z), developed at length in a law review article, that the second sentence of Rule 9(b) should be  
988 revised to restore the meaning it had before the Supreme Court decision in *Ashcroft v. Iqbal*, 556  
989 U.S. 662, 686-687 (2009). A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule*  
990 *9(b): Repairing the Damage Wrought by Iqbal*, 41 *Cardozo L. Rev.* 1015 (2020). The suggestion  
991 has been described to the Advisory Committee in some detail, both in the April agenda materials  
992 and in the April meeting. In-depth consideration has been deferred to the October meeting,  
993 however, because there was not time enough to deliberate in April.

994 The proposal would amend Rule 9(b) in this way:

995 (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a  
996 party must state with particularity the circumstances constituting fraud or mistake.  
997 Malice, intent, knowledge, and other conditions of a person's mind may be alleged  
998 generally without setting forth the facts or circumstances from which the condition  
999 may be inferred.

1000 The opinion in the *Iqbal* case interpreted "generally" to mean that while allegations of a  
1001 condition of mind need not be stated with particularity, they must be pleaded under the restated  
1002 tests for pleading a claim under Rule 8(a)(2).

1003 Dean Spencer challenges the Court’s interpretation on multiple grounds. In his view, it is  
1004 inconsistent with the structure and meaning of several of the pleading rules taken together. It also  
1005 departs from the meaning intended when Rule 9(b) was adopted as part of the original Civil Rules.  
1006 The 1937 committee note explains this part of Rule 9(b) by advising that readers see the English  
1007 Rules Under the Judicature Act. Dean Spencer’s proposed new language tracks the English rule,  
1008 and he shows that it was consistently interpreted to allow an allegation of knowledge, for example,  
1009 by pleading “knew” without more. More importantly, the lower court decisions that have followed  
1010 the *Iqbal* decision across such matters as discrimination claims and allegations of actual malice in  
1011 defamation actions show that the rule has become unfair. It is used to require pleaders to allege  
1012 facts that they cannot know without access to discovery, and it invites decisions based on the life  
1013 experiences that limit any individual judge’s impression of what is “plausible.”

1014 For about a decade, the Advisory Committee studied the pleading standards restated by the  
1015 decisions in *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). That work focused  
1016 on Rule 8(a)(2) standards, not Rule 9(b). Consideration of Rule 9(b) is not preempted by the  
1017 decision to forgo any present consideration of Rule 8(a)(2). But any decision to take on Rule 9(b)  
1018 will require deep and detailed work to explore its actual operation in current practices across a  
1019 range of cases that account for a substantial share of the federal civil docket. Any eventual proposal  
1020 to undo this part of the *Iqbal* decision must be supported by a strong showing of untoward  
1021 dismissals.

#### 1022 **IV. Proposals Removed from Docket**

1023 Five public proposals that were removed from the docket may be described briefly.

1024 One submission (20-CV-FF) asked about the relationship between Rule 4(f)(1), which  
1025 allows service abroad “by any internationally agreed means \* \* \* such as those authorized by the  
1026 Hague Convention \* \* \*,” and Rule 4(f)(2), which authorizes service abroad “if there is no  
1027 internationally agreed means, or if an international agreement allows but does not specify other  
1028 means \* \* \*.” The proposal asked how to fit in the parts of the Hague Convention that both  
1029 authorize and specify various methods of service. The answer seems to be that these means of  
1030 service come within (f)(1) as means authorized by the Convention. There is no apparent gap in the  
1031 rule text to fill.

1032 A second submission (21-CV-A) simply asked a question: Why does Rule 65(e)(2) say that  
1033 these rules “do not modify \* \* \* 28 U.S.C. § 2361, which relates to preliminary injunctions in  
1034 actions of interpleader or in the nature of interpleader \* \* \*.” Section 2361 includes provisions for  
1035 a permanent injunction. Rule 65(e)(2) has referred only to preliminary injunctions since its  
1036 inception in the original Civil Rules. Providing the full protections of Rule 65 to permanent  
1037 injunctions in interpleader actions seems desirable. It is more difficult to speculate about the  
1038 reasons for ensuring that the rules do not “modify” the statutory provisions for interlocutory  
1039 injunctions. Such help as can be found speculates that the court must be able to act immediately to  
1040 prevent destruction or preemption of the subject of the interpleader action. The submission does  
1041 not speak to this prospect, nor does it point to any problems in practice. If there were any question  
1042 to address, it would be whether Rule 65(e)(2) should be abandoned. Absent any indication of

1043 problems in practice, and given the value that has been ascribed to it, the Advisory Committee  
1044 voted to drop this subject from the agenda.

1045           The third submission (21-CV-B), by a pro se litigant, advanced two unrelated proposals.  
1046 One would expand Rule 6(d) to add three days to any time to act measured from entry of judgment  
1047 when the clerk serves notice by mail or the other means described in Rule 6(d). This suggestion  
1048 implicates a carefully integrated set of rules. Rules 50, 52, 59, and 60(c)(1) set times for post-  
1049 judgment motions. Rule 77(d)(1) directs the clerk to serve notice of the entry of judgment, while  
1050 Rule 77(d)(2) provides that lack of notice of entry does not affect the time for appeal, except as  
1051 allowed by Appellate Rule 4(a). Appellate Rule 4(a) includes various provisions for extending  
1052 appeal time. The relationships among these rules have been carefully worked out. It is better to  
1053 leave them as they are.

1054           The other proposal in the third submission would add to Rule 60(c)(1) a cross-reference to  
1055 the provision in Appellate Rule 4(a)(4)(A)(vi) that measures the effect of a Rule 60 motion on  
1056 appeal time. This proposal was rejected because cross-references are disfavored.

1057           Two proposals (20-CV-GG and 21-CV-D) were removed from the agenda on  
1058 recommendation of the Discovery Subcommittee. One suggested clarification of Rule 37(e) to  
1059 include express authorization of an award of attorney fees incurred in discovery efforts to restore  
1060 or replace electronically stored information that should have been preserved. Research found that  
1061 although the rule text is uncertain, courts generally have found fee awards an appropriate remedy.  
1062 It does not seem wise to reopen Rule 37(e) for this reason. The other proposal suggested adding a  
1063 provision to Rule 27(c) to authorize an action for pre-suit information preservation or, apparently,  
1064 an action for a declaration that information need not be preserved. An order to preserve need not  
1065 include discovery, but this proposal would encounter many of the problems that have deterred  
1066 adoption of pre-suit discovery rules, and likely would compound the problems. The Advisory  
1067 Committee has been reluctant to go beyond Rule 37(e) to address the duty to preserve information  
1068 in anticipation of litigation, and concluded that this proposal does not warrant further development.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

1   **Rule 12.    Defenses and Objections: When and How**  
2                   **Presented; Motion for Judgment on the**  
3                   **Pleadings; Consolidating Motions; Waiving**  
4                   **Defenses; Pretrial Hearing**

5   **(a)    Time to Serve a Responsive Pleading.**

6           **(1)    *In General.*** Unless another time is specified  
7                   by this rule or a federal statute, the time for  
8                   serving a responsive pleading is as follows:

9                                   \* \* \* \* \*

10          **(4)    *Effect of a Motion.*** Unless the court sets a  
11                   different time, serving a motion under this  
12                   rule alters these periods as follows:

13                   **(A)**    if the court denies the motion or  
14                   postpones its disposition until trial,  
15                   the responsive pleading must be  
16                   served within 14 days after notice of

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

17 the court’s action, or within 60 days  
18 if the defendant is a United States  
19 officer or employee sued in an  
20 individual capacity for an act or  
21 omission occurring in connection  
22 with duties performed on the United  
23 States’ behalf; or

24 \* \* \* \* \*

25 **Committee Note**

26 Rule 12(a)(4) is amended to provide a United States  
27 officer or employee sued in an individual capacity for an act  
28 or omission occurring in connection with duties performed  
29 on the United States’ behalf with 60 days to serve a  
30 responsive pleading after the court denies a motion under  
31 Rule 12 or postpones its disposition until trial. The United  
32 States often represents the officer or employee in such  
33 actions. The same reasons that support the 60-day time to  
34 answer in Rule 12(a)(3) apply when the answer is required  
35 after denial or deferral of a Rule 12 motion. In addition,  
36 denial of the motion may support a collateral-order appeal  
37 when the motion raises an official immunity defense.  
38 Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days  
39 in these cases, and includes “all instances in which the  
40 United States represents that person [sued in an individual  
41 capacity for an act or omission occurring in connection with  
42 duties performed on the United States’ behalf] when the  
43 judgment or order is entered or files the appeal for that



44 person.” The additional time is needed for the Solicitor  
45 General to decide whether to file an appeal and avoids the  
46 potential for prejudice or confusion that might result from  
47 requiring a responsive pleading before an appeal decision is  
48 made.

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### **Changes Made After Publication and Comment**

No changes were made after publication and comment.

### **Summary of Public Comment**

There were only three comments clearly directed to the proposal to amend Rule 12(a)(4)(A) that was published in August 2020. Rule 12(a)(4)(A) sets the time to file a responsive pleading at 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. The amendment would allow 60 days “if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.”

American Association for Justice (CV-2020-0003-0011): This is “an unfair and unnecessary across the board rule-based extension.”

“[T]here have been dozens of highly publicized incidents of police brutality” that “call for significant police reforms at both the state and federal level.” “The plaintiff already bears the burden to prove the case. So does it seem right or fair to add to that burden and provide DOJ with additional time?” The initial period for a DOJ response is 60 days. When a motion is filed, suspending the time, “the DOJ knows that the time to respond is coming and can plan for

it.” It will have all the time the court takes to consider the motion in addition to the 14 days.

“It is already extraordinarily difficult for a plaintiff to successfully bring a claim under *Bivens* and its progeny. If anything, the Advisory Committee should be considering whether DOJ has too much time to consider appeals \* \* \*.”

Federal Courts Committee, New York City Bar (CV-2020-0003-0018): “The Federal Courts Committee supports this minor change, particularly given that the court retains its authority to set a different time for the responsive pleading—including a shorter time, if expedition is appropriate.”

NAACP Legal Defense and Educational Fund (CV-2020-0003-0020): Opposes the proposal. It will add delay to litigation, and exacerbate problems with qualified immunity doctrine. “The proposed rule changes were requested by the DOJ with the express purpose of further sheltering federal defendants from litigation and expanding their already widespread use of immunity doctrines.”

The Department’s concern with interlocutory appeal opportunities in official immunity cases is characterized as the “primary justification” underlying its request for this rule change. The proposal is overblown as applied to cases with no potential immunity defense. All other defendants would still have to answer within 14 days. Filing an answer would rarely, if ever, interfere with the opportunity to file an interlocutory appeal; in the rare case that does present a problem, the defense can request an extension. And a stay of discovery can be sought pending appeal.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

SUPPLEMENTAL RULES FOR SOCIAL SECURITY  
ACTIONS UNDER 42 U.S.C. § 405(g)

1 **Rule 1. Review of Social Security Decisions Under 42**  
2 **U.S.C. § 405(g)**

3 **(a) Applicability of These Rules.** These rules govern an  
4 action under 42 U.S.C. § 405(g) for review on the  
5 record of a final decision of the Commissioner of  
6 Social Security that presents only an individual  
7 claim.

8 **(b) Federal Rules of Civil Procedure.** The Federal  
9 Rules of Civil Procedure also apply to a proceeding  
10 under these rules, except to the extent that they are  
11 inconsistent with these rules.

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<sup>1</sup> Redline showing post-publication changes.

1 **Rule 2. Complaint**

2 **(a) Commencing Action.** An action for review under  
3 these rules is commenced by filing a complaint with  
4 the court.

5 **(b) Contents.**

6 (1) The complaint must state:

7 (A) that the action is brought under  
8 § 405(g), identifying the final  
9 decision to be reviewed, including  
10 any identifying designation provided  
11 by the Commissioner with the final  
12 decision;

13 (B) the name, and the county of  
14 residence, ~~and the last four digits of~~  
15 ~~the social security number~~ of the  
16 person for whom benefits are  
17 claimed;

- 18                   (C)    the name ~~and last four digits of the~~  
19                                   ~~social security number~~ of the person  
20                                   on whose wage record benefits are  
21                                   claimed; and
- 22                   (D)    the type of benefits claimed.
- 23           (2)    The complaint may include a short and plain  
24   statement of the grounds for relief.

1 **Rule 3. Service**

2       The court must notify the Commissioner of the  
3 commencement of the action by transmitting a Notice of  
4 Electronic Filing to the appropriate office within the Social  
5 Security Administration’s Office of General Counsel and to  
6 the United States Attorney for the district {where the action  
7 is filed}. {If the complaint was not filed electronically, the  
8 court must notify the plaintiff of the transmission.} The  
9 plaintiff need not serve a summons and complaint under  
10 Civil Rule 4.

1   **Rule 4. Answer; Motions; Time**

2   **(a) Serving the Answer.** An answer must be served on  
3       the plaintiff within 60 days after notice of the action  
4       is given under Rule 3.

5   **(b) The Answer.** An answer may be limited to a certified  
6       copy of the administrative record, and to any  
7       affirmative defenses under Civil Rule 8(c). Civil  
8       Rule 8(b) does not apply.

9   **(c) Motions Under Civil Rule 12.** A motion under Civil  
10      Rule 12 must be made within 60 days after notice of  
11      the action is given under Rule 3.

12   **(d) Time to Answer After a Motion Under Rule 4(c).**  
13      Unless the court sets a different time, serving a  
14      motion under Rule 4(c) alters the time to answer as  
15      provided by Civil Rule 12(a)(4).

1 **Rule 5. Presenting the Action for Decision**

2       The action is presented for decision by the parties’  
3       briefs. A brief must support assertions of fact by citations to  
4       particular parts of the record.



1 **Rule 6. Plaintiff's Brief**

2           The plaintiff must file and serve on the Commissioner  
3 a brief for the requested relief within 30 days after the answer  
4 is filed or 30 days after ~~the court disposes~~ entry of an order  
5 disposing of ~~all motions~~ the last remaining motion filed  
6 under Rule 4(c), whichever is later.

1 **Rule 7. Commissioner's Brief**

2           The Commissioner must file a brief and serve it on the  
3 plaintiff within 30 days after service of the plaintiff's brief.

1 **Rule 8. Reply Brief**

2           The plaintiff may file a reply brief and serve it on the  
3 Commissioner within 14 days after service of the  
4 Commissioner's brief.

1

**Committee Note**

2           Actions to review a final decision of the Commissioner  
3 of Social Security under 42 U.S.C. § 405(g) have been  
4 governed by the Civil Rules. These Supplemental Rules,  
5 however, establish a simplified procedure that recognizes the  
6 essentially appellate character of actions that seek only  
7 review of an individual’s claims on a single administrative  
8 record, including a single claim based on the wage record of  
9 one person for an award to be shared by more than one  
10 person. These rules apply only to final decisions actually  
11 made by the Commissioner of Social Security. They do not  
12 apply to actions against another agency under a statute that  
13 adopts § 405(g) by considering the head of the other agency  
14 to be the Commissioner. There is not enough experience  
15 with such actions to determine whether they should be  
16 brought into the simplified procedures contemplated by  
17 these rules. But a court can employ these procedures on its  
18 own if they seem useful, apart from the Rule 3 provision for  
19 service on the Commissioner.

20           Some actions may plead a claim for review under  
21 § 405(g) but also join more than one plaintiff, or add a  
22 defendant or a claim for relief beyond review on the  
23 administrative record. Such actions fall outside these  
24 Supplemental Rules and are governed by the Civil Rules  
25 alone.

26           The Civil Rules continue to apply to actions for review  
27 under § 405(g) except to the extent that the Civil Rules are  
28 inconsistent with these Supplemental Rules. Supplemental  
29 Rules 2, 3, 4, and 5 are the core of the provisions that are  
30 inconsistent with, and supersede, the corresponding rules on  
31 pleading, service, and presenting the action for decision.

32           These Supplemental Rules establish a uniform  
33 procedure for pleading and serving the complaint; for  
34 answering and making motions under Rule 12; and for  
35 presenting the action for decision by briefs. These  
36 procedures reflect the ways in which a civil action under  
37 § 405(g) resembles an appeal or a petition for review of  
38 administrative action filed directly in a court of appeals.

39           Supplemental Rule 2 adopts the procedure of Civil  
40 Rule 3, which directs that a civil action be commenced by  
41 filing a complaint with the court. In an action that seeks only  
42 review on the administrative record, however, the complaint  
43 is similar to a notice of appeal. Simplified pleading is often  
44 desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by  
45 identifying the action as one brought under § 405(g). The  
46 Social Security Administration can ensure that the plaintiff  
47 is able to identify the administrative proceeding and record  
48 in a way that enables prompt response by providing an  
49 identifying designation with the final decision. The elements  
50 of the claim for review are adequately pleaded under  
51 Rule 2(b)(1)(B), (C), and (D). Failure to plead all the matters  
52 described in Rule 2(b)(1)(B), (C), and (D), moreover, should  
53 be cured by leave to amend, not dismissal. Rule 2(b)(2),  
54 however, permits a plaintiff ~~who wishes~~ to plead more than  
55 Rule 2(b)(1) requires ~~to do so~~.

56           Rule 3 provides a means for giving notice of the action  
57 that supersedes Civil Rule 4(i)(2). The Notice of Electronic  
58 Filing sent by the court suffices for service, so long as it  
59 provides a means of electronic access to the complaint.  
60 Notice to the Commissioner is sent to the appropriate  
61 regional office. The plaintiff need not serve a summons and  
62 complaint under Civil Rule 4.

63           Rule 4's provisions for the answer build from this part  
64 of § 405(g): "As part of the Commissioner's answer the

65 Commissioner of Social Security shall file a certified copy  
66 of the transcript of the record including the evidence upon  
67 which the findings and decision complained of are made.” In  
68 addition to filing the record, the Commissioner must plead  
69 any affirmative defenses under Civil Rule 8(c). Civil  
70 Rule 8(b) does not apply, but the Commissioner is free to  
71 answer any allegations that the Commissioner may wish to  
72 address in the pleadings.

73 The time to answer or to file a motion under Civil  
74 Rule 12 is set at 60 days after notice of the action is given  
75 under Rule 3. If a timely motion is made under Civil Rule 12,  
76 the time to answer is governed by Civil Rule 12(a)(4) unless  
77 the court sets a different time.

78 Rule 5 states the procedure for presenting for decision  
79 on the merits a § 405(g) review action that is governed by  
80 the Supplemental Rules. Like an appeal, the briefs present  
81 the action for decision on the merits. This procedure  
82 displaces summary judgment or such devices as a joint  
83 statement of facts as the means of review on the  
84 administrative record. Rule 5 also displaces local rules or  
85 practices that are inconsistent with the simplified procedure  
86 established by these Supplemental Rules for treating the  
87 action as one for review on the administrative record.

88 All briefs are similar to appellate briefs, citing to the  
89 parts of the administrative record that support an assertion  
90 that the final decision is not supported by substantial  
91 evidence or is contrary to law.

92 Rules 6, 7, and 8 set the times for serving the briefs: 30  
93 days after the answer is filed or 30 days after the court  
94 disposes of all motions filed under Rule 4(c) for the  
95 plaintiff’s brief, 30 days after service of the plaintiff’s brief  
96 for the Commissioner’s brief, and 14 days after service of

97 the Commissioner’s brief for a reply brief. The court may  
98 revise these times when appropriate.

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### **Changes Made After Publication and Comment**

Supplemental Rule 2(b)(1)(A) was changed to add a requirement that the complaint include any identifying designation provided by the Commissioner with the final decision. Supplemental Rules 2(b)(1)(B) and (C) were changed to delete the requirement that the complaint include the last four digits of the social security number of the person for whom benefits are claimed and the person on whose wage record benefits are claimed. Supplemental Rule 6 was changed to clarify that the effect of a motion on the time to file the plaintiff’s brief is measured by the entry of an order disposing of the last remaining motion.

### **Summary of Public Comment**

These notes summarize the public comments and public hearing transcript for the Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) published in August 2020. The summary is arranged by topics, dividing many of the comments and the testimony into parts that address common themes.

#### *Overall Reactions*

National Organization of Social Security Claimants’  
Representatives (NOSSCR) (CV-2020-0003-0005):  
Opposes adoption of the rules for several related reasons.

The rules are unnecessary. Claimants’ lawyers adjust to the different procedures used in different courts, even those who appear in several districts.

Divergent local practices that accommodate the preferences of particular districts or individual judges are desirable because they achieve prompt and accurate dispositions. Forcing judges to adhere to a national rule could disrupt present good procedure. This is true even though some local practices are not welcome – “joint statements of facts are widely unpopular.”

Social Security cases should not “be treated as lesser or different than the other 93% of cases, many of which also involve review of agency decisions.”

The Social Security Administration (SSA) should assign its attorneys in ways that avoid any need to learn disparate local practices. And it should improve its own decision processes and decisions to reduce the number of claimants who are forced to seek judicial review.

(Similar points are made in the testimony of Stacy Braverman Cloyd on behalf of NOSSCR, transcript pp. 7-10, 16-17, 26-27, 28. She added that “these rules are a lot better than previous drafts of them in terms of their equity between the plaintiff and the defendant, so I really appreciate that.” Transcript p. 26.)

Alan B. Morrison, Esq. (CV-2020-0003-0007): From a background in litigating social security appeals in a U.S. Attorney’s Office and with Public Citizen Litigation Group, and serving on the ACUS Committee that recommended the idea of special rules, can think of no case “in which Rules like these proposed would not have been helpful to the parties and the courts.” “[T]he current Civil Rules do not fit at all well with social security disability cases.” Local rules do not make up for the shortcomings, and impose burdens on lawyers who appear in more than one court. The sheer number of these cases is “another reason why a change is



worth the effort and any incursion on the principle of transubstantiality.”

Jeffrey Marion, Esq. (CV-2020-0003-0008): District courts need flexibility to manage their cases. They should not be subject to a “one size fits all” approach.

Anthony Ramos, Esq. (CV-2020-0003-0009): “I oppose the rule changes.” (Might include Rule 12 as well?)

Federal Magistrate Judges Association (CV-2020-0003-0010): “[S]upports the enactment of the proposed set of Supplemental Rules for Social Security Review Actions.”

American Association for Justice (AAJ) (CV-2020-0003-0011): These rules “do not warrant upending the principle of transubstantivity.” They are arguably more similar to appeals but “[t]here is not enough that is unique.” Adoption will make it more difficult to argue against new rules for separate practice areas in the future. And they “will fail to alleviate any of the actual problems with Social Security review cases.” The biggest problems are the volume of cases and the high remand rate. Uniform procedural rules are unlikely to address these problems. They seem to exist mainly to save time for SSA attorneys, but SSA can regularly assign attorneys to specific districts, and local rules will continue to defeat uniformity. Courts are doing an excellent job now; flexibility in managing dockets is paramount.

Hon. Frank P. Geraci, Jr., writing as Chief Judge of the Western District of New York (CV-2020-0003-0012): Social Security filings now account for 53% of the docket in the Western District of New York. It has had success with a local rule that addresses these cases in a framework that overlaps the proposed supplemental rules in many respects.

“[W]e support the proposed Supplemental Rules, which we understand as providing a floor, not a ceiling, for deadlines.” We have more generous deadlines, and believe they do not conflict.

Joanna L. Suyes, Esq. (CV-2020-0003-0013): If the goal is to reduce the number of social security cases filed in federal courts and to lighten the load on attorneys and courts, the proposed rules “do not solve those problems.” Accurate review and remand at the Appeals Council level would do more. And the Appeals Council conducts own-motion review of cases not appealed by the claimant, but only of decisions favorable to claimants. It should act on its own to review unfavorable decisions, weeding out more incorrectly decided cases.

Nor will uniformity result. Local rules will persist. The Richmond Division of the Eastern District of Virginia operates under three different standing orders. (The uniformity point was repeated in her testimony, transcript pp. 32-33.)

Her testimony included this: “[S]tremlining the process certainly does help, and the rules are clearly written. And that is all – that’s going to be very helpful, especially for pro se litigants.”

Hon. Ricardo S. Martinez, writing as Chief Judge of the Western District of Washington (CV-2020-0003-0015): The Western District of Washington handles the third highest volume of social security disability appeals of all federal courts, after the Western District of New York and the Central District of California. “[T]he backlog would be far more voluminous if we had not been using an appellate practice framework similar to the protocols set forth in the proposed Supplemental Rules.” The Western District “fully

supports the proposed Supplemental Rules, and I enthusiastically endorse innovation in this important area of law.”

Public Counsel (CV-2020-0003-0016): Public Counsel provides pro bono legal services to low-income communities in several hundred cases every year. About 10% of its clients are appealing denial of social security benefits. “The streamlined rules will greatly benefit all of our clients.” Simplified pleading is easier for pro se plaintiffs. Simplified case management processes also will be better, moving to a process “that alleviates the mandatory settlement procedures, joint status reports, and joint briefing currently used in many courtrooms.” “[W]e cannot overstate the need for a uniform case management procedure.” The clinic serves its clients by creating forms and samples, but “the variety of case management procedures in the Central District [of California] makes this impossible.”

SSA (CV-2020-0003-0017): Strongly supports the proposal. The Administrative Conference found that the general Civil Rules do not provide speedy or efficient review. Procedures vary considerably from courtroom to courtroom. Delays and litigation costs can be increased by “[b]urdensome procedures adopted by some districts or individual judges, such as simultaneous briefing schedules, joint briefing, joint statements of facts, and requirements that the agency file its brief before the plaintiff.” The committee note stating that the rules displace summary judgment is heartening.

New York City Bar, Federal Courts Committee (CV-2020-0003-0018): Agrees that a simplified appeal procedure is desirable. The Committee “has not identified any risks that the Supplemental Rules, as drafted, will modify any substantive rights or favor any special interests. Accordingly, the Federal Courts Committee is persuaded

that generic concerns about trans-substantivity do not overcome the benefits of the procedures set forth in the Supplemental Rules and supports their adoption.”

Empire Justice Center (CV-2020-0003-0019): The Center is a New York statewide not-for-profit law firm that represents low-income disability claimants before SSA and in district court. “We endorse the comments submitted by \* \* \* (NOSSCR), of which we are members.” The problems would be better addressed by SSA itself; “[b]etter decisions would lead to fewer appeals.” The current Civil Rules, when combined with local rules like those in the Western District of New York, “are effective and flexible. It is not necessary to have special rules for Social Security cases.”

*Rule 1: Review [Scope]*

Alan B. Morrison, Esq. (CV-2020-0003-0007): The committee note refers to plural claimants, without further explanation. So too there is a question, 2(b)(1)(B) and (C), why the last four digits of the social security number are required for more than one person. The intent should be clarified.

SSA (CV-2020-0003-0017): The Rule 1(a) definition of scope “describes virtually all of the approximately 18,000 Social Security civil actions filed each year.” It reaches Title II – old-age, survivors, and disability insurance benefits – and Title XVI – Supplemental Security Income. (Section 405(g) is incorporated for Title XVI by 42 U.S.C. § 1383(c)(3). One comment has reflected confusion about this point; perhaps further explanation should be added to the committee note.) Rule 1(a) “properly exclude[s] cases brought under other statutes that incorporate section 405(g)’s review procedures, but that relate to determinations

made by someone other than the Commissioner.” The exclusion of class actions also is appropriate.

*Rule 2: Complaint*

Hon. Patricia Barksdale (CV-2020-0003-0004): Two comments on Rule 2(b)(1)(B):

Stating the name of the person for whom benefits are claimed could be confusing when the person has died and a substituted person is pursuing the action.

Requiring that the name be stated is inconsistent with Civil Rule 5.2(a)(3), which requires that a paper that contains the name of a person known to be a minor include only the minor’s initials. (There is no inconsistency. Rule 5.2(a)(3) applies as the consistent means of providing the “name.”)

NOSSCR (CV-2020-0003-0005): Strongly supports Rule 2(b)(2), which permits, but does not require, the plaintiff to include a short and plain statement of the grounds for relief. And, see Rule 4, argues that the Commissioner should be forced to respond in the answer. (The testimony of Stacy Braverman Cloyd, Esq., for NOSSCR, adds that a more detailed complaint may lead the Commissioner to ask for a voluntary remand, transcript p. 12.)

The observation in the committee note that a failure to include all the elements required by Rule 2(b)(1) should be addressed by amendment, not dismissal, is approved, but with the suggestion that it should be elevated to rule text “or in a footnote.” (The same appoint appears in the testimony, transcript pp. 12-13.)

The testimony of Stacy Braverman Cloyd for NOSSCR responded to a question about child plaintiffs by noting that children can indeed receive benefits. She also noted the recommendation that even with adult claimants, some courts allow use of a first name and the initial of the last name in the caption. Transcript, pp. 19-20.

Alan B. Morrison, Esq. (CV-2020-0003-0007): The sentence at the end of the third full paragraph of the committee note on p. 219 of the published version could be edited: “Rule 2(b)(2), however, permits a plaintiff to plead more than Rule 2(b)(1) requires the plaintiff to do.”

SSA (CV-2020-0003-0017): “[I]mproved clarity in the plaintiff’s initial filing will assist the agency in promptly generating a record of the administrative proceedings.” (Footnote 9 responds to a drafting suggestion by Dean Morrison that is not summarized above for the reasons described in this footnote.)

Empire Justice Center (CV-2020-0003-0019): There may be cases where it is important to plead details that will alert the Commissioner to details that may lead to a voluntary remand earlier in the process.

*Last Four Digits*

A point made repeatedly during many prepublication meetings is made also in the comments and testimony. Requiring the plaintiff to provide the last four digits of relevant social security numbers creates an unacceptable risk of identity theft, particularly when the complaint is filed electronically. The SSA argument that it needs this information to ensure accurate identification of the administrative decision and record is not persuasive. The

current development of identification by Beneficiary Notice Control numbers provides a better means of identification.

NOSSCR (CV-2020-0003-0005): “SSA could either put a BCN [sic] on each Appeals Council denial or other place where it informs claimants about their right to appeal.” But the plaintiff should be permitted to include the last four digits if the plaintiff wants to. (Similar points are made in the testimony of Stacy Braverman Cloyd for NOSSCR, transcript pp. 10-12, adding that SSA can always ask the plaintiff for the social security number off the record. Later, she noted the BCN practice, and expressed uncertainty as to how far this practice has developed. Transcript pp. 23-26.)

AAJ (CV-2020-0003-0011): Given modern technology, “The last four digits are ‘in fact the most important to protect.’” Other means to identify the SSA proceeding can be used, including the BNC.

Joanna L. Suyes, Esq. (CV-2020-0003-0013): The last four digits of social security numbers should not be required. Using the BNC is safer. She repeated this observation in her testimony, transcript pp. 335.

Public Counsel (CV-2020-0003-0016): “The risk of identity theft is too great.” These cases are not usually visible via PACER, but “we have seen mistakes in this regard.”

### *Rule 3: Service*

NOSSCR (CV-2020-0003-0005): Draws on experience in districts that already allow electronic notice to effect service of the summons and complaint to elaborate on the committee note statement that a Notice of Electronic filing “suffices for service, so long as it provides a means of electronic access to the complaint.” Some district clerks have taken the

position that they cannot allow electronic access before the Commissioner had made an appearance. This problem has been cured by a standing order in one court. A means should be found to ensure that all district clerks allow access without further ado. (This point was made again in the testimony of Stacy Braverman Cloyd, Esq., for NOSSCR, transcript pp. 13-14.)

Alan B. Morrison, Esq. (CV-2020-0003-0007): “where the action is filed,” shown in brackets, may not be necessary, but it is helpful “and it is only five words.”

AAJ (CV-2020-0003-0011): It is vital to include the bracketed language requiring the court to notify the plaintiff of transmission of the notice of electronic filing when the complaint is not filed electronically.

Cheryl L. Siler, Esq., Aderant (CV-2020-0003-0014): Rule 3 should plainly state that transmission of the Notice of Electronic Filing is how notice of an action is given. That is important for Rule 4(a), which requires the Commissioner to serve an answer on the plaintiff “after notice of the action is given under Rule 3.”

Hon. Ricardo S. Martinez (CV-2020-0003-0015): The Western District of Washington has, since 2015, conducted an e-service pilot project similar to proposed Supplemental Rule 3, designed to operate within the framework of the Civil Rules.

Public Counsel (CV-2020-0003-0016): “The most important change will be relieving our clients of the burden of serving the summons and complaint in their cases.” Many clients have never mailed a letter or visited a post office, and find it burdensome to pay for certified mail. Many homeless people do not have someone to assist them with service.



SSA (CV-2020-0003-0017): Supports. If it is necessary to do anything to reconcile district court clerks, SSA will work to establish a blanket consent for this service by SSA and the Attorney General.

Testimony, Joanna L. Suyes, Esq., transcript p. 37: Supports the bracketed language “related to the importance of providing notice to the plaintiff of transmission of the complaint.”

*Rule 4: Answer and Motions*

Hon. Patricia Barksdale (CV-2020-0003-0004): This comment refers to proposed rule “8(b),” but may mean 4(b). The rule “may be confusing when a claimant raises only a constitutional issue and the commissioner waives administrative-review-process exhaustion.” (This may mean to ask about actions against the Commissioner that do not seek review of a final decision based on the administrative record. If that is the question, it addresses an action that, under Rule 1(a), is not within the Supplemental Rules.)

NOSSCR (CV-2020-0003-0005): Rule 4(b) “is not acceptable.” The Commissioner should be required to plead to all allegations in the complaint, to provide “plaintiffs enough information about SSA’s position on issues raised in the complaint to write thorough and concise briefs.” A general denial could simplify the answer process.

Using the administrative record as part of the answer may mean that SSA moves for a voluntary remand before answering and without providing the record. A requirement should be added to ensure that the record is filed with the motion if it is not already on file. (These same points are repeated in a January 22, 2020 [sic] Testimony Outline of Stacy Braverman Cloyd, Esq., for NOSSCR, and in her

testimony, transcript pp. 14-15. In response to a question, she suggested a possible supplemental rule “that filing the transcript is deemed a general denial to all allegations except those specifically admitted and a waiver of all affirmative defenses.” Transcript pp. 21-22. She added that pro se litigants may plead in non-standard forms, but responding to them is not likely to be a significant amount of work in contrast to the overall workload. Later, responding to a question, she made essentially the same points, transcript. pp. 25-26, 28-29.)

Hon. Frank P. Geraci, Jr. (CV-2020-0003-0012): A local practice has developed in the Western District of New York, without court mandate, to resolve Social Security appeals by cross-motions for judgment on the pleadings under Civil Rule 12(c). A similar practice appears to exist in other districts in New York, and in at least one other district. Supplemental Rule 4(c) seems inconsistent with this practice because it requires that any motion under Rule 12 be made within 60 days after notice of the action is given. If the Commissioner answers on the 60th day, a Rule 12(c) motion could not be made. Rule 4(c) should be revised so it applies only to motions to dismiss under Rule 12(b)(1) or (6).

SSA (CV-2020-0003-0017): “In the vast majority of cases, an answer from the Commissioner is unnecessary, and the parties are able to proceed to briefing as soon as the administrative record is filed.” At least 25 districts now allow the record to serve as the answer.

Empire Justice Center (CV-2020-0003-0019): Filing an answer in addition to the record “would require the agency to review the claim for possible remand at an earlier stage.”

*Brief Schedules*

Many comments suggest that the times set by Rules 6, 7, and 8 for filing briefs are too short. They will inevitably lead to motions for extensions, which will be granted. It is common to suggest that the periods should be 60 days for the plaintiff's brief, 60 days for the Commissioner's brief, and 21 days for a reply brief.

Hon. Patricia Barksdale (CV-2020-0003-0004): 60 days in Rules 6 and 7.

NOSSCR (CV-2020-0003-0005): The briefs “are dispositive in the vast majority of Social Security cases.” The times should be 60, 60, and 21 days. The plaintiff will have a special need for 60 days if the Commissioner is not required to plead in response to the complaint. (These comments are repeated in the testimony of Stacy Braverman Cloyd for NOSSCR, transcript pp. 15-16.)

Jeffrey Marion, Esq (CV-2020-0003-0008): Most plaintiffs' attorneys in these cases practice solo or in small firms. They often face a time crunch. And many district judges give low docket priority to these cases. Briefs should be due within 60 days.

AAJ (CV-2020-0003-0011): Whether claimants' representatives thought these briefing schedules would work depends on where they practice. But generally they feel that longer periods would reduce wasted time on motions for extensions, and that the result would be much like current practice. It is difficult to review enormous records in 30 days. Again, 60/60/21 is recommended.

Joanna L. Suyes, Esq. (CV-2020-0003-0013): The Eastern District of Virginia now gives plaintiffs 30 days to file briefs,

but allows 60 days for the Commissioner’s brief. Shortening it to 30 days will result in motions to extend time – “frankly, 30 days is not enough time for either side to prepare an adequate brief after receiving a certified administrative record which sometimes runs into the thousands of pages.” Her testimony was similar, transcript pp. 33-34.

Cheryl L. Siler, Esq., Aderant (CV-2020-0003-0014): Suggests an edit to clarify: “. . . within 30 days after the answer is filed or 30 days after ~~the court disposes~~ entry of the order disposing of all motions the last remaining motion filed under Rule 4(c), whichever is later.” (“remaining” is added because the last motion filed may be disposed of before an earlier filed motion.)

Public Counsel (CV-2020-0003-0016): Pro se litigants need more time. It should be 60 days for the plaintiff’s brief.

SSA (CV-2020-0003-0017): “We join other commenters in urging the Committee to extend the default briefing deadlines \* \* \* to 60 days. \* \* \* [B]oth plaintiffs’ bar and agency attorneys have massive caseloads, and reduced timelines likely will result in more requests for extensions of time, a pointless and inefficient exercise \* \* \*.”

*Other*

Jean Publieee (CV-2020-0003-0003): The general public “has a 12 year old recognition of the english language (or less).” Rules should be written in language that American citizens can understand.

Hon. Patricia Barksdale (CV-2020-0003-0004): Asks whether “a concerted decision has been made to omit 42 U.S.C. § 1383(c),” which provides for review of

overpayment decisions of the Commissioner through § 405(g). (See the SSA comment on Rule 1.)

This comment also suggests that the rules “should address the time to file a motion for an attorney’s fee under 42 U.S.C. § 406(b). (An elaborate draft on these fee motions was considered by the subcommittee.)

Jeffrey Marion, Esq. (CV-2020-0003-0008): In 25 years of practice the government has never served the record within 60 days. The rules should clarify what sanctions are available to a plaintiff.

Stacy Braverman Cloyd, testifying for NOSSCR, responded to a question about the time SSA takes to produce the record by observing that “it often goes above 60 days, and, certainly, since the pandemic, that has been a huge problem.” SSA recognizes the problem and is trying to improve, but NOSSCR members think “they are not where they need to be at all as an agency in getting those transcripts in in [sic] a timely fashion.” Transcript pp. 20-21. (A similar observation is made in CV-2020-0003-0019, the Empire Justice Center: WDNY allows the Commissioner 90 days to file an answer, but even with that “the Commissioner, particularly of late, has been unable to file the CAR in a timely fashion.”)

Joanna L. Suyes, Esq. (CV-2020-0003-0013): Adopting a 30-page limit for briefs would lead to better focused appeals.

SSA (CV-2020-0003-0017): Urges revival of the earlier effort to develop a rule to establish a uniform procedure for motions for attorney fees under 42 U.S.C. § 406(b). This statute governs fees for services in judicial review proceedings. “[I]ndividual courts have cobbled together different rules and practices, including as to timing.” The

statute does not say what should be submitted to support the petition. The procedure should include a requirement that the attorney attest to having informed the plaintiff of the request – fees are paid by the plaintiff, directly or through withholding from benefit payments. SSA has no direct financial stake, but plays a part resembling that of trustee for claimants.

Stacy Braverman Cloyd, Esq., for NOSSCR, transcript p. 15:  
The Commissioner should be required to file a notice before seeking a voluntary remand to enable plaintiffs to decide whether to consent and allow them to work out the details of remand.

# TAB 5B

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE  
APRIL 23, 2021

1 The Civil Rules Advisory Committee met by Teams teleconference  
2 on April 23, 2021. The meeting was open to the public. Participants  
3 included Judge Robert Michael Dow, Jr., Committee Chair, and  
4 Committee members Judge Jennifer C. Boal; Hon. Brian M. Boynton;  
5 David J. Burman, Esq.; Judge Joan N. Ericksen; Judge David C.  
6 Godbey; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara  
7 Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Joseph M.  
8 Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and  
9 Helen E. Witt, Esq. Professor Edward H. Cooper participated as  
10 Reporter, and Professor Richard L. Marcus participated as Associate  
11 Reporter. Judge John D. Bates, Chair; Catherine T. Struve,  
12 Reporter; Professor Daniel R. Coquillet, Consultant; and Peter D.  
13 Keisler, Esq., represented the Standing Committee. Judge Catherine  
14 P. McEwen participated as liaison from the Bankruptcy Rules  
15 Committee. Professor Daniel J. Capra participated as liaison to the  
16 CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk  
17 Representative. The Department of Justice was further represented  
18 by Joshua E. Gardner, Esq. Julie Wilson, Esq. and Kevin Crenny,  
19 Esq., represented the Administrative Office. Dr. Emery G. Lee, Dr.  
20 Tim Reagan, and Jason Cantone, Esq., represented the Federal  
21 Judicial Center.

22 Members of the public who joined the meeting are identified in  
23 the attached Teams attendance list.

24 Judge Dow opened the meeting with messages of thanks and  
25 welcome. He observed that there were around fifty participants and  
26 guests, a good attendance, but expressed a hope that the October  
27 meeting would be in person.

28 Judge Dow further noted that the meeting agenda is very full,  
29 but expected the Committee to do its best to get through all items.  
30 The work of the CARES Act Subcommittee has involved the parallel  
31 subcommittees for the Appellate, Bankruptcy, and Criminal Rules  
32 Committees, as well as all advisory committee reporters and  
33 Professors Capra and Struve as overall coordinating reporters.  
34 Their collective work "has been a marvelous thing to watch." He  
35 also thanked Julie Wilson and Brittany Bunting for all of the work  
36 that goes into preparing these meetings and that is done so well  
37 that we never see it.

38 The newest Committee members were introduced, repeating the  
39 introductions at the October meeting that anticipated their full-  
40 fledged arrival. Judge Godbey has already accepted appointment and  
41 begun work as chair of the Discovery Subcommittee. David Burman has  
42 agreed to serve on both the Discovery and MDL Subcommittees. Brian  
43 M. Boynton is serving as acting Assistant Attorney General for the  
44 Civil Division. And Judge McEwen is our new liaison from the



45 Bankruptcy Rules Committee.

46 Two committee members, Judge Ericksen and Judge Morris, have  
47 served two full terms, adding up to six years each, and are  
48 attending their final meeting today. They have contributed greatly  
49 in subcommittee and committee works, earning our enormous heartfelt  
50 gratitude and friendship.

51 Professor Capra "deserves a gold medal" for serving as  
52 ambassador plenipotentiary for CARES Act work. Judge Jordan and  
53 Judge Dow agree that watching his exchanges with the several  
54 reporters is like watching an Olympics ping-pong match with words.

55 Thanks also are due to the Federal Judicial Center,  
56 particularly Emery Lee and Tim Reagan, for tireless and expert  
57 work. Jerome Kalina, AO staff attorney for the Judicial Panel on  
58 Multidistrict Litigation has facilitated the invaluable help the  
59 Panel has provided to the MDL Subcommittee. Finally, thanks are due  
60 to all those who make time to observe committee meetings.

61 Judge Dow turned to a report on the January Standing Committee  
62 meeting. The CARES Act drafts from the Appellate, Bankruptcy,  
63 Civil, and Criminal Rules Committees consumed much of the  
64 discussion. The benefits of that discussion, and the further work  
65 of the advisory committees and Professor Capra, are reflected in  
66 the Rule 87 draft on today's agenda. Rule 7.1 was approved for  
67 adoption; because it missed the regular cycle, it will be presented  
68 to the Judicial Conference next September. Rules 15(a)(1) and  
69 72(b)(1) were approved for publication when one or more added  
70 proposals combine to make a suitable package for seeking public  
71 comment. There also was valuable feedback on the work of the MDL  
72 Subcommittee.

73 The Rule 30(b)(6) amendments took effect on December 1, 2020.  
74 No new rules are on track to take effect on December 1, 2021. Rule  
75 7.1 is in the pipeline to take effect on December 1, 2022.  
76 Depending on the outcome of today's deliberations and action by the  
77 Standing Committee, the Supplemental Rules for Social Security  
78 Cases and an amendment of Rule 12(a)(4) also could be headed toward  
79 an effective date of December 1, 2022.

80 *Legislative Report*

81 Julie Wilson provided the legislative update. The list of  
82 bills that would affect civil procedure is short because many bills  
83 expired at the end of the last Congress. Bills aiming to exclude  
84 "gig economy" claims from Rule 23 class actions and to limit the  
85 scope of injunctions to benefit only parties to the litigation  
86 repeat bills introduced in the last Congress. There has not yet  
87 been any movement on them. Senator Grassley has introduced S 818,  
88 a Sunshine in the Courtroom Act that would permit federal judges to  
89 allow cameras in the courtroom. This bill would have a particular  
90 impact on Criminal Rule 53, which prohibits photographs in the  
91 courtroom during proceedings or broadcasting proceedings. Similar

92 bills were introduced in earlier Congresses. The Administrative  
93 Office is working to reestablish closer ties on the Hill that will  
94 enable it to offer comments during the formative stages of  
95 potential legislation, often a more effective process than waiting  
96 until bills are pretty much formed.

97 *October 2020 Minutes*

98 The draft minutes for the October 16, 2020 Committee meeting  
99 were approved without dissent, subject to correction of  
100 typographical and similar errors.

101 *CARES Act: Rule 87*

102 Judge Dow introduced the CARES Act Subcommittee Report on  
103 draft Rule 87 by noting that the present purpose is to continue to  
104 develop a draft to recommend for publication alongside emergency  
105 rules proposals by the Appellate, Bankruptcy, and Criminal Rules  
106 Committees. Today's deliberations are framed to keep open the  
107 question whether, after public comment, to recommend adoption of a  
108 civil rule for rules emergencies, or instead to recommend revision  
109 of the civil rules themselves, or to conclude that experience  
110 during the pandemic has shown there is no need for new rules texts  
111 to meet emergency circumstances. This caution was repeated in the  
112 Subcommittee Report: in the end, the Subcommittee may recommend  
113 adding more emergency rules, or instead adapting what now are  
114 proposed as Emergency Rules 4 and 6(b)(2) by amendments to the  
115 regular rule texts, or simply abandoning all of these attempts.  
116 Much remains to be learned by further work and in the public  
117 comment process.

118 Judge Jordan delivered the Subcommittee report. He began by  
119 stating that the Subcommittee members have done extraordinary work,  
120 and thanking them for continuing devotion to the hard work. He also  
121 expressed thanks to the reporters for all the advisory committees.  
122 A full history of all the work is not needed for today's  
123 discussion. It suffices to note that there were many Subcommittee  
124 meetings, and a lot of work by the reporters, with guiding help and  
125 coordination by Professor Capra.

126 The Subcommittee began with independent reviews of all the  
127 rules by several people, looking for all those that might be  
128 strained by emergency circumstances. Special thanks are due to  
129 Subcommittee member Sellers for a painstaking review of all of the  
130 civil rules in a search for those that might present obstacles to  
131 effective procedure during an emergency. Long initial lists of  
132 potentially inflexible rule language were pared down, and pared  
133 down again. In addition to reviewing rules texts, as much  
134 information as possible was sought in actual experience with civil

135 actions during the pandemic. Broad general experience has seemed to  
136 show that the rules have held up remarkably well. Their inherent  
137 flexibility and general reliance on judicial discretion have  
138 enabled courts and parties to function as well as emergency  
139 circumstances permit without encountering impractical obstacles in  
140 rule language. Careful review of rule texts, rather than  
141 difficulties encountered in emergency practice, has provided the  
142 basis for proposing emergency rules. For now, the result is to  
143 recommend emergency provisions only for the methods of serving  
144 process under some subdivisions of Rule 4 and for extending the  
145 time for post-judgment motions otherwise prohibited by Rule  
146 6(b)(2). It may be that barriers raised by other rules remain to be  
147 discovered. Publishing Rule 87 for comment will be a good way to  
148 gather additional information.

149 Strenuous efforts were made to achieve as much uniformity as  
150 possible with the other proposed emergency rules. The definition of  
151 a rules emergency is uniform across all of them, including Rule  
152 87(a), with one departure in Criminal Rule 62(a) that adds a  
153 requirement that the Judicial Conference find that "no feasible  
154 alternative measures would sufficiently address the impairment [of  
155 the court's ability to perform its functions in compliance with  
156 these rules] within a reasonable time." The Appellate and  
157 Bankruptcy Rules Committees agree with the Subcommittee that this  
158 added provision is not useful in their emergency rules, and the  
159 Subcommittee agrees. The Criminal Rules emergency provisions  
160 address many matters made sensitive by tradition, constitutional  
161 protections, and the singular weight of criminal conviction. Adding  
162 language to ensure exhaustion of all available alternatives by the  
163 Judicial Conference is suitable for the Criminal Rules, but  
164 unnecessary and possibly confusing in the other rules.

165 Substantial uniformity also has been achieved in the  
166 provisions for declaring a rules emergency. Rule 87(b)(1)(B),  
167 however, departs from the Bankruptcy and Criminal Rules. The  
168 Bankruptcy provision tracks Criminal Rule 62(b)(1)(B): the Judicial  
169 Conference declaration "must \* \* \* state any restrictions on the  
170 authority granted in (d) and (e)." Rule 87(b)(1)(B) is "must \* \* \*  
171 adopt all of the emergency rules in Rule 87(c) unless it excepts  
172 one or more of them." Drafting history and, more importantly, the  
173 character of the emergency civil rules, underlie the difference.  
174 Earlier drafts of Rule 87 provided that the declaration of  
175 emergency should specify which of the emergency civil rules were  
176 included. This approach reflected the character and limited number  
177 of the emergency rules. The provisions for serving process in  
178 Emergency Rule 4 are designed to rely on circumstance-specific  
179 determinations of what means of service should be approved; there  
180 is no reason to "restrict" this authority. Instead, it may make  
181 sense to limit which of the Emergency Rule 4 subdivisions might be

182 authorized. Emergency Rule 6(b)(2) is quite different, but includes  
183 intricately intertwined provisions for extending the time for post-  
184 judgment motions and integrating extensions with the provisions of  
185 Appellate Rule 4(a)(4)(A) for resetting appeal time. Any attempt to  
186 "restrict" this rule risks untoward consequences; it should be all  
187 on or all off. Inviting the Judicial Conference to select from this  
188 short menu of emergency rules is attractive. But that approach was  
189 abandoned in the interest of uniformity – the consensus was that  
190 the Judicial Conference should not be confronted with an approach  
191 that required it to "select out" particular provisions in the  
192 Bankruptcy and Criminal rules, but to select which emergency civil  
193 rules to include. The result was rather awkward language focusing  
194 on making exceptions. There may be room to improve the language,  
195 but without embracing the inapposite concept of "restrictions."  
196 This is a point on which some differences in language are needed to  
197 reflect the different settings in which emergency rules would  
198 operate as well as differences in the character of the emergency  
199 rules themselves.

200 Discussion reiterated the view that there are real differences  
201 between the Criminal and Civil Rules settings. Emergency Rule 4  
202 requires a court order for an alternative method of service.  
203 "Restricts" fits in the context of Criminal Rule 62, but not Civil  
204 Rule 87.

205 Another suggestion was that Emergency Rule 4 is framed as one  
206 rule, but has several parts because it addresses several  
207 subdivisions of Rule 4. The Judicial Conference might, for example,  
208 decide that alternative methods of service could be ordered on  
209 corporations covered by Rule 4(h)(1), but not on individuals  
210 covered by Rule 4(e). Should it be "adopt all or part of the  
211 emergency rules"?

212 A judge brought the discussion back to Rule 87(b)(1)(A).  
213 Can a declaration cover a division rather than an entire district?  
214 It is easy to imagine a local emergency – or to remember a  
215 courthouse bombing – that affects only one division within a  
216 district. The intent has been to authorize a declaration for a  
217 division, recognizing, in line with Criminal Rule 62(a)(2), that  
218 the Judicial Conference would have to consider the possibility of  
219 operating under the regular rules by moving activities to another  
220 division within the district, obviating any need for emergency  
221 rules. This question has played a role in drafting the Bankruptcy  
222 emergency rules. It will be studied further, considering the  
223 possibility of added rule text or adding to the Committee Note.

224 A related question asked whether the rule text should provide  
225 an explicit procedure for informing the Judicial Conference of an  
226 emergency. A local emergency may not otherwise come to the

227 Conference's attention. The response was that early drafts included  
228 a provision for informing the Conference, but the provision was  
229 thought unnecessary. Conference members are likely to be attuned to  
230 conditions within their circuits, even the district judges. And any  
231 judge who believes that emergency circumstances warrant a  
232 Conference declaration will be able to inform the Conference  
233 immediately, either by direct communication or through a local  
234 Conference member.

235 Rule 87(c) establishes two Emergency Civil Rules, although  
236 Emergency Rule 4 has several parts.

237 Emergency Rule 4 authorizes a court to order that service of  
238 summons and complaint be made "by a method that is reasonably  
239 calculated to give notice" on defendants addressed by some, but not  
240 all, subdivisions of Rule 4. Earlier drafts sought to ease the task  
241 of moving between Rule 4 and Emergency Rule 4 by copying the full  
242 text of Rule 4 into the corresponding emergency rule provision,  
243 adding authority to authorize service "by registered or certified  
244 mail or other reliable means that require a signed receipt." The  
245 full text approach was abandoned when Rule 4(i) was added to the  
246 list, generating an emergency rule of great length. Ongoing  
247 experience with postal service, moreover, prompted consideration of  
248 the prospect that some emergencies – and most particularly an  
249 emergency with the postal service – might require different  
250 alternative methods of service.

251 The current draft requires a court order to authorize service  
252 by an alternative method. The alternative must be "reasonably  
253 calculated to give notice." "Notice" means actual notice, but it  
254 was thought better to omit "actual" from rule text for fear of  
255 inviting inappropriate arguments, most particularly in cases that  
256 accomplished actual notice by means challenged as not reasonably  
257 calculated to do what in fact was done. Ordinarily the court order  
258 must be made in response not only to the circumstances of the  
259 particular emergency but also the circumstances of the particular  
260 case. As one example, a method of service reasonably calculated to  
261 give notice to a large and sophisticated corporation under  
262 Emergency Rule 4(h)(1) might not be reasonably calculated to give  
263 notice to a small and unsophisticated incorporated family business.  
264 The Committee Note, however, also reflects the prospect that some  
265 emergencies might justify a standing order that authorizes a  
266 particular method of service. When Rule 4 authorizes service by  
267 mail, for example, a breakdown of the postal service – perhaps a  
268 strike – Emergency Rule 4 might authorize a general order for  
269 service by designated commercial carriers with confirmation of  
270 delivery.

271 Emergency Rule 4 authorizes alternative methods of service

272 only for Rules 4(e), (h)(1), (i), or (j)(2), or on a minor or  
273 incompetent person in a judicial district of the United States. The  
274 omissions all tie to Rule 4(f). Rule 4(f) governs service at a  
275 place not within any judicial district of the United States. It is  
276 incorporated in Rule 4(h)(2). Rule 4(j)(1) provides for service on  
277 a foreign state or its agency under the Foreign Sovereign  
278 Immunities Act. It seems better not to attempt to expand the  
279 extensive and at times flexible provisions for service abroad, in  
280 part because service of process is commonly viewed as a sovereign  
281 act that impinges on the sovereignty of the country where service  
282 is made. Similar concerns arise from Rule (4)(g), which lacks  
283 paragraph designations to support simple cross-reference. Instead,  
284 Rule 87(c)(1) refers to service "on a minor or incompetent person  
285 in a judicial district of the United States," omitting the part of  
286 subdivision (g) that addresses service outside a judicial district  
287 of the United States.

288 The final sentence of Emergency Rule 4 provides a specific  
289 focus on what had been a general provision in earlier drafts of  
290 Rule 87(d). The question is what to do when a declaration of a  
291 rules emergency ends before completion of an act authorized by an  
292 order made under an emergency rule. The earlier provision borrowed  
293 the language of Rule 86(a)(2)(B) that governs the retroactive  
294 effect of a rule amendment by asking whether applying the new rule  
295 "would be infeasible or work an injustice." The analogy may help,  
296 but it is indefinite. And it seemed to apply without distinction  
297 between Emergency Rule 4 and Emergency Rule 6(b)(2). Reflection,  
298 however, showed that different tests should apply. For Emergency  
299 Rule 4, any of three alternatives may be desirable when an order  
300 authorizes service by a method not within Rule 4 and service is not  
301 completed when the declaration ends. It may be useful to allow  
302 service to be completed as authorized by the order, and perhaps  
303 important if the claim is governed by a limitations statute that  
304 requires actual service by a stated time. Or it may be useful to  
305 strike one of the alternative methods authorized by the order while  
306 leaving another to be completed. Or it may seem better to terminate  
307 the order, falling back on the ordinary methods authorized by Rule  
308 4.

309 Emergency Rule 6(b)(2) is a quite different matter. The first  
310 part of it is simple enough. Rule 6(b)(2) raises an impermeable  
311 barrier: "A court must not extend the time to act under Rules 50(b)  
312 and (d), 52(b), 59(b), (d), and (e), and 60(b)." Emergency Rule  
313 6(b)(2) changes "must not" to "may." But it is carefully hedged  
314 about. The court can grant an extension only by acting under Rule  
315 6(b)(1)(A), which requires good cause and that the court act, or a  
316 request be made, before the original time expires. For Rules 50,  
317 52, and 59, the original time is 28 days from entry of judgment.  
318 Rule 60(b) is governed by a more complex time provision, which

319 creates complications for integration with Appellate Rule  
320 4(a)(4)(A)(vi), yet to be discussed. The extension is limited to "a  
321 period of not more than 30 days after entry of the order" granting  
322 an extension. Setting the limit to run from entry of the order  
323 enables the court to consider the matter carefully, but it is  
324 expected that ordinarily the needs for prompt disposition of post-  
325 judgment motions will encourage prompt decisions.

326 What remains is not so simple. Timely post-judgment motions  
327 reset appeal time under Appellate Rule 4(a)(4)(A). Emergency Rule  
328 6.2(b) would not work if it did not reset appeal time, requiring a  
329 party either to surrender any opportunity to appeal or to make the  
330 post-judgment motion within the ordinary time unaltered by any  
331 extension. Earlier drafts, framed in the spirit of flexibility and  
332 purpose-oriented interpretation that characterize the Civil Rules,  
333 relied on a simple provision that a motion filed within the period  
334 authorized by an extension has the same effect under Appellate Rule  
335 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60.  
336 That approach was accepted for a while on all sides. But after a  
337 while the appellate rules experts began to have doubts. The appeal  
338 times in Rule 4 that reflect statutory provisions are treated as  
339 mandatory and jurisdictional. There is no room for harmless error,  
340 no matter how innocent or how obscure the time calculations may be.  
341 Greater precision was sought. A series of detailed exchanges among  
342 Standing, Appellate, and Civil Rules reporters produced several  
343 revised drafts, exploring – and at times backtracking from – many  
344 variations. The draft in the original agenda materials was replaced  
345 by a more detailed version that breaks out three distinct sequences  
346 of events. Here too the task is relatively straightforward for  
347 motions under Rules 50, 52, or 59.

348 The first step in Emergency Rule 6(b)(2)(B) is to ensure that  
349 if a longer appeal time is available under the ordinary rules, that  
350 governs. An example would be a motion made by one party within the  
351 ordinary 28 days from entry of judgment, followed by a motion for  
352 an extension by another party. The court might deny an extension,  
353 or grant an extension and dispose of a timely motion filed within  
354 the extended period without yet disposing of the original motion.  
355 Appeal time would be reset to run for all parties from the later  
356 order disposing of the original motion.

357 Three variations are addressed by items (i), (ii), and (iii).  
358 Under (i), appeal time is reset to run from an order denying a  
359 motion for an extension. Under (ii), a motion authorized by the  
360 court and filed within the extended period is filed "within the  
361 time allowed by" the Federal Rules of Civil Procedure for purposes  
362 of Appellate Rule 4(a)(4)(A). Appeal time is reset to run from the  
363 last such remaining motion. Under (iii), a failure to file any  
364 authorized motion within the extended period resets appeal time to

365 run from the expiration of the extended period. All of these  
366 variations fit neatly within the purposes of the emergency rule and  
367 Appellate Rule 4(a)(4)(A).

368 The complication that caused real difficulty arises from the  
369 time limits set by Rule 60(c)(1) for motions under Rule 60(b). Rule  
370 60(c)(1) sets the basic limit for a Rule 60(b) motion at a  
371 reasonable time, but also imposes a cap of one year for motions  
372 under Rule 60(b)(1) (mistake, etc.), (2)(newly discovered  
373 evidence), and (3)(fraud or misrepresentation). These three  
374 subdivisions account for most Rule 60(b) motions. And they closely  
375 resemble grounds for relief that may be sought under Rules 52 and  
376 59.

377 The first step is clear enough. What is a reasonable time for  
378 a Rule 60(b) motion should be calculated in light of emergency  
379 circumstances that impede filing within what otherwise would be a  
380 reasonable time. The one-year cap, however, presents a problem. It  
381 is possible that an emergency could thwart filing a motion in a  
382 time that is reasonable in light of the emergency but runs beyond  
383 the one-year cap. Allowing an extension under Emergency Rule  
384 6(b)(2) fits within the purpose of the emergency rule.

385 The next step is not quite so clear. Experience shows that  
386 motions for relief that could be sought under Rule 52 or 59 are at  
387 times captioned as Rule 60(b) motions. If the motion is filed  
388 within 28 days after entry of judgment and seeks relief available  
389 under those rules, it should have the same effect in resetting  
390 appeal time. That result has been accomplished by Appellate Rule  
391 4(a)(4)(A)(vi), which resets appeal time on a motion "for relief  
392 under Rule 60 if the motion is filed no later than 28 days after  
393 the judgment is entered." The same resetting effect should follow  
394 under the circumstances described in Emergency Rule 6(b)(2)(B)(i),  
395 (ii), and (iii).

396 Interpreting Appellate Rule 4(a)(4)(A)(vi) together with  
397 Emergency Rule 6(b)(2), however, has not seemed as easy as the  
398 evident purpose suggests. A close technical reading would insist  
399 that a motion filed more than 28 days after judgment, although  
400 timely because of an emergency extension, is not "filed no later  
401 than 28 days after the judgment is entered." Simply saying that a  
402 motion made within the time authorized by an emergency extension  
403 has the same effect as a timely motion does not do the job.

404 The Appellate Rules Committee has considered this difficulty,  
405 and has drafted a cure by a proposed amendment of Appellate Rule  
406 4(a)(4)(A)(vi) to read: "for relief under Rule 60 if the motion is  
407 filed within the time allowed for filing a motion under Rule 59."  
408 The draft Committee Note for new (vi) states that "if a district



409 court grants an extension of time to file a Rule 59 motion and a  
410 party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion  
411 has resetting effect so long as it is filed within the extended  
412 time set for filing a Civil Rule 59 motion."

413 With the help of the proposed appellate rule amendment,  
414 Emergency Rule 6(b)(2) is effectively integrated with the rules for  
415 resetting appeal time. This process has impressed participants with  
416 the conviction that Rule 4 is a delicate topic, even a mystery, but  
417 the work has succeeded with particular help from those with deep  
418 knowledge of the Appellate Rules.

419 Finally, the last sentence of Emergency Rule 6(b)(2) provides  
420 a different answer from Emergency Rule 4 for the effect of a  
421 declaration's end on an act authorized by an order under Rule  
422 6(b)(2) but not completed when the declaration ends. The act, which  
423 may be either a motion or an appeal, may be completed under the  
424 order. If the order denies a timely motion for an extension, the  
425 time to appeal runs from the order. If an extension is granted, a  
426 motion may be filed within the extended period. Appeal time starts  
427 to run from the order that disposes of the last remaining  
428 authorized motion. If no authorized motion is filed within the  
429 extended period, appeal time starts to run on expiration of the  
430 extended period. Any other approach would sacrifice opportunities  
431 for post-judgment relief or appeal that could have been preserved  
432 if no emergency rule motion had been made.

433 Discussion returned to Emergency Rule 4. It says "the court  
434 may order." Does that clearly require a court order, or does it  
435 leave room for a party to devise and use a novel method of service,  
436 preparing to argue that it was reasonably calculated to give notice  
437 of a challenge should be made? The Committee Note says that the  
438 rule authorizes the court to order service. The rule text itself  
439 focuses only on a court order, an approach used throughout the  
440 rules to describe acts that can be done only under a court order.  
441 It would be a brave or foolish lawyer who decided to act without an  
442 order. Still, thought will be given either to an explicit statement  
443 in the Committee Note or even to added rule text that authorizes an  
444 alternative method of service "only if authorized by court order"  
445 or some such words.

446 A motion to recommend Rule 87 for publication was adopted  
447 without dissent.

448 *Supplemental Rules for Social Security Review Actions Under*  
449 *42 U.S.C. § 405(g)*

450 Judge Lioi delivered the Report of the Social Security Review  
451 Subcommittee.

452 The proposed Supplemental Rules for Social Security Review  
453 Actions under 42 U.S.C. § 405(g) were published last August. They  
454 drew a comparatively modest number of comments. Two witnesses  
455 appeared for the public hearing. The comments and testimony led to  
456 useful improvements in the rules draft.

457 The more important improvement is deletion of the provisions  
458 that required that the complaint include the last four digits of  
459 relevant social security numbers. That requirement had met  
460 continued and vigorous opposition based on the fear of identity  
461 theft. But it was retained because the Social Security  
462 Administration maintained that this information was essential to  
463 enable it to accurately identify the proceeding and produce the  
464 record for review. So many claims are processed through to final  
465 administrative disposition that relying on the claimant's name  
466 alone does not enable prompt identification of all cases. The  
467 comments and testimony, however, revealed that, responding to the  
468 Social Security Number (SSN) Fraud Prevention Act of 2017, SSA has  
469 launched a system that attaches a 13-character alphanumeric  
470 designation, currently called a Beneficiary Notice Control Number,  
471 to each notice it sends to a claimant. This unique number readily  
472 identifies the proceeding and record. SSA anticipates that this  
473 practice will be expanded to include all final dispositions before  
474 the proposed supplemental rules can become effective. Elimination  
475 of the last-four-digits requirement is accomplished by instead  
476 requiring that the complaint include "any identifying designation  
477 provided by the Commissioner with the final decision."

478 Rule 6 was improved to state more clearly that the time to  
479 file the plaintiff's brief is reset by the order disposing of the  
480 last remaining motion filed under Rule 4(c). Some changes were made  
481 in the Committee Note, including one that responds to a comment  
482 that it should say clearly that Rule 1 brings into the Supplemental  
483 Rules an action that presents a single claim based on the wage  
484 record of one person for an award to be shared by more than one  
485 person.

486 The Subcommittee agrees unanimously that this is a good set of  
487 rules. No further work is needed. The remaining question is whether  
488 to recommend adoption or to abandon the project because of doubts  
489 about the wisdom of adopting substance-specific rules.

490 These rules are neutral as between claimant and the  
491 Commissioner. A quick sketch may be useful for new committee  
492 members. Supplemental Rule 1 defines the scope of the rules to  
493 include actions under 42 U.S.C. § 405(g) for review on the record  
494 of a final decision of the Commissioner of Social Security that  
495 presents only an individual claim. The Civil Rules also apply,  
496 except to the extent that they are inconsistent with the

497 Supplemental Rules.

498 Supplemental Rule 2 authorizes a simple complaint that need  
499 state only that the action is brought against the Commissioner  
500 under § 405(g), identify the claimant and person on whose wage  
501 record benefits are sought, and identify the type of benefits  
502 claimed. The plaintiff is free, but not required, to add a short  
503 and plain statement of the grounds for relief.

504 Supplemental Rule 3 requires the court to notify the  
505 Commissioner of the action by transmitting a Notice of Electronic  
506 Filing to the Commissioner and to the United States Attorney for  
507 the district. This provision reflects a practice established in  
508 some districts now. The plaintiff need not serve a summons and  
509 complaint under Rule 4. This rule is vigorously supported by  
510 claimants as well as SSA.

511 Supplemental Rule 4 describes the answer and motions. The  
512 answer may be limited to the administrative record and any  
513 affirmative defenses. It states explicitly that Rule 8(b) does not  
514 apply -- the Commissioner is free to answer the allegations in the  
515 complaint, but need not.

516 Supplemental Rule 5 is in many ways the core of the rules. It  
517 provides that the action is presented for decision on the parties'  
518 briefs. Supplemental Rules 2, 3, 4, and 5 taken together reflect  
519 the character of § 405(g) actions within the scope of Supplemental  
520 Rule 1. They are statutory actions for review on an administrative  
521 record, not suited for the civil rules that govern proceedings  
522 headed for trial.

523 Supplemental Rules 6, 7, and 8 set the times for submitting  
524 briefs. Thirty days are set for filing the plaintiff's brief, then  
525 for the Commissioner's brief. Fourteen days are set for a reply  
526 brief. The public comments and testimony almost universally urged  
527 that the times be set at 60 days, 60 days, and 21 days. Similar  
528 comments were made throughout the years the Subcommittee worked  
529 with claimants' groups and SSA. They urge that all sides need more  
530 time. Plaintiffs' attorneys may come to the case for the first time  
531 after the final administrative decision. Often they practice in  
532 small firms with heavy case loads. The administrative records may  
533 run to thousands of pages. SSA attorneys may be similarly  
534 overworked. When local rules set similarly short briefing  
535 schedules, extensions are routinely requested and routinely  
536 granted. These are good arguments. But these cases typically spend  
537 years in the administrative process. Claimants often are in urgent  
538 need. The Subcommittee concluded that it is better to set an  
539 expeditious briefing schedule that can be met in many cases, but  
540 still permits extensions when truly needed.

541 Despite unanimous agreement that these rules have been  
542 polished into a very good procedure for § 405(g) administrative  
543 review actions, the Subcommittee divided on the question whether to  
544 recommend adoption. Four of those who participated in the  
545 discussion, including all three judges, recommended adoption. Three  
546 others, however, remained uncertain, "on the fence," or even  
547 negative.

548 Doubts about recommending adoption spring from concern about  
549 the principle of transsubstantivity that pervades the Rules  
550 Enabling Act. Section 2072(a) authorizes "general rules of practice  
551 and procedure." Do rules confined to § 405(g) review actions count  
552 as "general"? If these rules are adopted, will it be more difficult  
553 in the future to resist proposals for other special rules,  
554 motivated not by the general public interest but by narrow private  
555 interest, whether to the rules committees or in Congress? Some  
556 doubters also suggest that there is nothing distinctive about §  
557 405(g) actions that merits special rules that generate these risks.  
558 To them, the general civil rules, together with local rules or  
559 standing orders, suffice. And claimants' representatives, even  
560 though they recognize that the rules have been refined into a good  
561 procedure, prefer to stick with the variety of disparate procedures  
562 that are familiar to judges.

563 These doubts are met, first, by the basic fact that these  
564 actions are appeals on a closed record. There is no occasion for  
565 discovery -- adding any claims that might support discovery takes  
566 an action outside the scope of the Supplemental Rules.

567 The rules also are neutral between the parties, claimants and  
568 Commissioner. They are good rules that will help claimants, the  
569 Commissioner, and courts. SSA strongly supports the rules, based on  
570 their deep experience with proceedings under the civil rules and  
571 divergent local practices. The Department of Justice is promoting  
572 a model local rule that is largely drawn from earlier drafts of the  
573 Supplemental Rules. The judges who commented support the proposed  
574 rules, including the chief judges of two of the three districts  
575 that have the greatest number of § 405(g) actions and have local  
576 rules closely similar to the proposed rules.

577 The proliferation of local rules shows that courts recognize  
578 the need to supplement the general rules.

579 Comments on the proposal entrench the prediction that these  
580 simple rules will provide important help to pro se plaintiffs.

581 The value of supplemental rules is further shown by the great  
582 number of these cases. The annual count has run between 17,000 and  
583 18,000; the most recent annual figure is 19,454. The benefit of

584 improved procedure in so many cases is important.

585 It also is significant that this project began with a proposal  
586 by the Administrative Conference of the United States, bolstered by  
587 a thorough study by two leading procedure scholars of procedures  
588 for § 405(g) actions throughout the country.

589 Finally, it should be remembered that there are other  
590 substance-specific rules. Rule 71.1 for condemnation actions is  
591 prominent. The Supplemental Rules for Admiralty or Maritime Claims  
592 and Asset Forfeiture Actions enjoy a strong history, but include  
593 the much more recent addition of Rule G, strongly urged by the  
594 Department of Justice, governing forfeiture actions in rem. The  
595 separate sets of rules for § 2254 and § 2255 proceedings are other  
596 prominent examples. Others can be found as well.

597 Discussion began with the observation that the public comments  
598 and testimony "were a real help."

599 A second observation was to point to the Appellate Rules.  
600 There is a general Rule 15 for petitions to review administrative  
601 action, but also a specific Rule 15.1 that applies only to the  
602 order of briefing and oral argument in enforcement or review  
603 proceedings with the National Labor Relations Board. Rules focused  
604 on specific substantive areas are not limited to the Civil Rules.

605 A Subcommittee member began by praising the supplemental rules  
606 as "extremely well-written," reflecting intense and engaging work.  
607 But "I'm on the fence," uncertain both whether we need special  
608 rules and whether they will much improve things.

609 Dean Coquillette, who served three decades as Standing  
610 Committee Reporter, described himself as "an apostle of  
611 transsubstantivity." But this "is the best possible job. I can see  
612 doing it. It will address real problems."

613 The Subcommittee representative from the Department of Justice  
614 agreed that the rules are about as good as can be. But the  
615 Department remains concerned. The rules might be seen as designed  
616 to assist SSA attorneys, who often appear in these review actions  
617 as Assistant United States Attorneys. The plaintiffs' bar is at  
618 best divided. Should we favor, or appear to favor, one side? Yes,  
619 these are appeals. But they are no much different from the mine-run  
620 of APA cases; there is a risk of mission creep. And the hoped-for  
621 efficiency will be threatened by local rules which will persist in  
622 face of the new national practice.

623 A judge member of the Subcommittee said that the supplemental  
624 rules promote efficiency for all parties. They will be especially

625 helpful for pro se plaintiffs. The briefing times will generate  
626 requests for extensions.

627 Another Subcommittee member judge reiterated the point that  
628 the Department of Justice is promoting a model local rule for  
629 adoption in all districts. It is similar to the supplemental rules.  
630 But it, like other local rules, has not gone through the lengthy  
631 and painstaking process that generated the supplemental rules. The  
632 Department model, for example, requires social security numbers.  
633 "These rules treat all parties equally and fairly."

634 Another judge agreed that the Subcommittee should be thanked  
635 for its great work. "The rules are top-notch." But it is important  
636 to consider at least two concerns. First, although these rules  
637 benefit all parties, will there be a perception that, in the face  
638 of opposition by claimants' organizations, they are proposed for  
639 the benefit of SSA? Second, although many judges seem to favor  
640 these rules, there are others who will remain inclined to do things  
641 their own way. Will uniformity in fact happen? Certainly there will  
642 be more uniformity, but how much more? How often will local rules  
643 and individual judges depart to satisfy their own desires? That is  
644 a risk for all national rules, but can we be confident of  
645 uniformity?

646 Yet another judge admitted to an initial reluctance about  
647 adopting substance-specific rules, "but I'm coming around. These  
648 are different from the mine-run of cases." "We struggle with the  
649 same issues" in my court. The proposed rules are better than many  
650 local rules. The Federal Magistrate Judges Association supports the  
651 proposal, and their views carry weight. Concern for pro se  
652 litigants also provides support. "Yes, judges will do what they  
653 want to do." There is not much that rules can do about that. But  
654 "On balance, I like this. A lot of districts will embrace them."

655 A lawyer summarized the views that the plaintiffs' bar and the  
656 Department of Justice oppose the proposals, while SSA supports  
657 them. These positions should be taken seriously. "We want neutral  
658 rules." But the Subcommittee has taken these concerns seriously. It  
659 is right in finding that the rules are neutral and address the  
660 proper concerns that have been expressed. "The asymmetry of support  
661 is almost an optics problem" that should not get in the way of  
662 adopting good rules.

663 Judge Lioi concluded the discussion, saying that these are  
664 rules of procedure. Judges have not resisted them. Once they engage  
665 in discussion, they support them. And the benefits to pro se  
666 claimants are important.

667 The Committee voted to recommend the Supplemental Rules for

668 adoption. A Committee member who arrived at the meeting just as the  
669 vote was being taken abstained. The Department of Justice dissented  
670 from the recommendation, at the same time agreeing that "these are  
671 strong rules."

672 *Rule 12(a)(4)(A): Time to Respond*

673 A proposal to amend Rule 12(a)(4)(A) was published last  
674 August. It is time to decide whether to recommend it for adoption.

675 The proposal was brought to the committee by the Department of  
676 Justice. It rests on experience with the difficulties the  
677 Department has encountered in one class of cases with the provision  
678 in Rule 12(a)(4)(A) that, unless the court sets a different time,  
679 directs that a responsive pleading must be served within 14 days  
680 after the court denies a motion under Rule 12 or postpones its  
681 disposition until trial. These are cases brought against "a United  
682 States officer or employee sued in an individual capacity for an  
683 act or omission occurring in connection with duties performed on  
684 the United States' behalf." The Department often provides  
685 representation in such cases.

686 The difficulty of responding within 14 days rests in part on  
687 the need for more time than most litigants need, at times in  
688 deciding whether to provide representation, and more generally in  
689 providing representation. But the need is aggravated by a an  
690 additional factor. The individual defendant often raises an  
691 official immunity defense. Denial of a motion to dismiss based on  
692 an official immunity defense can be appealed as a collateral order  
693 in many circumstances. Time is needed both to decide whether appeal  
694 is available and wise, and then to secure approval by the Solicitor  
695 General. Allowing 60 days is consistent with the recognition of  
696 similar needs in Rule 12(a)(3), which provides a 60-day time to  
697 answer, and in Appellate Rule 4(a)(1)(B)(iv), which sets appeal  
698 time at 60 days.

699 There were only three comments on the proposal. The New York  
700 City Bar supports it. The American Association for Justice and the  
701 NAACP Legal Defense Fund oppose it. The reasons for opposition  
702 reflect concern that plaintiffs in these actions often are involved  
703 in situations that call for significant police reforms, parallel  
704 concerns about established qualified immunity doctrine, the general  
705 issues arising from delay in resolving these actions, and the  
706 breadth of the proposal in applying to actions in which there is no  
707 immunity defense.

708 Discussion began with a statement for the Department of  
709 Justice. The proposal is important, in part because of the frequent  
710 need to seek approval of an appeal by the Solicitor General.

711 Opposition that rests on the need for police reform, and on  
712 distress with official immunity doctrines, addresses collateral  
713 concerns. The Department appreciates these concerns, but continues  
714 to believe that the amendment is important.

715 A committee member suggested that the proposed amendment is  
716 overbroad, reaching cases in which there is no occasion to consider  
717 an appeal, most obviously in those that do not include an immunity  
718 defense in a motion to dismiss. As it stands, Rule 12(a)(4) allows  
719 the court to set a time different than 14 days. It will work better  
720 to require the Department to request an extension when needed to  
721 support its deliberation of a possible appeal, avoiding the  
722 opportunity for delayed answers in all of these cases.

723 Another member agreed, and added that "60 days is far too long  
724 in any event."

725 A judge member suggested that it is a question of what the  
726 presumption should be. Should it be presumed that the defendant  
727 gets more than 14 days? Or that the plaintiff is entitled to an  
728 answer within less than 60 days? The difference "is not likely to  
729 change the litigation very much." How many cases will provide  
730 likely occasions for appeal? How much difference will the choice of  
731 time to answer make in the progress of what often are very  
732 complicated cases?

733 An initial response for the Department of Justice noted that  
734 the Rule 12(a)(3) provision allowing 60 days to answer in these  
735 cases is important, whether or not grounds for an immunity appeal  
736 are anticipated. But data on the empirical question of how many  
737 cases involve potential immunity appeals are uncertain. This  
738 proposal originated in the Torts branch, prompted by experience  
739 when an answer is filed within the present 14-day period. In some  
740 actions they are required to proceed to Rule 16(b) scheduling  
741 conferences, and even into discovery, while a decision whether to  
742 appeal is being made.

743 A judge member observed that immunity defenses are often  
744 raised in § 1983 actions against state or local officials: don't  
745 they have similar arguments for more time? They may face local  
746 problems similar to the need arising from the need for Solicitor  
747 General approval of appeals, and from the more general need for  
748 time. It was noted that similar concerns about the needs of state  
749 and local governments have been raised in considering other rules  
750 provisions that give distinctive treatment to federal actors, but  
751 that so far the needs of the federal government have been found to  
752 justify distinctive treatment not accorded to other governments.

753 A veteran of Department of Justice service observed that the



754 Department must manage a great number of cases, and that it is  
755 important to have one person -- the Solicitor General --  
756 responsible for making and enforcing a nationally uniform practice  
757 on taking appeals. It is unlikely that any state or local  
758 government faces like concerns. Fourteen days is a short period,  
759 and the pressure is not alleviated simply by seeking an extension.  
760 Until an extension is actually granted, the Department must proceed  
761 on the assumption that it will not be granted. Given the brevity of  
762 time, moreover, the request is likely to be pretty much boilerplate  
763 that does not adequately explain case-specific needs for an  
764 extension.

765 A judge member asked whether, if the 60-day period is adopted,  
766 the government will routinely ask for extensions? Judges are likely  
767 to be amenable to a first motion to extend, whether the period is  
768 initially set at 14 days or 60 days. They are less likely to be  
769 amenable to a second request. The choice of the initial period to  
770 answer makes a real difference. The Department answered that the  
771 process can, and often does, happen within 60 days. But not within  
772 14.

773 A judge returned discussion to the argument that the proposed  
774 rule is overbroad by renewing the question whether it is possible  
775 to come up with an empirical estimate of how many cases will be  
776 affected? "I get the need for time when an appeal is in prospect.  
777 I rarely get requests to extend in § 1983 cases." This is a  
778 pragmatic question of where the burden should lie -- on the  
779 government to seek more time, or on the plaintiff to seek a reduced  
780 time if the rule sets the general time at 60 days.

781 The Department of Justice responded with a reminder that the  
782 need for 60 days to respond is felt even when there is no prospect  
783 of a collateral-order appeal. The reasons are the same reasons as  
784 have been accepted in providing 60-day periods by earlier  
785 amendments of Rule 12(a)(3) and Appellate Rule 4(a). Local  
786 attorneys still need to consult with the Department in Washington.  
787 And the reasons that explain denial of the motion to dismiss may  
788 affect the next steps, including the answer.

789 A judge agreed that the need for time to prepare an answer in  
790 all cases, including affirmative defenses, may justify a blanket  
791 60-day provision.

792 Another judge agreed that the problem "is bigger than immunity  
793 appeals." It is not surprising that the Department needs more time  
794 to answer in these cases, parallel to the needs that led to  
795 amending Rule 12(a)(3).

796 A committee member asked how often is the Department unable to

797 complete its consulting process in 14 days? We have only the  
798 Department's statement that this is a problem. Is more time needed  
799 in all cases? Compare Rule 15(a)(3), which allows only 14 days to  
800 respond to an amended pleading if the original time to answer  
801 expires before then.

802 Another participant noted that the parallel to Rule 12(a)(3)  
803 is not complete. Rule 12(a)(2) gives the Department 60 days to  
804 answer in actions against the United States or its agencies or  
805 officers sued in an official capacity, but it has not been proposed  
806 that Rule 12(a)(4)(A) should be expanded to provide 60 days in  
807 those cases. And if the 14-day response period leads to a risk of  
808 discovery before the time to appeal runs out, the Department can  
809 always seek a stay of discovery. The Department responded that this  
810 is part of the problem. "Discretion is exercised differently."

811 A lawyer member asked about empirical evidence of actual  
812 problems. Perhaps this item should be tabled for further discussion  
813 in October. How often do courts deny an extension of the time to  
814 respond? How often does that force a rushed response, or lead to  
815 other problems?

816 A judge asked whether it is useful to put judges to the work  
817 of ruling on motions to extend the time to respond? Is it useful  
818 even if the motions are routinely granted? Experience in a United  
819 States Attorney office and as a district judge showed that "this is  
820 a gigantic system. The default mode should be enough time to make  
821 the system work." In the relatively rare cases where there is a  
822 real need for a response in less than 60 days, let the plaintiff  
823 make the motion to shorten the time.

824 A different member asked what is the reason for picking the  
825 particular figure of 60 days? It has no obvious anchor in the  
826 arguments that more time is needed in cases that do not present the  
827 possibility of a collateral-order appeal. A response was offered --  
828 the 60-day period does have a clear anchor in the 60-day appeal  
829 period set by Appellate Rule 4 for cases with the possibility of an  
830 appeal.

831 These competing concerns were summarized. One argument is that  
832 this general provision is too broad; 60 days are not needed in  
833 cases without the prospect of a collateral-order appeal. But the  
834 Department responds that it needs this time for other purposes, not  
835 only to decide whether to seek the Solicitor General's approval for  
836 an appeal. It is important to remember that these competing  
837 concerns meet on a field of presumptions: should the presumption be  
838 that the period is 60 days, subject to shortening by court order?  
839 Or should it be that the period is 14 days, subject to extension by  
840 court order?

841 A lawyer suggested that the problem arising from the time  
842 needed to win approval to appeal could be met by limiting the 60-  
843 day period to cases "where a defense of immunity was denied."  
844 Another member supported this suggestion.

845 A Department of Justice representative reported talking with  
846 the Torts branch during today's meeting. They do not track how  
847 often requests to extend the present 14-day period are made and  
848 denied. But the burdens on courts and the Department are those that  
849 have been described in today's discussion. And it is clear that the  
850 Department assumes that it must go forward even after moving for an  
851 extension unless the court acts quickly on the motion. Beyond that,  
852 the Torts branch reports that most motions to dismiss do raise  
853 immunity defenses. Any issue of overbreadth in reaching cases that  
854 do not include an immunity defense is not a real-world concern.

855 A judge noted that either way, the rule does not address stays  
856 of discovery. In most cases, discovery will be stayed because  
857 immunity is at issue. A Department representative responded that  
858 some judges do not grant stays. But it was noted that discovery  
859 stops once an appeal is taken.

860 The Department of Justice representative added that as  
861 compared to having no amendment of Rule 12(a)(4) for all of these  
862 actions, it would be better to have a rule extending the time to  
863 answer to 60 days in cases where an immunity defense is raised.

864 The possibility of narrowing the rule in this fashion led to  
865 the question whether the narrower rule should be republished to  
866 support a new period for comment. This is always an uncertain  
867 calculation. For this situation, a participant suggested that  
868 republication is probably not necessary. The narrower version gives  
869 the opponents something of what they wanted, and does not take away  
870 anything. But republication would be warranted if the task of  
871 drafting the amended rule shows a risk that the new language may  
872 not get it right.

873 A judge asked whether there is any real advantage in limiting  
874 the 60-day period to cases with an immunity defense, when the  
875 choice of time does no more than establish a presumption. Another  
876 judge noted that whichever is the presumed time to respond, a  
877 motion to stay discovery may remain necessary. A third judge  
878 responded that shifting the presumption to 60 days is likely to  
879 reduce the need for motions to extend, and it is likely that  
880 discovery will be suspended "on its own."

881 Another judge suggested that whether or not the Department is  
882 right that only a few cases do not include immunity defenses,  
883 limiting the 60-day period to immunity cases would create a gap

884 with the time to appeal, which remains set at 60 days both for  
885 cases with an immunity defense and for cases without.

886 Limiting the rule to cases with an immunity defense was  
887 defended again as a measure designed to address the cases where the  
888 Solicitor General has to be consulted. If indeed that covers most  
889 individual-capacity cases, there will be few occasions to move to  
890 extend the time to answer. But if there are a good number of cases  
891 without immunity defenses -- and we do not have hard data on that  
892 -- it can be useful to confine the 60-day period to cases with an  
893 immunity defense. Another member agreed. "Lunch-time conversations"  
894 within the Department of Justice do not take the place of firm  
895 data.

896 It was pointed out that there may be cases with two or more  
897 individual-capacity defendants, one of whom raises an immunity  
898 defense while the other does not. Should a rule that focuses on a  
899 defendant that raises an immunity defense be designed to set  
900 different times to answer for one defendant and the other? It was  
901 quickly agreed that if immunity-defense cases are to be  
902 distinguished, it would better to have a single time for all  
903 defendants. A judge observed that if the rule did set different  
904 times to answer, it is likely that the court would extend the  
905 shorter period to match the longer period. And it also is likely  
906 that if discovery is stayed as to one defendant, it will be stayed  
907 generally.

908 Another judge agreed that as long as there is an immunity  
909 defense and a possibility of a collateral-order appeal, it is not  
910 likely that the case will go to discovery before the end of the 60-  
911 day period, no matter whether there is a defendant that has not  
912 pleaded immunity. "There are complexities." But both judges agreed  
913 that their own experience and practices cannot be taken, without  
914 more, to describe practices universal to all judges. Yet another  
915 judge agreed, being moderately comfortable with the proposal  
916 without attempting to distinguish how many defendants have immunity  
917 defenses.

918 A motion was made to amend the rule to allow 60 days to  
919 respond only when "a defense of immunity has been postponed to  
920 trial or denied." The motion was defeated, six votes for and nine  
921 votes against.

922 A motion to recommend approval for adoption of the amendment  
923 as published passed, ten votes for and five votes against.

924 *MDL Subcommittee Report*

925 Judge Rosenberg delivered the Report of the MDL Subcommittee.

926 Three topics are addressed.

927 One topic that remains under discussion is "early vetting."  
928 This is a broad term used to describe various methods of attempting  
929 to get behind the pleadings to sort out individual plaintiffs who  
930 clearly do not have claims, who do not have a chance of success.  
931 Lawyers representing plaintiffs and defendants agree that some such  
932 process is desirable in at least some MDLs, particularly the "mass  
933 tort" proceedings that account for a great share of the total  
934 federal civil docket. A practice described as "plaintiff fact  
935 sheets" has grown up in the last few years, and has become  
936 widespread in the largest MDL proceedings. But more recently,  
937 plaintiffs have developed, and some MDL courts have adopted, a  
938 somewhat simpler process described as an "initial census." Under  
939 this practice, both plaintiffs and defendants send data to a  
940 "provider" that merges it and provides the results to all parties.  
941 One result may to ensure that the plaintiff sues the right  
942 defendant. The Subcommittee continues to study evolving practice  
943 closely.

944 The opportunity for interlocutory appeals has been a second  
945 topic that commanded close study for a good time, including  
946 conferences aimed at this topic alone. Last October the  
947 Subcommittee recommended that this topic be dropped from present  
948 work. The Committee agreed, and the Standing Committee accepted  
949 this disposition. Appeal opportunities are not being studied  
950 further.

951 A third topic is as much as anything a combination of topics.  
952 The broad general questions focus on the MDL court's role in  
953 appointing lead counsel and in setting a framework for settlement  
954 negotiations and possibly for settlement review. These broad  
955 questions lead to others that the Subcommittee has not yet  
956 discussed in any detail, including how to establish and administer  
957 common-benefit funds and the possibility of imposing limits on the  
958 attorney fees provided by contracts between individual plaintiffs  
959 and their counsel.

960 Counsel on all sides, and most MDL judges, agree that there is  
961 no need for a rule for supervising settlements. A March 24  
962 conference sponsored by Emory Law School showed reasons to oppose  
963 judicial supervision of efforts to achieve "global" settlements.  
964 Defendants want to be free to settle segments of the proceeding  
965 without having to settle all parts. And they are concerned that it  
966 may be difficult for judges to understand the legitimate reasons  
967 that lead to different structures for different settlements.

968 Despite these concerns, the Subcommittee is continuing its  
969 investigation of practices in appointing lead counsel, and looking

970 toward the MDL judge's role in settlement. MDL proceedings account  
971 for nearly half of the civil actions on the federal docket; it is  
972 important to be confident there is no need for rules addressing  
973 them. There also is concern that some individual plaintiffs whose  
974 attorneys do not have a role with lead counsel have only minimal  
975 representation.

976 As compared to the "Rule 23.3" draft in the agenda materials,  
977 the Subcommittee has turned to exploring the possibility of  
978 providing general guidance in Rule 16(b), and perhaps in Rule 26.  
979 New Rule 16 provisions could offer guidance on orders appointing  
980 leadership, compensation, and early vetting. A lot has happened  
981 since the Manual for Complex Litigation was revised in 2004. Or it  
982 may be enough to simply help prepare a set of "best practices."  
983 Whatever the means, there is a broad interest in expanding the  
984 ranks of MDL judges to bring more federal judges into these  
985 proceedings. It may be helpful to find a means to guide them toward  
986 the special tasks required to manage MDL proceedings.

987 A general question has persisted throughout Subcommittee  
988 deliberations. Many of the issues that have been explored arise in  
989 "mega" MDL proceedings that bring together thousands or tens of  
990 thousands of cases. Despite efforts to engage lawyers and judges  
991 with experience in less sprawling proceedings, it remains unclear  
992 whether any new rules should be available in all MDL proceedings or  
993 should be limited only to more limited categories, however they  
994 might be defined.

995 More specific questions address particular topics. What  
996 standards might be defined for appointing lead counsel? Can they be  
997 drawn from the Manual for Complex Litigation? How should the court  
998 articulate the duties of lead counsel or a leadership team? Should  
999 a rule address common benefit funds? Caps on fees set by individual  
1000 client contracts? How might a rule relate to Rule 23, recognizing  
1001 that MDL proceedings often include class actions and may be  
1002 resolved by certifying a class?

1003 Professor Marcus added that "this is the toughest set of  
1004 problems we had addressed in MDLs." One pervasive question is how  
1005 to describe the court's duty -- sometimes characterized as a  
1006 fiduciary duty -- to all claimants, especially those whose  
1007 individually retained attorneys do not participate in or with the  
1008 leadership team? There are tensions within the plaintiffs side, and  
1009 also on the defense side. We have heard of settlements of various  
1010 sizes: global, continental, inventory, and individual. Can courts  
1011 prefer global settlements? When inventory settlements are reached,  
1012 we have heard that there are good reasons for settling on different  
1013 terms with different inventories. One inventory may consist of  
1014 cases that have all been thoroughly worked up, high-value cases

1015 that deserve high settlement values. Another inventory may consist  
1016 of a large number that have not been carefully worked up, some of  
1017 them with strong claims and others with weak or no claims. It may  
1018 be difficult for a judge to evaluate the differences.

1019 A judge observed that there is an important relationship  
1020 between what happens early in a proceeding and what happens as the  
1021 proceeding progresses. The structure at the beginning has a  
1022 profound effect on how it ends. The leadership order may hamper the  
1023 ability of non-lead individually retained plaintiffs' attorneys to  
1024 represent their clients. That cannot be avoided. "You cannot have  
1025 5,000 lawyers participating in a status conference."

1026 Professor Marcus added that, as compared to class actions,  
1027 almost every plaintiff brought into an MDL proceeding has a  
1028 personal lawyer. There are likely to be few pro se plaintiffs.  
1029 "Judges should be concerned with process more than outcome." The  
1030 initial order appointing lead counsel structures the proceeding,  
1031 setting the process in motion. Judges should be aware of this, and  
1032 perhaps offered guidance in a rule.

1033 A judge observed that at the annual conference for MDL judges,  
1034 they are advised that all nonleadership lawyers "should be included  
1035 in conference calls." This practice prompts lead counsel to  
1036 communicate with nonlead counsel to forestall comments based on a  
1037 lack of information about the work being done.

1038 *Discovery Subcommittee*

1039 Judge Godbey delivered the report of the Discovery  
1040 Subcommittee, beginning with thanks to all Subcommittee members for  
1041 participating in the February 26 meeting, noting that the  
1042 contributions of the four lawyer members were invaluable. The  
1043 thorough and thoughtful research by Kevin Crenny, the Rules Law  
1044 Clerk, also was helpful.

1045 The Subcommittee considered four topics: privilege logs;  
1046 sealing orders; the availability of attorney fees under Rule 37(e)  
1047 as a remedy for spoliating electronically discoverable information;  
1048 and a proposal to add a new Rule 27(c) to authorize an independent  
1049 action for an order to preserve information or an order that  
1050 information need not be preserved. The first two deserve further  
1051 study.

1052 Privilege Logs Several general questions surround the privilege log  
1053 practice mandated by Rule 26(b)(5)(A). It is common to observe that  
1054 they are expensive, and not uncommon to suggest that often they are  
1055 not helpful. Laments are made that lawyers commonly assume that a  
1056 log has to be detailed on a document-by-document basis, even though

1057 the 1993 Committee Note said this: "Details concerning time,  
1058 persons, general subject matter, etc., may be appropriate if only  
1059 a few items are withheld, but may be unduly burdensome when  
1060 voluminous documents are claimed to be privileged or protected,  
1061 particularly if the items can be described by categories." It has  
1062 been suggested that complaints about expense are overblown -- that  
1063 most of the expense is necessary to identify relevant and  
1064 responsive documents, to screen them for privilege, and to decide  
1065 which to withhold. It also is suggested that the opportunity to  
1066 invoke Rule 26(b)(5)(B) or Evidence Rule 502 to establish clear  
1067 provisions that protect against inadvertent waiver may reduce the  
1068 burden of drafting a privilege log.

1069 A common observation has been that most of the problems arise  
1070 because privilege logs are commonly produced toward the close of  
1071 the discovery period.

1072 The central question is whether it will be possible to write  
1073 new rule text that reduces the challenges of privilege log  
1074 practice. The Subcommittee will reach out to the bar for further  
1075 information that may help in addressing the problem.

1076 Professor Marcus noted the proposal from Lawyers for Civil  
1077 Justice included in the agenda materials. That proposal is  
1078 essentially contingent on party agreement, without addressing any  
1079 rule provision prompting such agreement or even discussion of  
1080 possible agreement. The initial discussion in the Subcommittee has  
1081 not been along the lines suggested by their actual proposal.  
1082 Instead, the focus has been on getting lawyers to address these  
1083 issues early in the litigation. "How do we provide a prod in a  
1084 rule? Is improvement possible? If so, where would new provisions  
1085 fit in the body of the Civil Rules"?

1086 The invitation for discussion was met by brief silence. Then  
1087 a lawyer member suggested that we need more information on  
1088 technological implications for practice. Is metadata an appropriate  
1089 means of compiling a log? Some lawyers find this an acceptable  
1090 practice, but "judges are not yet there." And in fact creating a  
1091 log can be as much of a problem as identifying protected documents  
1092 when there a thousand of them.

1093 Another lawyer member observed that the four lawyers on the  
1094 Committee and the Subcommittee practice in large cases, with e-  
1095 discovery and responses. "We should not lose sight of more regular  
1096 cases."

1097 Another lawyer said that this is a problem worth thinking  
1098 about, although it is difficult to imagine a rule that will improve  
1099 the process.



1100 The fourth lawyer member agreed that "one rule for all sizes  
1101 of cases is not likely to work. Metadata logs aren't likely to  
1102 apply to most cases." Even with the most sophisticated lawyers in  
1103 the most sophisticated litigation, there is much to learn about how  
1104 to form a log by searching metadata.

1105 A judge said that privilege logs are a not infrequent problem  
1106 in practice. Adding provisions to Rule 16 to prompt the parties and  
1107 court to address it early on may be useful.

1108 A lawyer member agreed. "Timing is critical." Participants may  
1109 often push these problems toward the discovery cutoff.  
1110 Encouragement in Rule 16 to address them early in the litigation  
1111 would be very helpful.

1112 A judge suggested that silence among judges asked about their  
1113 experience with these problems is not a sign that the problems  
1114 encountered in compiling logs are unimportant. "A lot of money is  
1115 spent that judges don't know about." A lot of further work by the  
1116 Subcommittee will be valuable. Another judge agreed that the log  
1117 and the process for logging are issues that deserve further work.

1118 The subcommittee indeed will continue its work.

1119 Sealing Orders Judge Godbey began the report on sealing orders by  
1120 noting the proposal submitted by press interests to adopt an  
1121 elaborate rule with many specific provisions to regulate orders  
1122 that seal anything in court files. The proponents see a problem  
1123 that media and First Amendment interests "are not at the table when  
1124 these issues are discussed." The proposal can be seen as an attempt  
1125 to give a "virtual seat" at the table to these interests.

1126 The Subcommittee has not generated much enthusiasm for the  
1127 specific proposal. But these issues "have been floating around for  
1128 decades." A decade ago the Committee on Court Administration and  
1129 Case Management produced a best practices guide for sealing. The  
1130 Criminal Rules do address sealing.

1131 The Rules Law clerk reviewed a sample of local court rules on  
1132 sealing, drawing from districts represented on the committee. the  
1133 survey shows the local rules are not uniform. Further information  
1134 was provided by a letter from Lawyers for Civil Justice.

1135 As work goes forward, it may be useful to do more to  
1136 distinguish inter partes protective orders from sealing court  
1137 files. The appropriate standards may be different.

1138 Professor Marcus elaborated the introduction, suggesting that  
1139 the "bells and whistles" in the submitted proposal are not

1140 productive. But it is important to remember that transparency in  
1141 the courts has important constitutional and common-law aspects that  
1142 are different from discovery protective orders. A basic question  
1143 will be identifying a standard for sealing if it should be more  
1144 demanding than "good cause." Further study will be important. Many  
1145 local methods of sealing "may be just fine, not in need of a  
1146 national rule."

1147 A lawyer member reported that the Sedona Conference is working  
1148 on these issues.

1149 Sealing orders will remain on the Subcommittee agenda.

1150 Rule 37(e) Attorney Fee Awards A question has been raised whether  
1151 attorney fees can be awarded to reimburse costs incurred by a party  
1152 requesting discovery to restore or replace electronically stored  
1153 information that should have been preserved in the anticipation or  
1154 conduct of litigation. Rule 37(e) addresses spoliation of  
1155 electronically stored information, but does not include an express  
1156 provision for attorney fees. Rule 37(e)(1) authorizes "measures no  
1157 greater than necessary to cure the prejudice," but it might be read  
1158 to be limited to circumstances where the information cannot be  
1159 restored or replaced through additional discovery.

1160 Research by the Rules Law Clerk shows that there is a  
1161 potential problem in reading the rule text, but not a practical  
1162 problem. Almost all courts that address the question find authority  
1163 to award attorney fees. Compensation for the costs of successful  
1164 efforts to retrieve information that should have been preserved in  
1165 a more easily accessible form seems an obviously appropriate  
1166 remedy.

1167 Professor Marcus added that past work by Tom Allman, and a  
1168 recent letter from him, bolster the conclusion that there is no  
1169 practical problem. Reopening Rule 37(e), further, might lead to  
1170 work comparable to the difficult process that led to adopting its  
1171 current form.

1172 This subject will be removed from the agenda.

1173 Presuit Preservation Orders Professor Jeffrey Parness submitted a  
1174 proposal to add a new element to Rule 27(c):

1175 (c) PERPETUATION BY AN ACTION. This rule does not limit a  
1176 court's power to entertain an action to perpetuate  
1177 testimony and an action involving presuit  
1178 information preservation when necessary to secure  
1179 the just, speedy, and inexpensive resolution of a  
1180 possible later federal civil action.

1181 Judge Godbey illustrated some of the questions raised by this  
1182 proposal. The duty to preserve information in anticipation of  
1183 litigation was left to the common law when Rule 37(e) was developed  
1184 and revised, in part because of questions whether a rule that  
1185 imposes a duty to preserve before any federal action is filed would  
1186 be authorized by the Rules Enabling Act. Referring to a "possible  
1187 later federal civil action" raises questions of subject-matter  
1188 jurisdiction different from the provision in Rule 27(a)(1) for  
1189 perpetuating testimony "about any matter cognizable in a United  
1190 States court," showing that the petitioner expects to be a party to  
1191 such an action but cannot presently bring it or cause it to be  
1192 brought. The supporting memorandum suggests that "an action  
1193 involving presuit information preservation" can include an action  
1194 for a declaration that information need not be preserved. What if  
1195 two actions, one to preserve and one to permit destruction, lead to  
1196 conflicting orders?

1197 Professor Marcus added that the proposal is not limited to  
1198 electronically stored information, a limitation deliberately  
1199 incorporated in Rule 37(e). In developing Rule 37(e), the Committee  
1200 "did not want to encourage preservation orders in litigation."  
1201 Beyond that, pre-litigation discovery generally has not been  
1202 popular. People do preserve information. Demand letters are sent.  
1203 The committee should not take up this subject.

1204 The committee agreed to remove this proposal from the agenda.

1205 *Rule 9(b): Pleading State of Mind*

1206 Judge Dow introduced the Rule 9(b) proposal by reminding the  
1207 committee that this subject was taken up at the October meeting  
1208 only for a brief introduction. A more thorough introduction will be  
1209 provided today, but without any thought of moving toward a  
1210 recommendation. Further consideration over the summer will be  
1211 important.

1212 Dean Spencer provided a summary of his article on this topic,  
1213 which he has submitted as a proposal for action. The purpose today  
1214 is not to advocate for adoption. The purpose, rather, is to show  
1215 that the proposal is worthy of serious study. "There are concerns  
1216 that need to be addressed."

1217 The focus is on revising the second sentence of Rule 9(b) to  
1218 modify the interpretation adopted by the Supreme Court in *Ashcroft*  
1219 *v. Iqbal*, 556 U.S. 662, 686-687 (2009). As revised, Rule 9(b) would  
1220 read:

1221 (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or  
1222 mistake, a party must state with particularity the

1223 circumstances constituting fraud or mistake.  
1224 Malice, intent, knowledge, and other conditions of  
1225 a person's mind may be alleged generally without  
1226 setting forth the facts or circumstances from which  
1227 the condition may be inferred.

1228 The Supreme Court ruled that "generally" means pleading that  
1229 satisfies the "plausibility" standard recently adopted for  
1230 interpreting Rule 8(a)(2). Lower courts adhere to the Court's  
1231 ruling, requiring that a pleading include facts that make plausible  
1232 an allegation of state of mind.

1233 One reason to question the Court's interpretation can be found  
1234 in the meaning intended when the present language was adopted in  
1235 1938. The 1937 Committee Note refers to the English Rule that  
1236 permitted conditions of mind to be alleged as a fact, without  
1237 alleging facts from which the condition of mind might be inferred.  
1238 The Court's interpretation is inconsistent with the intended  
1239 meaning.

1240 Added reasons can be found in the structure of the pleading  
1241 rules. Rule 8(a)(2) addresses what is required to plead a claim.  
1242 Rule 9(b) is a rule for pleading allegations, not claims. Rule  
1243 8(d)(1) is a rule for pleading allegations, and requires that the  
1244 allegation be "simple, concise, and direct." In Rule 9(b) itself,  
1245 further, "generally" is used to establish a contrast with the "with  
1246 particularity" standard required for allegations of fraud or  
1247 mistake, but the Court's interpretation requires that conditions of  
1248 mind be pleaded with particularity.

1249 Policy issues further undermine the Court's interpretation.  
1250 Plaintiffs cannot be expected to have detailed information of the  
1251 facts that will support an inference of intent at the time an  
1252 action is filed. Discovery is needed.

1253 Discussion began with comments that recounted other themes in  
1254 the article, offered from the perspective of one who was both  
1255 surprised and nonplussed by the Supreme Court's interpretation of  
1256 Rule 9(b). "Generally" had always seemed to recognize that  
1257 knowledge, intent, malice, and other conditions of mind often are  
1258 proved, not by confession but by inference from a mass of facts.  
1259 Even if all the facts were available to the pleader at the time of  
1260 framing the pleading, little purpose would be served by dumping  
1261 them all into the pleading, much less to put a judge to the task of  
1262 determining whether the "well pleaded" facts would permit a  
1263 rational trier of fact to draw the asserted inference. It is more  
1264 effective to permit a pleading to allege a state of mind as a  
1265 simple fact -- the defendant intended to discriminate, and so on.  
1266 There is a more particular danger that evaluation of plausible

1267 inferences is hampered by perspective: inferences that seem  
1268 plausible to one mind may seem impossible to another, depending on  
1269 experience and the influences of stereotypes. And of course the  
1270 pleader is not likely to have access to all the supporting facts at  
1271 the time of pleading. Discovery is necessary.

1272 This comment went on, however, to suggest that the first rush  
1273 of enthusiasm for this proposal should be tempered by further  
1274 reflection. Practices that worked in the context of Nineteenth  
1275 Century substantive law may not be as suitable to the enormous  
1276 spread of substantive law, often through ambitious statutes, in the  
1277 Twenty-First Century. Is it useful to apply a single rule for  
1278 pleading intent in an individual employment discrimination action,  
1279 an action under RLUIPA for denial of a zoning permit sought by a  
1280 religious institution, or a "class of one" equal protection claim?

1281 Professor Marcus added another perspective. It would be useful  
1282 to know more about how Rule 9(b) was actually applied over the  
1283 years before the Supreme Court adopted what has come to be  
1284 described as the "plausibility" pleading standard. Practice under  
1285 Rule 8(a)(2) varied widely, both in lower courts and at times in  
1286 the Supreme Court. The same may have been true for Rule 9(b),  
1287 reflecting concerns that will inform our consideration today. One  
1288 example is provided by a mid-1970s Second Circuit decision that  
1289 required pleading in a securities case of facts giving rise to a  
1290 strong inference of scienter, a standard that was later adopted by  
1291 statute.

1292 Professor Marcus also recalled Committee experience after the  
1293 1993 decision in the Leatherman case. The Court's opinion seemed to  
1294 invite consideration of rules for "heightened pleading" of some  
1295 matters, but repeated efforts failed to generate any proposal. The  
1296 road ahead with the Rule 9(b) proposal may be long and arid. "It's  
1297 an uphill push." Many judges seem to believe that the developing  
1298 plausibility standard of pleading is desirable. So it may be for  
1299 Rule 9(b).

1300 A third observation was that this topic is "incredibly  
1301 important, and deserves close attention."

1302 A judge reported denial of a motion to dismiss in a Title VII  
1303 case, relying on Dean Spencer's arguments. The Supreme Court  
1304 standard is tough to meet in these cases.

1305 Another judge observed that the plausibility pleading approach  
1306 "gives me a tool to encourage the parties to come up with better  
1307 pleadings." It is a way to encourage them to try harder. But  
1308 different issues may be presented when pleading a defendant's state  
1309 of mind. This proposal will be retained for further study.

1310 It may prove desirable to appoint a subcommittee to study Rule  
1311 9(b). That could stimulate the kind of discussion we need. Dean  
1312 Spencer agreed that a subcommittee with judges and practitioners  
1313 could be useful.

1314 *Appeal Finality After Consolidation Subcommittee*

1315 Judge Rosenberg delivered the report of the joint Appellate-  
1316 Civil Rules Subcommittee that is studying the impact of the  
1317 decision in Hall v. Hall, 138 U.S. 1118 (2018). The Court ruled  
1318 that even if initially separate cases are consolidated for all  
1319 purposes, a judgment that completely disposes of all claims among  
1320 all parties to what began as a separate action is final for  
1321 purposes of appeal.

1322 Last October the Subcommittee reported on the results of an  
1323 in-depth FJC study that found no identifiable difficulties stemming  
1324 from lost opportunities to appeal.

1325 Since October, informal inquiries have been made to the  
1326 Second, Third, Seventh, Ninth, and Eleventh Circuits. All routinely  
1327 screen appeals for timeliness. Two have appeals handbooks that  
1328 point to the rule in Hall v. Hall. Only one case in the Second  
1329 Circuit was found to illustrate lost opportunities to appeal.

1330 There is no sense of imminent need to consider rules that  
1331 might establish a different rule of finality for appeal.

1332 Discussion began with a judge's observation that the Supreme  
1333 Court chose one of the various possible rules. That may be reason  
1334 to let the question rest.

1335 The choice now seems to be whether to leave this topic to rest  
1336 for a while without further work, or instead to disband the  
1337 subcommittee. There is no present plan to expand the informal  
1338 survey. Expanding the FJC study would be costly, and there is  
1339 little reason to suppose that it would produce markedly different  
1340 results. "We're really doing nothing." But retaining the topic in  
1341 a state of suspense may be useful, looking both for developing  
1342 experience in practice and for possible reasons to believe that,  
1343 even without evidence of lost appeal opportunities, integrating  
1344 consolidation practice with the partial final judgment provisions  
1345 of Rule 54(b) might better serve the needs of the parties, the  
1346 trial court, and appeals courts.

1347 Because the Subcommittee was appointed by the Standing  
1348 Committee as a joint subcommittee, action by the Standing Committee  
1349 will be required to dissolve it. The question will be taken to the  
1350 Appellate Rules Committee for further consideration.

1351 *Rules 12(a)(2), (3): Statutory Appeal Times*

1352 Rule 12(a)(1) sets general times to respond to a pleading,  
1353 subject to a qualification: "Unless another time is specified by \*  
1354 \* \* a federal statute." No similar qualification appears in either  
1355 paragraph (2) or (3), which set 60-day response times for actions  
1356 against the United States and for actions against a United States  
1357 officer or employees sued in an individual capacity. The problem is  
1358 that at least a few statutes -- most prominently the Freedom of  
1359 Information Act -- set shorter periods. On its face, the rule  
1360 supersedes any statute enacted before the rule was adopted, and is  
1361 superseded by any statute enacted after the rule was adopted. There  
1362 is no reason to believe that this result was intended. The problem  
1363 also is easily fixed by revising the structure of Rule 12(a):

1364 (a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time  
1365 is specified by a federal statute, the time for  
1366 serving a responsive pleading is as follows:

1367 Paragraphs (1), (2), and (3) would all be subject to a statute that  
1368 sets a different time.

1369 Two arguments have been advanced for deciding not to fix this  
1370 textual misadventure. One is that it has not given rise to any  
1371 practical problems. The Department of Justice reports that it is  
1372 fully aware of the 30-day response times set in the Freedom of  
1373 Information Act and the Sunshine in Government Act, and generally  
1374 complies with them or, in appropriate cases, seeks an extension.  
1375 Extensions are often requested in cases that combine claims, one  
1376 subject to a 30-day response period and the other subject to the  
1377 general 60-day response period. But it fears that if the statutes  
1378 are explicitly recognized in Rule 12(a) text, courts may be less  
1379 willing to grant extensions in the combined-claim cases.

1380 At the October meeting, these competing concerns led the  
1381 Committee to an equally divided vote on recommending publication of  
1382 the proposed amendment, six votes for publication and six votes  
1383 against.

1384 Since the October meeting, an extensive PACER survey of actual  
1385 response times in FOIA action was made by John A. Hawkinson, a  
1386 freelance news reporter, and Rebecca Fordon of the UCLA Law School.  
1387 The survey covers FOIA actions in 87 districts from 2018 up to  
1388 2021. It shows nationwide mean times of 42 days, with 66% of  
1389 responses received outside of 30 days. A spreadsheet shows the  
1390 experience in each district. 1,391 of the 2,115 case total were  
1391 filed in the District Court for the District of Columbia, a court  
1392 that has a "mechanism" for issuing summonses that set a 30-day  
1393 response time. The median there is 31 days, and the mean 40 days.

1394 The four other districts with more than 30 cases during this period  
1395 show comparable or shorter times. The method used for preliminary  
1396 analysis did not show whether the Department of Justice had moved  
1397 for an extension of time during the 30-day period. Nor does it seem  
1398 to show whether the FOIA claim was joined with a claim not subject  
1399 to the 30-day response period.

1400 This survey is remarkably helpful. It seems to confirm the  
1401 description of Department of Justice practice.

1402 The Department of Justice representative repeated the earlier  
1403 descriptions of Department practice, adding that there has been no  
1404 reason to think that plaintiffs are concerned about it practices.

1405 Discussion concluded with the reminder that this topic was not  
1406 listed for action at this meeting. The division of votes at the  
1407 October meeting suggests that it deserves further consideration. It  
1408 will be brought back for disposition at the next October meeting.

1409 *Rule 4(f)(2)*

1410 This suggestion raises a question about the interplay between  
1411 paragraphs (1) and (2) of Rule 4(f).

1412 Rule 4(f)(1) authorizes service "at a place not within any  
1413 judicial district of the United States: (1) by any internationally  
1414 agreed means of service \* \* \* such as those authorized by the Hague  
1415 Convention \* \* \*." (f)(2) authorizes service "if there is no  
1416 internationally agreed means, or if an international agreement  
1417 allows but does not specify other means, by a method that is  
1418 reasonably calculated to give notice."

1419 The suggestion points out that the Hague Convention  
1420 establishes a system for service through the central authorities in  
1421 states that are parties to the convention. At the same time, it  
1422 permits service by other means, all of which are specified. Thus  
1423 these other means do not fall within (f)(2) -- the Convention  
1424 authorizes them, but also does specify them.

1425 Although this limit in (f)(2) is said to present a problem,  
1426 the suggestion does not deal with the more apparent reading of  
1427 (f)(1). Service by means that are both authorized and specified by  
1428 the Hague Convention fits squarely within (f)(1). There is no  
1429 apparent reason to undertake some revision of (f)(2) to include  
1430 these circumstances.

1431 The committee voted to remove this item from the agenda.

1432 *Rule 65(a)(2): Interlocutory Statutory Interpleader Injunctions*



1433 This suggestion points out that Rule 65(e)(2) seems curiously  
1434 incomplete:

1435 (e) These rules do not modify the following:  
1436 (2) 28 U.S.C. § 2361, which relates to  
1437 preliminary injunctions in actions  
1438 of interpleader or in the nature of  
1439 interpleader;

1440 The suggestion points out that § 2361 includes two paragraphs.  
1441 The first provides that the court may issue its process for all  
1442 claimants "and enter its order restraining them from instituting or  
1443 prosecuting any proceeding" affecting the subject of the  
1444 interpleader "until further order of the court." Without using the  
1445 exact words, this provision seems to relate to interlocutory or  
1446 preliminary injunctions. The second provides that the court may  
1447 "make the injunction permanent."

1448 The question asked, without further elaboration, is why does  
1449 the rule address only preliminary injunctions?

1450 The question in part may reflect a change made when Rule 65(e)  
1451 was restyled in 2007. From 1938 to 2007, it referred to the  
1452 provisions of the interpleader statute "relating to" preliminary  
1453 injunctions. That language did not imply that § 2361 relates only  
1454 to preliminary injunctions. As restyled, "which relates to" seems  
1455 to say that § 2361 relates only to preliminary injunctions,  
1456 apparently excluding permanent injunctions.

1457 This potential explanation still leaves the question: Why  
1458 should the statutory provisions for preliminary injunctions in  
1459 interpleader actions be protected against modification by Rule 65,  
1460 while the provisions for permanent injunctions are not?

1461 Preliminary research, stretching back into the Equity Rules  
1462 that preceded the Civil Rules, has revealed no indication of the  
1463 purposes that underlie the distinction. One plausible speculation  
1464 may be that the original advisory committee thought that the  
1465 statute might imply power to issue preliminary injunctions by a  
1466 process, and perhaps on terms, not consistent with Rule 65. Rule  
1467 65(e)(2) then reflects an intent to avoid modifying the statutory  
1468 powers.

1469 There has been no indication that the uncertain purpose of  
1470 Rule 65(e)(2) has caused any difficulties in practice. The few  
1471 courts that have confronted this question have suggested that  
1472 departures from regular Rule 65 procedure may be required by the  
1473 imperative for immediate action to forestall competing judicial  
1474 proceedings that might effectively defeat the interpleader action

1475 by disposing of the contested property. Permanent injunctions at  
1476 the conclusion of the interpleader action do not present like  
1477 problems.

1478 It would be possible to reexamine the question whether changed  
1479 circumstances, perhaps most plausibly the development of widespread  
1480 means of instantaneous communication, justify the cautious approach  
1481 reflected in Rule 65(e)(2). That would be a substantial  
1482 undertaking, perhaps difficult to justify absent any sign of  
1483 problems in practice. It would be much easier to undo the style  
1484 revision, but that work too might fall before the general practice  
1485 that avoids amendments framed only to revisit earlier styling  
1486 decisions.

1487 The Committee voted to remove this item from the agenda.

1488 *Rules 6, 60*

1489 This suggestion, addressing some effects of the Civil Rules on  
1490 the Appellate Rules, raises separate questions for Rules 6 and 60.

1491 Rule 6(d) Rule 6(d) provides that "3 days are added" when a party  
1492 may or must act within a specified time after being served and  
1493 service is made under Rule 5(b)(2)(C), (D), or (F). The proposal is  
1494 that 3 days should be added when a party must act within a  
1495 specified time "after entry of judgment" and service is made by any  
1496 of the same three means.

1497 The underlying concern is that notice of judgment may be  
1498 served by mail, delaying receipt of notice and thus shortening, as  
1499 a practical matter, the time to make motions under Rules 50, 52,  
1500 59, or 60 after judgment is entered. The running of appeal time can  
1501 be affected as well. (Service by leaving with the district court  
1502 clerk or "other means consented to" does not seem likely to be at  
1503 issue.)

1504 This proposal enters a web of related rules that run time to  
1505 act from the entry of judgment, not from being served. Rules 50,  
1506 52, 59, and 60 set the time for various post-judgment motions to  
1507 run from the entry of judgment. Appellate Rule 4(a) sets the time  
1508 to appeal to run from the entry of judgment. Rule 77(d)(1) directs  
1509 the clerk to immediately serve every party with notice of the entry  
1510 of judgment "as provided in Rule 5(b)." Rule 77(d)(2) provides that  
1511 lack of notice of entry does not affect the time for appeal or  
1512 authorize the court to relieve a party for failing to appeal within  
1513 the time allowed "except as allowed by Federal Rule of Appellate  
1514 Procedure 4(a)." Rule 4(a)(5) provides a general authority to  
1515 extend appeal time. Rule 4(a)(6) specifically allows the district  
1516 court to extend appeal time for a party who did not receive the

1517 Rule 77(d) notice within 21 days after entry of judgment, subject  
1518 to several limits.

1519 The integrated framework of these rules shows that the  
1520 Appellate and Civil Rules Committees have worked to coordinate the  
1521 provisions for notice of judgment, post-judgment motions, and  
1522 appeal times. Amending to allow "3 added days" would revise this  
1523 system, and should be approached with care, if at all.

1524 A potential complication was pointed out. It can be expected  
1525 that ordinarily notice of judgment will be provided through the  
1526 court's CM/ECF system. Mail is likely to be used primarily for pro  
1527 se parties. A revised rule should resolve the question whether  
1528 different parties should have different times for post-judgment  
1529 motions and appeal, or whether all parties should get an additional  
1530 3 days because one party received notice by mail.

1531 It also was suggested that automatically allowing an  
1532 additional 3 days would seldom be the best way to address such  
1533 legitimate needs as may arise in a few cases.

1534 The Committee voted to remove this item from the agenda.

1535 Rule 60(c)(1): Rule 60(c)(1) sets the time for making motions for  
1536 relief from judgment under Rule 60(b). As reflected in the  
1537 discussion of Rule 87 and Emergency Rule 6(2)(b)(2), integration of  
1538 Rule 60(b) motions with Appellate Rule 4(a)(4)(A) has been more  
1539 complicated than integration of post-judgment motions under Rules  
1540 50, 52, or 59. Rule 4(a)(4)(A)(vi) gives a Rule 60(b) motion the  
1541 same effect as timely Rule 50, 52, or 59 motions "if the motion is  
1542 filed no later than 28 days after the judgment is entered."

1543 The proposal is to add a cross-reference to Appellate Rule 4  
1544 as a new subparagraph Rule 60(c)(1)(B): "A motion under Rule 60(b)  
1545 must be made \* \* \* (B) within 28 days to toll the time for filing  
1546 an appeal." The idea of adding a cross-reference is clear, although  
1547 the wording might need some work, particularly if Appellate Rule  
1548 4(a)(4)(A)(vi) is amended to refer to the time for a Rule 59(e)  
1549 motion rather than 28 days.

1550 The question is whether to add another cross-reference to the  
1551 Appellate Rules in the Civil Rules. The cross-reference to  
1552 Appellate Rule 4 in Rule 77(d) was noted above. Another example  
1553 appears in Rule 58(e). Both of these provisions were worked out in  
1554 careful coordination with the Appellate Rules Committee. Similar  
1555 work integrated the general entry of judgment provisions of Rule 58  
1556 with Appellate Rule 4, leaving the task of cross-reference to  
1557 Appellate Rule 4.

1558 The purpose of adding a cross-reference to Rule 60(c)(1) would  
1559 be a simpler purpose to provide notice to litigants who are not  
1560 familiar with the interplay of appeal time provisions with Rule 60.  
1561 Similar opportunities for cross-references have not been seized.  
1562 The Rule 54(b) provisions for partial final judgment to not warn  
1563 that appeal time starts to run on entry of the judgment. Nor has  
1564 any attempt be made to provide notice, perhaps in Civil Rule 42, of  
1565 the effects of the decision in Hall v. Hall, noted above, on the  
1566 time to appeal. Cross-references may be difficult to draft -- just  
1567 what sorts of consolidations might fall into a potential cross-  
1568 reference, for example, might be challenging to identify. And a  
1569 proliferation of cross-references might generate misleading  
1570 implications that there is no need to worry about Appellate Rule 4  
1571 when there is no cross-reference in a Civil Rule, for example when  
1572 a preliminary injunction is entered.

1573 The Appellate Rules Committee has removed this proposal from  
1574 its agenda.

1575 The Committee voted to remove this proposal from the agenda.

1576 *In Forma Pauperis Standards and Procedures*

1577 Judge Dow introduced this subject. Professors Clopton and  
1578 Hammond have submitted a proposal that the Committee should renew  
1579 its consideration of standards and procedures for granting  
1580 petitions to proceed in forma pauperis. Similar issues were  
1581 considered at the three most recent committee meetings. The  
1582 submission underscores the evidence that standards for granting  
1583 i.f.p. status vary widely across the country and even within a  
1584 single district. And the forms used to collect information are  
1585 confusing and often invade privacy, including privacy interests of  
1586 nonparties, and may imply that it is appropriate to consider  
1587 information that is not properly considered.

1588 This is a succinct suggestion. The Committee has recognized at  
1589 its earlier meetings that "these are big problems." Both the Court  
1590 Administration and Case Management Committee and the Appellate  
1591 Rules Committee have considered proposals that relate to these  
1592 topics.

1593 The Northern District of Illinois has taken a close look at  
1594 its practices, prompted by the work of Professors Clopton and  
1595 Hammond. The local rules committee studied the issues for many  
1596 months, and the Chicago Council of Lawyers collected a lot of data.  
1597 The local i.f.p. form has been revised a number of times --  
1598 revisiting the form is a constant battle. The District has 12 staff  
1599 attorneys for prisoner litigation; they do the preliminary  
1600 screening of i.f.p. requests and apply uniform standards.

1601 Uniformity has been further promoted by the departure from the  
1602 bench of judges who had adopted "outlier" practices.

1603 These are important issues, but it is not clear whether  
1604 answers are best sought by adopting new Civil Rules to address a  
1605 topic that has not been addressed by the rules. Would other means  
1606 be more flexible, more readily adapted to different circumstances  
1607 -- most notably the cost of living -- in different parts of the  
1608 country, and perhaps better informed by procedures different from  
1609 Rules Enabling Act procedures? Model standards, or model local  
1610 rules, might be developed and offer better help than formal  
1611 national rules.

1612 One beginning might be to collect information from the  
1613 districts represented on the Committee. Further study may lead to  
1614 a decision whether to proceed further.

1615 A judge noted that her district's pro se clerks show the  
1616 judges of the district "are all over the map in standards," and  
1617 even on whether they take up the i.f.p. question before or after  
1618 screening. The Administrative Office has a working group for pro se  
1619 issues. Perhaps they can help us gather information.

1620 Judge Dow noted that the very process of gathering information  
1621 may show the districts that they need to get their practices in  
1622 order. "Highlighting the issue can be helpful."

1623 Another judge suggested that this topic might benefit from  
1624 joint work with the Appellate Rules Committee. They have an i.f.p.  
1625 subcommittee at work now, investigating suggestions for revising  
1626 the Appellate Form 4 affidavit to accompany a motion for permission  
1627 to appeal in forma pauperis. It seems likely that the Bankruptcy  
1628 Rules Committee also frequently encounters these problems.

1629 Judge Dow brought the discussion to a point by suggesting  
1630 several steps that may be taken to gather more information. He will  
1631 consult with the Federal Judicial Center. Judge Rosenberg can help  
1632 with the Administrative Office pro se working group. The Appellate  
1633 and Bankruptcy Rules Committees chairs and reporters will be  
1634 consulted; it may make sense to establish a means for coordinating  
1635 work, whether through a joint subcommittee or more informal  
1636 coordination among the reporters. Emery Lee volunteered to  
1637 cooperate with the work and with coordinating the reporters.

1638 *Initial Mandatory Discovery Pilot Projects*

1639 Judge Dow provided an interim summary of the mandatory initial  
1640 discovery pilot projects in the Northern District of Illinois and  
1641 the District of Arizona. It was a good thing to have done in

1642 Illinois. "What we learned is all in the eyes of the beholder." The  
1643 FJC is mining the data to see what conclusions can be drawn beyond  
1644 the impressions of each judge, both those who participated in the  
1645 project and those who did not.

1646 Emery Lee offered a brief summary. Each pilot project ran for  
1647 three years, concluding on April 30, 2020, in the District of  
1648 Arizona, and on May 31, 2020, in the Northern District of Illinois.  
1649 There will be no new pilot cases.

1650 More than 5,000 cases came into the project in Arizona; 90% of  
1651 them had terminated by this April 1. Some 12,000 cases came into  
1652 the project in Illinois; some 83% of them had terminated by April  
1653 1.

1654 The FJC is tracking the longer-pending cases. The pandemic  
1655 disrupted the study; about two-thirds of the cases had terminated  
1656 when the pandemic began, about the same proportion in both  
1657 districts. It seems probable that the effect of the pandemic was  
1658 the same in both districts, so comparisons will not be distorted.  
1659 The same is true for the comparison districts. If problems do arise  
1660 on that score, there are statistical techniques that can help  
1661 adjust, but it is too early to know whether they should be used.

1662 The FJC is on the eighth round of closed-case attorney  
1663 surveys. Response rates have held up across the pandemic.

1664 Judge Dow closed the meeting with thanks for the good work and  
1665 attention of everyone involved. Let us hope that the next meeting,  
1666 scheduled for October 5 in Washington, D.C., will indeed be held in  
person.

Respectfully submitted,

Edward H. Cooper  
Reporter

CIVIL RULES APRIL 23, 2021 OBSERVER LIST

Alex R. Dahl	Founder - Strategic Policy Counsel	<b>Alex Dahl</b>
Amy Brogioli	Associate General Counsel - AAJ	<b>Amy Brogioli</b>
Amy E. Sellars	Assistant General Counsel - Cardinal Health	<b>Amy Sellars</b>
Andrew Cohen	Director/Counsel - Burford Capitol	<b>Andrew Cohen</b>
Andrew Hammond	Assistant Professor of Law - U. of Florida Levin College of Law	<b>BY PHONE</b>
Andrew Peck	Retired Magistrate Judge SDNY, Senior Counsel DLA Piper	<b>Andrew Peck</b>
Benjamin Robinson	Partner - Holland & Knight	<b>Benjamin Robinson</b>
Brittany K. T. Kaufman	Senior Director - IAALS	<b>Brittany Kaufman</b>
Dai Wai Chin Feman	Corporate Counsel - Parabellum Capitol	<b>Dai Wai</b>
Eric H. Blinderman	Chief Executive Officer - Therium Capital Management	<b>Eric H. Blinderman</b>
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Jakub Madej	Research Assistant - Yale University	<b>Jakub Madej</b>
James L. McCrystal, Jr.	Attorney - Sutter O'Connell	<b>BY PHONE</b>
Jason Cantone	FJC	<b>Jason Cantone</b>
Jeannine M. Kenney	Partner - Hausfeld	<b>Jeannine Kenney</b>
Jennie Anderson	Attorney - Andrus Anderson LLP	<b>Jennie Anderson</b>
Jerome Kalina	AO Staff Attorney - Judicial Panel On Multidistrict Litigation	<b>Jerome Kalina</b>
Jerome Scanlan	Assistant General Counsel - EEOC	<b>BY PHONE</b>
Jim Batson	Legal Counsel - Omni Bridgeway	<b>Jim Batson</b>
Joe Cecil	retired from FJC; fellow at Berkeley Law School	<b>Joe Cecil</b>
John H. Beisner	Counsel - Skadden Aps	<b>John Beisner</b>
John Hawkinson	Freelance Journalist	<b>John Hawkinson</b>
Jordan Singer	Professor - New England Law	<b>Jordan Singer</b>
Kenneth J. Withers	Deputy Executive Director - Sedona Conference	<b>Kenneth J. Withers</b>
Kevin F. Brady	Corporate Counsel - E-Discovery & RIM, Volkswagon	<b>Kevin Brady</b>
Laura M.L. Wait	Associate General Counsel - District of Columbia Courts	<b>Laura Wait</b>
Lea Bays	Counsel - Robbins Geller Rudman & Dowd LLP	<b>Lea Bays</b>
Maria Salacuse	Assistant General Counsel for Technology - EEOC	<b>Maria Salacuse</b>
Martin T. Tully	Partner - Actuate Law LLC	<b>Martin Tully</b>
Matthew Lee Wiener	Acting Chairman - Administrative Conference of the U.S.	<b>Matt Wiener</b>
Patrick J. Dempsey	Chief Investment Officer - Therium Capital Management	<b>Patrick Dempsey</b>
Robert Levy	Executive Counsel - Exxon Mobil Corporation	<b>Robert Levy</b>
Robert Owen	Senior Counsel - Eversheds Sutherland	<b>Bob Owen</b>
Ross M. Gotler	E-Discovery Counsel - Paul, Weiss, Rifkind, Wharton & Garrison LLP	<b>Ross Gotler</b>
Sai	Pro se litigant	<b>Sai</b>
Sandra Metallo-Barragan	Deputy Chief E-Discovery Division - NY City Law Department	<b>Sandra Metallo-Barragan</b>
Sue Steinman	Senior Director of Policy & Sr. Counsel - AAJ	<b>Sue Steinman</b>
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Theodore Hirt	Professorial Lecturer in Law - GW	<b>BY PHONE</b>
Thomas Allman	Adjunct Professor - U. of Cincinnati College of Law, Member of Sedona Conference Steering Committee	<b>Tom Allman</b>
Tim Reagan	FJC	<b>Tim Reagan</b>
Tina Young	Chief of Staff - Omni Bridgeway	<b>Tina Young</b>
Zachary Clopton	Law Professor - Northwestern	<b>Zachary Clopton</b>



# TAB 6

# TAB 6A

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

**JOHN D. BATES**  
CHAIR

**CHAIRS OF ADVISORY COMMITTEES**

**JAY S. BYBEE**  
APPELLATE RULES

**DENNIS R. DOW**  
BANKRUPTCY RULES

**ROBERT M. DOW, JR.**  
CIVIL RULES

**RAYMOND M. KETHLEDGE**  
CRIMINAL RULES

**PATRICK J. SCHILTZ**  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Raymond M. Kethledge, Chair  
Advisory Committee on Criminal Rules

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

**DATE:** June 1, 2021

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**I. Introduction**

The Advisory Committee on Criminal Rules (Advisory Committee) met on a videoconference platform that included public access on May 11, 2021. Draft minutes of the meeting are attached.

The Advisory Committee's report presenting a draft emergency rule for publication is included above with the joint report.

In this report, the Advisory Committee seeks final approval for a proposed amendment to Rule 16 previously published for public comment. The proposal and a summary of public comments are included as an appendix to this report. The Advisory Committee also considered several other items, which are information items in Part III of this report.

## **II. Action Item for Final Approval After Public Comment: Rule 16**

The proposed amendments to this rule arose from three suggestions that the Advisory Committee consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). With the aid of an extensive briefing session presented by the Department of Justice (DOJ) and a miniconference bringing together experienced prosecutors and defense lawyers, the Advisory Committee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Because the Advisory Committee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Advisory Committee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended subsections (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) generally mirror one another.

### **A. The Public Comments**

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes in the text and the committee note. As described more fully below, after considering these suggestions, the Advisory Committee decided against adopting any of them.

#### **1. Setting a Default Time for Disclosures**

Many commenters focused on the amendment's timing for disclosures, which was an issue that the Advisory Committee considered at length during the drafting process. Rather than setting a default date for disclosures, (a)(1)(G)(ii) and (b)(1)(C)(ii) specify that the disclosure must be made "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Although the California Lawyers Association supported this approach, the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the New York City Bar Association (NYC Bar) all urged the Advisory Committee to include a default deadline, though they did not agree on what that deadline should be.

The NYC Bar did not specify a preferred deadline. Noting the variety of deadlines set in other jurisdictions (ranging from 60 days to 21 days before trial), it urged that setting some default date would provide helpful certainty to the parties while allowing the courts discretion to increase or decrease the time period on particular cases. It added that some members took the view that default dates should not be set "too far in advance of trial," so that the government would not have to undertake such discovery in smaller cases that were unlikely to go to trial.

The FMJA commented that busy trial judges contending with large caseloads and the demands of the Speedy Trial Act would “appreciate the guidance” of a default deadline, and they suggested a default of 21 days before trial, as well as a requirement that rebuttal experts be disclosed 7 days before trial. Finally, the FMJA commented that some (though not all) of its members expressed concern about allowing deadlines to be set by local rules, which could be a trap for defense lawyers unfamiliar with the local rule.

NACDL agreed that the rule should set a default date for expert disclosures, but it supported earlier default deadlines: no later than 30 days before trial for the initial disclosures, and 14 days before trial for reciprocal disclosures. It argued these earlier deadlines are needed “to minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare.” Further, NACDL argued that the rule should require the court to set a case-specific deadline in writing, in order to minimize any risk of confusion or misunderstanding.

During the drafting process, the Advisory Committee carefully considered whether to include a default deadline—and declined to do so. The draft amendment seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule *must* set a specific time for each party to make its disclosures of expert testimony to the other party. These disclosure deadlines, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side’s expert evidence. Because caseloads vary from district to district, the amended rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Finally, under the new Rule 16.1, the parties must “confer and try to agree on a timetable” for pretrial disclosures, and the court in setting times for expert disclosures should consider the parties’ recommendations.

Many members initially favored a specific deadline as the best way to ensure that the parties have sufficient time to prepare for trial. After extensive consideration and discussion, however, the Advisory Committee was unable to come up with specific times that would fit every case and comply with the Speedy Trial Act. Given the enormous variation in cases and caseloads, the Advisory Committee decided unanimously to adopt a flexible and functional standard focused on the ultimate goal of ensuring that the parties have adequate time to prepare. Although some defense members had initially pressed for default deadlines, they came to the view that the defense might be benefited by this flexible approach. Some members also suggested that the functional approach would be more efficient since it would avoid the need for motions to adjust the default deadlines in individual cases. Finally, there was significant support for recognizing in the text that individual districts might adopt local rules setting default deadlines.

After considering the NYC Bar, FMJA, and NACDL comments, the Advisory Committee rejected the suggestion that it set a default deadline and reaffirmed its support for the amendment's flexible and functional approach. Responding to the concern expressed by some FMJA members and NACDL that local rules setting disclosure deadlines would create unnecessary confusion or be an unfair trap for unwary counsel, the Advisory Committee concluded it was reasonable to expect counsel to consult the local rules. Indeed, the amendment itself puts readers on notice that they should check the local rules. Proposed (a)(1)(G)(ii) and (b)(1)(C)(ii) state "The court, by order *or local rule*, must set a time [to make] disclosures." (emphasis added).

## **2. Deleting the Requirement that the Parties Disclose a "Complete" Statement of the Expert's Opinions**

The parallel requirements of (a)(1)(G)(iii) and (b)(1)(C)(iii) require the parties to provide "a complete statement of all opinions" the party will elicit from any expert in its case in chief. In order to underscore the difference between this requirement and that imposed by Civil Rule 26, the California Lawyers Association urged the Advisory Committee to remove the word "complete."

The requirement that a party's statement of its expert's opinions be "complete" goes to the heart of the amendment. The Advisory Committee extensively discussed the requirement of a "complete statement" at its fall meeting in 2019. After discussing the possibility that district judges would mistakenly assume that the amended rule in all respects adopts Civil Rule 26, the Advisory Committee decided to retain the phrase "complete statement" as well as the current statement in the note.

The amendment remedies the problem of insufficient pretrial disclosure of expert witnesses. In doing so it moves criminal discovery closer to civil discovery, though without replicating civil discovery in all respects. On this point, as published, the amended rule reflects a number of delicate compromises that allowed the proposal to receive unanimous support. First, the amendment requires a "complete statement" of the expert's opinions in order to clearly signal the need for more complete disclosures. The Advisory Committee also decided not to require a "report," which some members felt would suggest an unduly onerous requirement. Rather than put a label on the disclosures, the amendment allows the specific requirements set forth in (a)(1)(G)(iii) and (b)(1)(C)(iii) to speak for themselves. Finally, the committee note states that the amendment does not "replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases."

In sum, the requirement for disclosure of a "complete" statement is critical to addressing the problem of insufficiently complete disclosures under the current rule. The Advisory Committee therefore declined to remove it.

## **3. Enlarging the Required Disclosures**

NACDL urged that the Advisory Committee expand the required disclosures to include two additional elements:

- transcripts in the party's possession of any testimony by the witness in the past four years; and
- any information in the government's possession favorable to the defense on the subject of the expert's testimony or opinion or any information casting doubt on the opinion or conclusions.

NACDL also urged that the proposal be amended to require the same disclosures to other stages in the proceedings, including preliminary matters and sentencing.

The Advisory Committee rejected these suggestions for two main reasons. First, the inclusion of some or all of these proposed changes would require further study and republication to obtain public comments, slowing the process by at least one year. Some elements of the proposal would likely be controversial.<sup>1</sup> Second, expanding the scope of the amendment by including additional elements might imperil the consensus enjoyed by the current narrowly targeted proposal.

#### **4. Additional Note Language**

Three comments suggested changes in the committee note. The Advisory Committee decided against making them.

##### **a) The FMJA Proposal**

The FMJA urged the addition of note language. It expressed concern that the specific limitations for government disclosures in (a)(1)(G)(iii) concerning publications within the past 10 years and testimony within the past 4 years “could be misconstrued as defining the scope of disclosures required by the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland*, 373 U.S. 83 (1963).”

The Advisory Committee concluded that these concerns did not warrant revisions to the committee note. Members viewed it as unlikely that readers would mistakenly believe that the amendment sought to govern the constitutional obligation imposed by *Brady v. Maryland*, or to define the scope of disclosures required by the Jencks Act, now supplemented by Rule 26.2. Indeed, Rule 26.2, which governs *midtrial* disclosures after a witness has testified, includes in subdivision (f) a detailed description of a statement *for purposes of that rule*.

##### **b) The NACDL Proposal**

On pages 2-3 of its comments, NACDL described a Tenth Circuit decision, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), ruling that a defendant's expert disclosure

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<sup>1</sup> Indeed, NACDL implicitly recognizes that its proposal would be in conflict with 18 U.S.C. § 3500 and Rule 26.2, and specifies that the proposed disclosure would be required notwithstanding Rule 26.2 and any contrary statute.

must, on its face, be sufficient to withstand a *Daubert/Kumho Tire* challenge. NACDL proposed language stating that the amendment:

should not be read as a requiring that the disclosure must itself be sufficient to allow the expert's option to pass muster under [*Daubert* and/or *Kumho Tire*] or otherwise conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see, e.g., United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert's opinion, so as to permit that party to file an appropriate motion, if it so chooses.

For a variety of reasons the Advisory Committee chose not to include this language in the note. First, the Advisory Committee previously decided not to detail the differences between civil and criminal discovery in the committee note. Second, as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended. Finally, the reporters expressed concern that the *Nacchio* case was not in fact on point, and they urged the subcommittee not to include this citation.

### c) The Department of Justice

Mr. Wroblewski relayed a concern from the Drug Enforcement Administration (DEA) regarding the requirement that the parties disclose “a list of all publications authored in the previous 10 years” by the expert. The DEA expressed concern that this language might be interpreted “to require the government to identify every publication, regardless of relevance, including sensitive intelligence documents published within a law enforcement component, within the DOJ or within the executive branch, for example even classified scientific papers provided to the White House or the CIA could conceivably be included.” In research to explore this concern, Mr. Wroblewski found little case law defining the term “publication” under the Civil or Criminal Rules. The few cases that did address the definition of “publication” focused on disclosure of the information to the public, and the common meaning of the term “publication” seems to exclude internal materials not available to the public.<sup>2</sup>

The DEA's concerns arose from the common use of the term “publication” to refer to the circulation of internal documents within the executive branch. Mr. Wroblewski suggested the adding language to the committee note to reassure government entities that use of the term “publication” does not include internal circulation.

Although the subcommittee recommended note language to address the DEA's concern, the Advisory Committee decided against including it. For two reasons, members concluded that note language carving out “internal government documents” was neither necessary nor desirable. First, nobody thought that the courts would construe the amended rule to include internal government documents. The term “publication” has long been included in Civil Rule 26, and no

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<sup>2</sup> *See, e.g., BLACK'S LAW DICTIONARY* (11th ed. 2019) (defining “publication” as “the act of declaring or announcing to the public,” and in the context of copyright law “offering or distributing copies of a work to the public”).



one knew of any case in which it had been applied to internal government documents. Second, the inclusion of a carve-out would wrongly imply that absent this limitation the term “publication” was broad enough to include internal documents that had never been released publicly. After discussion, the DOJ’s representatives declined to press for the change, noting that the concerns cited by various members were legitimate.

### **III. Clarifying Changes Made During and After the Meeting**

In response to issues raised at the meeting, the Advisory Committee made several clarifying changes. Most were made during the meeting, but one set of issues was set aside for further consultation with the style consultants.

#### **A. Changes in (a)(1)(G)**

On lines 18-19, the Advisory Committee corrected a cross reference to a request for discovery “under the second bullet point in subdivision (b)(1)(C)(ii).” The style consultants were helpful in determining how the bullet could be cited.

On lines 25-28, the Advisory Committee moved the phrase “at trial” to parallel its placement on line 11, so that both refer to “use at trial.” On lines 27-28 it deleted as superfluous the phrase “as evidence,” since use under Federal Rule of Evidence 702, 703, or 705 would necessarily be as evidence.

The Advisory Committee considered at length the remaining differences between the first and second sentences in this subsection, and it found no reason to make additional changes. The first sentence currently limits the government’s general disclosure obligation to expert testimony it intends to use in its “case-in-chief.” The amendment adds the requirement that the government also disclose expert testimony it intends to use “during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).” The addition of a requirement that the government disclose this specified rebuttal evidence responded to one of the major concerns practitioners raised at the miniconference. The second sentence, which governs disclosure of expert testimony concerning the defendant’s mental condition, fits into a specialized disclosure regime under Rule 12.2. Because the government would not necessarily address a potential insanity defense in its case-in-chief, the current text refers to testimony the government intends to use “at trial.” During the process of studying the proposed amendments, the Advisory Committee received no comments that there were any problems with pretrial disclosure in the cases governed by this sentence, and it concluded that the best course was to leave that language unchanged.

#### **B. Clarifying Changes to Distinguish Between General Disclosure Obligations and Disclosures Regarding Specific Expert Witnesses**

At the meeting, Judge Bates raised a concern about potential confusion from the use of the word “disclosure” in a collective sense (a disclosure that itself includes multiple disclosures regarding individual witnesses) as well as to refer to a disclosure for a particular witness. As he noted, the government may have multiple witnesses, with separate disclosures for each. In

addition, disclosures for some government experts must be made at a different time than disclosures for others. A disclosure for a rebuttal witness is required only after the defendant makes a disclosure under (b)(1)(C) (which will be after the government has made its disclosure of evidence it intends to use in its case-in-chief). Finally, disclosure of mental health witnesses may take place at a separate time, potentially creating a third different disclosure deadline (although it will often be the same time as government rebuttal witnesses). Similarly, the defense may have multiple experts, and may make disclosures at different times.

Whether this language needed revision was unclear at the meeting. No comments during the process leading up to publication or received during the comment period raised this issue, and the context seemed to make it clear that (a)(1)(G)(ii) referred to all of the witness disclosures, while (a)(1)(G)(iii), (iv), (v), and (vi) referred to the required disclosures regarding individual witnesses. For example, one witness could not be expected to sign a disclosure that includes information about the statements to be made by other witnesses.

After consultation with the style consultants, however, clarifying language was developed to address Judge Bates's concern. The changes distinguish the parties' general disclosure obligations—in parallel items (i), (ii) and (vi)—from the requirements for a disclosure for a particular expert witness—in items (iii), (iv), and (v). Although the changes were intended to be stylistic only, they were circulated to the Advisory Committee by email asking members to raise any concerns or objections. None were raised.

#### **IV. Information Items**

The Advisory Committee reports the following information items:

- The Advisory Committee's continuing review of proposals to amend Rule 6(e), governing grand jury secrecy, including new proposals for additional changes.
- The Advisory Committee's decision to place two suggestions on its study agenda:
  - to amend Rule 16 to require the court to inform prosecutors of their constitutional *Brady* obligations; and
  - to amend Rule 11 to allow the court to accept a negotiated plea of not guilty by reason of insanity; and
- The Advisory Committee's decision not to move forward with a suggestion that it amend Criminal Rule 29.1 to eliminate prosecutorial rebuttal in closing arguments.

##### **A. Proposals to Amend Rule 6**

The Advisory Committee received a progress report from the Rule 6 Subcommittee.

The Advisory Committee is reviewing several suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy. Many of these suggestions propose adding an additional exception to grand jury secrecy for materials of historical or public interest, though they vary

significantly in how they would define that exception. *See* 20-CR-B; 20-CR-D; 20-CR-J; and 21-CR-F. In 2012, the Advisory Committee declined to pursue a similar proposal by the DOJ, finding no need for such an exception in light of decisions allowing release under appropriate conditions. The situation has changed, however, in light of recent appellate decisions holding the district courts have no inherent authority to disclose material not included in the exceptions to Rule 6(e). *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020).

Two other proposals also arose from the decisions holding the district courts have no inherent authority to release grand jury materials, and the Advisory Committee referred these proposals to the Rule 6 Subcommittee as well.

The DOJ requested consideration of an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings. In response to the *McKeever* decision, however, some district courts are now stepping back from issuing delayed disclosure orders, pointing out that Rule 6(e) does not explicitly permit such an order. *See* 20-CR-H.

Chief Judge Beryl Howell and Judge Royce Lamberth of the District Court of the District of Columbia wrote to request consideration of an amendment to allow the court to continue its practice, which relied on the court's inherent authority, of issuing redacted judicial opinions that might be thought to disclose matters occurring before the grand jury in violation of Rule 6(e). *See* 21-CR-C.

The Rule 6 Subcommittee held a day-long virtual miniconference in April to gather more information about the proposals to allow the disclosure of historical or public interest materials, and the authority to issue temporary non-disclosure orders. It obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration. The miniconference provided important perspectives on the issues raised by the proposals, and the participants also agreed to serve as resources to the subcommittee as it continued its work.

Some of the pending proposals seek amendments explicitly addressing the courts' inherent authority to disclose grand jury materials. The Advisory Committee is closely following a case in the Supreme Court that presents the question whether the exceptions in Rule 6 are exclusive. The respondent in *Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (*cert. granted*, July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the decision below. Following the election, on November 20, 2020 the Court granted the respondent's motion to remove the case from the Court's December argument calendar,<sup>3</sup> but it

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<sup>3</sup> The motion noted that after a new Congress was convened and Joseph Biden inaugurated as president, the newly constituted House Judiciary Committee would have to determine whether it wished to continue pursuing the application for the grand-jury materials that gave rise to this case.

remains on the Court's docket.

Finally, the Advisory Committee received, and referred to the Rule 6 Subcommittee, a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. *See* 21-CR-A. The forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee will be very active over the summer, and it plans to present recommendations to the Advisory Committee at its fall meeting.

## **B. Additions to the Advisory Committee's Study Agenda**

The Advisory Committee decided to place two suggestions on its study agenda.

### **1. Informing Prosecutors of their Constitutional Duties**

Suggestions 21-CR-A and 21-CR-B propose amending Rule 16 to require courts to inform prosecutors of their constitutional *Brady* obligations. Although the recently enacted Due Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, these suggestions urge the Advisory Committee to develop a national standard.

The Act allows for significant discretion and variety. It gives responsibility to the Judicial Council in each circuit to promulgate a model order, but each individual court in the circuit may use the model order as it determines is appropriate.

The Advisory Committee determined that it would not be appropriate to propose a national rule at this time. It placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

### **2. Amending Rule 11 to Allow the Court to Accept a Negotiated Plea of Not Guilty by Reason of Insanity**

Suggestion 21-CR-D proposed amending Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Initial research disclosed several cases where the parties agreed that a verdict of not guilty by reason of insanity was appropriate, and the court conducted a stipulated bench trial. The Advisory Committee deferred any decision on whether to pursue an amendment to allow for further research on the use of this alternative.

**C. A Suggestion Removed from the Advisory Committee’s Agenda**

The Advisory Committee decided not to pursue Suggestion 20-CR-I, which proposed amending Rule 29.1 to eliminate government rebuttal in closing arguments at trial. The Advisory Committee was not persuaded that the current rule was causing difficulties, and it noted that analogues to rebuttal (such as reply briefs) are common, useful, and not controversial.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE<sup>1</sup>**

1     **Rule 16. Discovery and Inspection**

2     **(a) Government’s Disclosure.**

3         **(1) Information Subject to Disclosure**

4   \* \* \* \* \*

5             **(G) Expert witnesses.**

6                     **(i) Duty to Disclose.** At the defendant’s  
7                     request, the government must **give**  
8                     **disclose** to the defendant, **in writing, the**  
9                     **information required by (iii) for a written**  
10                    **summary**—of any testimony that the  
11                    government intends to use **at trial** under  
12                    **Federal** Rules of Evidence 702, 703, or  
13                    705 ~~of the Federal Rules of Evidence~~  
14                    during its case-in-chief **at trial, or during**  
15                    **its rebuttal to counter testimony that the**

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

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16 defendant has timely disclosed under  
17 (b)(1)(C). If the government requests  
18 discovery under the second bullet point  
19 in subdivision—(b)(1)(C)(ii) and the  
20 defendant complies, the government  
21 must, at the defendant’s request, give  
22 disclose to the defendant, in writing, the  
23 information required by (iii) for a written  
24 summary—of testimony that the  
25 government intends to use at trial under  
26 Federal Rules of Evidence 702, 703, or  
27 705 of the Federal Rules of Evidence as  
28 evidence at trial on the issue of the  
29 defendant’s mental condition.

30 (ii) Time to Disclose. The court, by order or  
31 local rule, must set a time for the  
32 government to make its disclosures.

33                    The time must be sufficiently before  
34                    trial to provide a fair opportunity for the  
35                    defendant to meet the government's  
36                    evidence.

37                    **(iii) Contents of the Disclosure.** The  
38                    disclosure for each expert witness  
39                    summary provided under this  
40                    subparagraph must contain:

- 41                    • a complete statement of all  
42                    describe the witness's opinions;  
43                    that the government will elicit  
44                    from the witness in its case-in-  
45                    chief, or during its rebuttal to  
46                    counter testimony that the  
47                    defendant has timely disclosed  
48                    under (b)(1)(C);



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- 49                   ● the bases and reasons for ~~those~~  
50                    ~~opinions them; and~~
- 51                   ● the witness's qualifications,  
52                    including a list of all publications  
53                    authored in the previous 10 years;  
54                    and
- 55                   ● a list of all other cases in which,  
56                    during the previous 4 years, the  
57                    witness has testified as an expert at  
58                    trial or by deposition.
- 59                   **(iv) Information Previously Disclosed. If**  
60                    the government previously provided a  
61                    report under (F) that contained  
62                    information required by (iii), that  
63                    information may be referred to, rather

64 than repeated, in the expert-witness  
65 disclosure.

66 (v) Signing the Disclosure. The witness  
67 must approve and sign the disclosure,  
68 unless the government:

69 • states in the disclosure why it  
70 could not obtain the witness's  
71 signature through reasonable  
72 efforts; or

73 • has previously provided under  
74 (F) a report, signed by the witness,  
75 that contains all the opinions and  
76 the bases and reasons for them  
77 required by (iii).

78 (vi) Supplementing and Correcting a  
79 Disclosure. The government must

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80 supplement or correct its disclosures in

81 accordance with (c).

82 \* \* \* \* \*

83 **(b) Defendant’s Disclosure.**

84 **(1) Information Subject to Disclosure**

85 \* \* \* \* \*

86 **(C) Expert witnesses.**

87 (i) Duty to Disclose. At the government’s

88 request, the defendant must, at the

89 government’s request, disclose give to the

90 government, in writing, the information

91 required by (iii) for a written summary of

92 any testimony that the defendant intends to

93 use under Federal Rules of Evidence 702,

94 703, or 705 of the Federal Rules of

95 Evidence as evidence during the

96 defendant’s case-in-chief at trial, if—:

97                    ~~(i)~~ (i) the defendant requests disclosure  
98                    under ~~subdivision~~ (a)(1)(G) and the  
99                    government complies; or

100                   ~~(ii)~~ (ii) the defendant has given notice  
101                    under Rule 12.2(b) of an intent to  
102                    present expert testimony on the  
103                    defendant's mental condition.

104                   (ii) Time to Disclose. The court, by order or  
105                    local rule, must set a time for the  
106                    defendant to make the defendant's  
107                    disclosures. The time must be  
108                    sufficiently before trial to provide a fair  
109                    opportunity for the government to meet  
110                    the defendant's evidence.

111                   (iii) Contents of the Disclosure. The  
112                    disclosure for each expert witness  
113                    ~~This summary~~ must contain:

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114                   ● a complete statement of all ~~describe~~  
115                   the ~~witness's~~ opinions; that the  
116                   defendant will elicit from the witness  
117                   in the defendant's case-in-chief;  
118                   ● the bases and reasons for ~~them~~those  
119                   opinions; and  
120                   ● the witness's qualifications,  
121                   including a list of all publications  
122                   authored in the previous 10 years; and  
123                   ● a list of all other cases in which,  
124                   during the previous 4 years, the  
125                   witness has testified as an expert at  
126                   trial or by deposition.  
127                   **(iv) Information Previously Disclosed.**  
128                   If the defendant previously provided a  
129                   report under (B) that contained

130 information required by (iii), that  
131 information may be referred to, rather  
132 than repeated, in the expert-witness  
133 disclosure.

134 **(v) Signing the Disclosure.** The witness  
135 must approve and sign the disclosure,  
136 unless the defendant:

137 • states in the disclosure why the  
138 defendant could not obtain the  
139 witness's signature through  
140 reasonable efforts; or

141 • has previously provided under (F) a  
142 report, signed by the witness, that  
143 contains all the opinions and the bases  
144 and reasons for them required by (iii).

145 **(vi) Supplementing and Correcting a**  
146 **Disclosure.** The defendant must

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147 supplement or correct the defendant's

148 disclosures in accordance with (c).

149 \* \* \* \* \*

150 **Committee Note**

151 The amendment addresses two shortcomings of the  
152 prior provisions on expert witness disclosure: the lack of  
153 adequate specificity regarding what information must be  
154 disclosed, and the lack of an enforceable deadline for  
155 disclosure. The amendment clarifies the scope and timing of  
156 the parties' obligations to disclose expert testimony they  
157 intend to present at trial. It is intended to facilitate trial  
158 preparation, allowing the parties a fair opportunity to prepare  
159 to cross-examine expert witnesses and secure opposing  
160 expert testimony if needed.

161 Like the existing provisions, amended subsections  
162 (a)(1)(G) (government's disclosure) and (b)(1)(C)  
163 (defendant's disclosure) generally mirror one another. The  
164 amendment to (b)(1)(C) includes the limiting phrase—now  
165 found in (a)(1)(G) and carried forward in the amendment—  
166 restricting the disclosure obligation to testimony the  
167 defendant will use in the defendant's "case-in-chief."  
168 Because the history of Rule 16 revealed no reason for the  
169 omission of this phrase from (b)(1)(C), this phrase was  
170 added to make (a) and (b) parallel as well as reciprocal. No  
171 change from current practice in this respect is intended.

172 The amendment to (a)(1)(G) also clarifies that the  
173 government's disclosure obligation includes not only the

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174 testimony it intends to use in its case-in-chief, but also  
175 testimony it intends to use to rebut testimony timely  
176 disclosed by the defense under (b)(1)(C).

177 To ensure enforceable deadlines that the prior  
178 provisions lacked, items (a)(1)(G)(ii) and (b)(1)(C)(ii)  
179 provide that the court, by order or local rule, must set a time  
180 for the government to make its disclosures of expert  
181 testimony to the defendant, and for the defense to make its  
182 disclosures of expert testimony to the government. These  
183 disclosure times, the amendment mandates, must be  
184 sufficiently before trial to provide a fair opportunity for each  
185 party to meet the other side's expert evidence. Sometimes a  
186 party may need to secure its own expert to respond to expert  
187 testimony disclosed by the other party. Deadlines should  
188 accommodate the time that may take, including the time an  
189 appointed attorney may need to secure funding to hire an  
190 expert witness, or the time the government would need to  
191 find a witness to rebut an expert disclosed by the defense.  
192 Deadlines for disclosure must also be sensitive to the  
193 requirements of the Speedy Trial Act. Because caseloads  
194 vary from district to district, the amendment does not itself  
195 set a specific time for the disclosures by the government and  
196 the defense for every case. Instead, it allows courts to tailor  
197 disclosure deadlines to local conditions or specific cases by  
198 providing that the time for disclosure must be set either by  
199 local rule or court order.

200 Items (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to  
201 set a time for disclosure in each case if that time is not  
202 already set by local rule or other order, but leave to the  
203 court's discretion when it is most appropriate to announce  
204 those deadlines. The court also retains discretion under Rule



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205 16(d) consistent with the provisions of the Speedy Trial Act  
206 to alter deadlines to ensure adequate trial preparation. In  
207 setting times for expert disclosures in individual cases, the  
208 court should consider the recommendations of the parties,  
209 who are required to “confer and try to agree on a timetable”  
210 for pretrial disclosures under Rule 16.1.

211 To ensure that parties receive adequate information  
212 about the content of the witness’s testimony and potential  
213 impeachment, items (a)(1)(G)(i) and (iii)—and the parallel  
214 provisions in (b)(1)(C)(i) and (iii)—delete the phrase  
215 “written summary” and substitute specific requirements that  
216 the parties provide “a complete statement” of the witness’s  
217 opinions, the bases and reasons for those opinions, the  
218 witness’s qualifications, and a list of other cases in which the  
219 witness has testified in the past 4 years. The term  
220 “publications” does not include internal government  
221 documents. Although the language of some of these  
222 provisions is drawn from Civil Rule 26, the amendment is  
223 not intended to replicate all aspects of practice under the civil  
224 rule in criminal cases, which differ in many significant ways  
225 from civil cases. The amendment requires a complete  
226 statement of all opinions the expert will provide, but does  
227 not require a verbatim recitation of the testimony the expert  
228 will give at trial.

229 On occasion, an expert witness will have testified in a  
230 large number of cases, and developing the list of prior  
231 testimony may be unduly burdensome. Likewise, on  
232 occasion, with respect to an expert witness whose identity is  
233 not critical to the opposing party’s ability to prepare for trial,  
234 the party who wishes to call the expert may be able to  
235 provide a complete statement of the expert’s opinions, bases

236 and reasons for them, but may not be able to provide the  
237 witness's identity until a date closer to trial. In such  
238 circumstances, the party who wishes to call the expert may  
239 seek an order modifying discovery under Rule 16(d).

240 Items (a)(1)(G)(iv) and (b)(1)(C)(iv) also recognize  
241 that, in some situations, information that a party must  
242 disclose about opinions and the bases and reasons for those  
243 opinions may have been provided previously in a report  
244 (including accompanying documents) of an examination or  
245 test under subparagraph (a)(1)(F) or (b)(1)(B). Information  
246 previously provided need not be repeated in the expert  
247 disclosure, if the expert disclosure clearly identifies the  
248 information and the prior report in which it was provided.

249 Items (a)(1)(G)(v) and (b)(1)(C)(v) of the amended rule  
250 require that the expert witness approve and sign the  
251 disclosure. However, the amended provisions also recognize  
252 two exceptions to this requirement. First, the rule recognizes  
253 the possibility that a party may not be able to obtain a  
254 witness's approval and signature despite reasonable efforts  
255 to do so. This may occur, for example, when the party has  
256 not retained or specially employed the witness to present  
257 testimony, such as when a party calls a treating physician to  
258 testify. In that situation, the party is responsible for  
259 providing the required information, but may be unable to  
260 procure a witness's approval and signature following a  
261 request. An unsigned disclosure is acceptable so long as the  
262 party states why it was unable to procure the expert's  
263 signature following reasonable efforts. Second, the expert  
264 need not sign the disclosure if a complete statement of all of  
265 the opinions, as well as the bases and reasons for those  
266 opinions, were already set forth in a report, signed by the

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267 witness, previously provided under subparagraph  
268 (a)(1)(F)—for government disclosures—or (b)(1)(B)—for  
269 defendant’s disclosures. In that situation, the prior signed  
270 report and accompanying documents, combined with the  
271 attorney’s representation of the expert’s qualifications,  
272 publications, and prior testimony, provide the information  
273 and signature needed to prepare to meet the testimony.

274 Items (a)(1)(G)(vi) and (b)(1)(C)(vi) require the parties  
275 to supplement or correct each disclosure to the other party in  
276 accordance with Rule 16(c). This provision is intended to  
277 ensure that, if there is any modification of a party’s expert  
278 testimony or change in the identity of an expert after the  
279 initial disclosure, the other party will receive prompt notice  
280 of that correction or modification.

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**Changes Made After Publication and Comment**

Clarifying and stylistic changes were made. In (a)(1)(G)(i) the cross reference was corrected to refer to the second bullet point in (b)(1)(C)(i). The second sentence was revised slightly to parallel the first sentence more closely and to delete as redundant the phrase “as evidence,” which referred to evidence to be introduced under Federal Rules of Evidence 702, 703, or 705. To avoid any possible confusion, references in (a)(1)(G)(ii), (iii), and (vi) and (b)(1)(C)(ii), (iii), and (vi) were rephrased slightly to clarify whether they referred collectively to all of each party’s disclosures or to specific disclosures. Parallel changes were made in the note.

### Summary of Public Comment

Jean Publiee (CR-2020-0004-003): Urges that all rules should be made simpler and fully explained.

Yvette Chevalier (CR-2020-0004-005): Comments that “specification of information sharing is great,” and “[g]ood changes.”

Federal Magistrate Judges Association (CR-2020-0004-007): Supports the disclosure obligations and suggests three changes:

- Set the default time for disclosure at 21 days before trial in the rule;
- Do not permit courts to set the time for disclosure in local rules; and
- Add note language stating that nothing in the rule is intended to limit the government’s obligations under 18 U.S.C. § 3500 or *Brady v. Maryland*, 373 U.S. 83 (1963).

New York City Bar Association (CR-2020-0004-008): Calls proposal “long overdue” and “a welcome development,” endorses reciprocity, but supports setting a default deadline for disclosure subject to modification by the court for good cause, noting that the time should not be too far in advance of trial.

National Association of Criminal Defense Lawyers (CR-2020-0004-009): Generally supports the amendment but proposes several changes:

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- Requiring the court—in a written order—to set a case specific deadline for disclosure no later than 30 days before the date set for trial;
- Adding language to the note stating that it should not be read as requiring the disclosure itself to be sufficient to withstand a *Daubert/Kumho* challenge;
- Requiring the parties to provide a transcript of the witness’s prior testimony in the past 4 years, notwithstanding Rule 26.2 and any contrary statute;
- Adding a requirement that the government disclose any information in its possession favorable to the defense on the subject of the expert witness’s testimony or opinion or any information casting doubt on the opinions or conclusions; and
- Making the disclosures applicable to other stages in the proceedings, including preliminary matters and sentencing.

California Lawyers Association (CR-2020-0004-0010): Supports the proposal for reciprocal disclosure sufficiently before trial, but proposes that the amendment require only a “statement”—not a “complete statement”—to avoid ambiguity and underscore the point that the amendment does not replicate the requirements of Civil Rule 26. Also suggests changing the form of internal cross references.

# TAB 6B

**ADVISORY COMMITTEE ON CRIMINAL RULES  
DRAFT MINUTES  
May 11, 2021**

**Attendance and Preliminary Matters**

The Advisory Committee on Criminal Rules (“Committee”) met by videoconference on May 11, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair  
Judge Timothy Burgess  
Judge James C. Dever, III  
Professor Roger A. Fairfax, Jr.  
Judge Michael J. Garcia  
Lisa Hay, Esq.  
James N. Hatten, Esq., Clerk of Court Representative  
Judge Denise P. Hood  
Judge Lewis A. Kaplan  
Judge Bruce J. McGiverin  
Nicholas L. McQuaid, Esq., *ex officio*<sup>1</sup>  
Judge Jacqueline H. Nguyen  
Catherine M. Recker, Esq.  
Susan M. Robinson, Esq.  
Jonathan Wroblewski, Esq.<sup>1</sup>  
Judge John D. Bates, Chair, Standing Committee  
Judge Jesse M. Furman, Standing Committee Liaison  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King, Associate Reporter  
Professor Catherine Struve, Reporter, Standing Committee  
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Brittany Bunting, Administrative Analyst, Rules Committee Staff  
Shelly Cox, Management Analyst, Rules Committee Staff  
Kevin Crenny, Esq., Law Clerk, Standing Committee  
Bridget M. Healy, Esq., Counsel, Rules Committee Staff  
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center  
S. Scott Myers, Esq., Counsel, Rules Committee Staff  
Julie Wilson, Acting Chief Counsel, Rules Committee Staff

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was also in attendance.

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<sup>1</sup> Mr. McQuaid and Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers:

Amy Brogioli, American Association for Justice  
Patrick Egan, American College of Trial Lawyers  
Peter Goldberger, National Association of Criminal Defense Lawyers  
John Hawkinson, a freelance journalist who expressed interest in Rule 16  
Jakub Madej, Research Assistant, Yale University  
Brent McKnight, Research Assistant, Duke University  
Laura M.L. Wait, Assistant General Counsel, D.C. Courts

### **Opening Business**

Judge Kethledge noted several members are leaving the Committee, specifically Judge James Dever, Judge Denise Hood, Judge Lewis Kaplan, and Mr. James Hatton. Judge Kethledge thanked each of them for their service to the Committee. He noted that Judge Dever, who chaired the Rule 62 subcommittee, and Judge Kaplan, who chaired the Cooperators Subcommittee and task force, had carried especially heavy loads. Judge Kethledge also observed that this was the first meeting for Judge Timothy Burgess of the United States District Court for the District of Alaska and for Mr. Nicholas McQuaid, Acting Assistant Attorney General for the Criminal Division in the Department of Justice (DOJ). Finally, Judge Kethledge also congratulated Professor Fairfax on his appointment as Dean of the American University Washington College of Law.

Judge Kethledge welcomed Judge Bates, Judge Furman, and Professor Struve from the Standing Committee, and Professor Capra, who is coordinating all of the emergency rules. Finally, he recognized the observers, and thanked them for their interest in the Criminal Rules.

### **Review and Approval of Minutes**

A motion was made, seconded, and passed to approve the minutes of the Committee's November meeting as presented at Tab 1B of the agenda book.

### **Report of the Rules Committee Staff**

In lieu of a report from the Rules Committee Staff on the materials presented in the first and second bullet points of Tab 1C of the agenda book, Judge Kethledge noted that discussion of the Standing Committee's meeting would be folded into the discussion of Rule 62 and that the report on the Judicial Conference would be presented at the end after the Committee's business was concluded.

### **Update on Pending Legislation**

Judge Kethledge asked Ms. Wilson to provide an update on legislation currently pending in Congress. Ms. Wilson turned the Committee's attention to Tab 1C of the agenda book, specifically to page 101, where the legislation section begins. She highlighted the Sunshine in the Court Room Act, which Senator Chuck Grassley introduced in 2021. The Committee was not made



aware of the legislation before it was introduced, but it had been made aware of a second bill Senator Grassley introduced the same day. Ms. Wilson explained that the Sunshine in the Courtroom Act would give judges discretion to allow media coverage of proceedings at both the district and appellate levels. She noted the Act would potentially impact Rule 53. However, she continued, the Act would instruct the Judicial Conference to promulgate guidelines for how the Act would operate, allowing leeway to protect Rule 53.

Judge Kethledge asked whether the Act would be offered as an amendment to any other legislation already moving through the legislative process. Ms. Wilson replied that, so far, the Administrative Office had no indication that this would happen. She further noted the possibility of discussing the Act with Senator Grassley, given his correspondence with the Administrative Office about other legislation.

### **Discussion of Public Comments Received for the Text of Rule 16**

Judge Kethledge asked Professor Beale to guide the Committee through a discussion of the comments received in response to the publication of the draft amendments to Rule 16, which the Committee had been working on for more than three years. Professor Beale directed the Committee to page 107 in Tab 2 of the agenda book, which contains the reporters' memorandum on the public comments and the Rule 16 subcommittee's discussion of them. Professor Beale explained that the Committee received six public comments, each of which the subcommittee evaluated in a telephone meeting. The subcommittee concluded that no changes to the version of the rule approved in April were warranted, but it agreed on one minor change to the committee note. The change to the committee note is discussed in the following section. Before proceeding further, Professor Beale reminded the Committee that the action before them was consideration of the comments and consideration of whether to send the proposed rule to the Standing Committee with a recommendation that it approve the rule and forward it to the Judicial Conference (and ultimately the Supreme Court and Congress). This meeting would be the Committee's last chance to make changes, and to be sure it fully endorsed the amendment.

The discussion of Rule 16 at points encompassed various topics. For the sake of clarity, these minutes present the discussion topically, rather than in chronological order.

#### *A. Overview of Rule 16 Process*

Professor Beale began by giving the Committee a brief overview of the need for a Rule 16 amendment and the process undertaken to date. The idea behind Rule 16 was that some changes were needed to move criminal pretrial discovery of expert witnesses closer to civil discovery of experts. The aim was to achieve earlier and more complete disclosure. The subcommittee began by holding an extremely useful miniconference to gather information and get feedback from practitioners. Given that judges are not ordinarily involved in cases during the pretrial disclosure period, getting the views of both prosecutors and defense lawyers was critical. The miniconference revealed two problems. First, pretrial disclosure related to expert witnesses was insufficiently complete to allow parties to adequately prepare for trial. Second, parties needed an enforceable deadline for disclosure because advocates could not properly meet expert testimony that they had

heard about only a few days before trial. Because Rule 16 lacked a deadline, there was no breach of the rules when disclosures were made at the last minute, even if this created problems for litigants. To solve these problems, the subcommittee attempted to ensure the rule would adequately specify what should be disclosed, and it created an enforceable deadline schedule.

*B. Proposals for a Default Deadline*

The public comments were very supportive of the idea of amending Rule 16, but four comments suggested changes. Professor Beale explained that three of the comments centered on whether the rule should provide a default deadline, as many state rules do. But the comments varied significantly on what the default deadline should be. When the subcommittee considered these proposals, it concluded there was no single default deadline that would be appropriate in every case. Instead of creating a default rule and asking parties to go to court to seek case-specific changes, the subcommittee concluded it was preferable to adhere to the Committee's position of creating a functional deadline: sufficiently in advance of trial to allow parties to prepare adequately. The judge must set the deadline in individual cases, or districts can create district-wide local rules. The Federal Magistrate Judges Association's ("FMJA") comment argued this latter aspect of the functional approach would create a problem because people would not read the local rules. But the new rule explicitly mentions local rules, and the subcommittee concluded this was sufficient to put parties on notice to consult the local rules. In sum, the subcommittee recommended staying with the Committee's flexible, functional deadline.

Judge Kethledge invited comments related to these proposals but noted that both the subcommittee and Committee had already considered the issue at some length. Hearing no comments on the issue, the Committee declined to add a default deadline.

*C. Proposal to Delete "Complete" in "Complete Statement"*

Professor Beale then moved to the next issue raised by the public comments, which focused on the rule's requirement that the expert give a "complete statement." Professor Beale observed the Committee deliberately chose to import parts of the civil rules to show that more complete disclosure is required. One comment argued that the phrase "complete statement" could be misleading, and the Committee should omit the word "complete." Professor Beale explained that completeness was a core idea animating the changes to Rule 16, and the subcommittee was unanimous in recommending retention of the "complete statement" language. Judge Kethledge then invited comments related to this suggestion. Hearing none, the Committee declined to omit the word "complete."

*D. Proposal to Enlarge Disclosures Required by Rule 16*

The next comment the Committee considered was from the National Association of Criminal Defense Lawyers ("NACDL"), which asked the Committee to enlarge the disclosures the rule required. Rather than require only the disclosure of the list of cases in which the expert has previously testified, NACDL proposed also requiring disclosure of any transcripts of testimony in the government's possession. It also proposed adding required disclosure of any information in the

government's possession favorable to the defense on the subject of the expert's testimony or opinion, or any information casting doubt on the opinion or conclusions. NACDL further proposed that these requirements apply to preliminary matters as well as pretrial, trial, and sentencing proceedings. Essentially, the proposal would bring within Rule 16's ambit material that the prosecution is already required to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). However, in its proposal, NACDL recognized that this suggestion could run afoul of the Jencks Act and Rule 26.2.

Professor Beale explained that accepting the NACDL proposal would be a major change and a substantive enlargement of draft Rule 16, requiring republication and a new public comment period. Further, the subcommittee also worried these changes would undermine the unanimous support enjoyed by the current targeted Rule 16 amendments.

Judge Kethledge commented on the importance of the Rule 16 amendment's support. Rule 16 has proved difficult to amend in the past, and there have been two or three attempts that failed after moving a significant way through the process. Judge Kethledge noted that amending Rule 16 is a delicate undertaking, and it is only through the good faith of both the DOJ and the defense bar that the Committee had made it this far over the last three and a half years. The current proposed amendments represent a delicate compromise, and Judge Kethledge urged that it should take a very good reason before the Committee moves to adjust the terms of that compromise.

Professor Beale added that the question for the Committee was whether this proposal would make a real improvement or whether, without it, the rule would be so incomplete that a larger, bolder proposal is necessary. The subcommittee's view was that a targeted, narrower approach was the right step, even if the Committee returns to Rule 16 to consider other changes in the future.

Judge Kethledge then invited comments on the NACDL proposal. A member questioned whether, if an expert witness's statement already implicates *Brady*, that statement would automatically be a part of the process of parties exchanging information. Judge Kethledge thought that was correct in light of the *Brady* obligation being totally independent of Rule 16 and the new *Brady* notification rule under the Due Process Protection Act. Professor Beale agreed that Rule 16 in no way limits the prosecution's *Brady* obligations. To the extent parties and the government are well aware of *Brady* obligations, that would be a part of the on-going disclosure process. Rule 16 is simply one piece of that process that focuses on what must be disclosed regarding experts. But if the government must go further than Rule 16 to meet *Brady*, then of course it must do so. Professor Beale also noted that the FMJA comments proposed that the Note reflect some interaction with *Brady* and Rule 26.2. The subcommittee did not think anyone would conclude that Rule 16 could somehow restrict, or would be intended to restrict, *Brady* obligations.

#### *E. Cross-Reference Issue*

Judge Bates noted that on page 115 of the agenda book, at line 19, the reference in the rule should be to (b)(1)(C)(i), not (C)(ii), because (C)(i) is the actual duty to disclose, not the timing of the disclosure. Specifically, the reference should be to the second of two bullet points under (b)(1)(C)(i). After the cross-reference was checked, there was a motion to amend the reference on

line 19 to amend “(ii)” to refer to the correct provision. A judge member seconded the motion, and it passed unanimously.

Later in the meeting, Professor Beale said she had heard from the style consultants on how to address the issue of cross-referencing to bullet points. The language could say: “the second bullet point in item (b)(1)(C)(i).” Suggestions were made and accepted to remove the word “item.” A judge member moved to adopt this change. Two members seconded, and the motion passed unanimously.

*F. Discussion of Asymmetrical Language in (a)(1)(G)(i)*

Judge Bates raised a concern over (a)(1)(G)(i), on pages 114–15 of the agenda book. He noted that the provision contains two sentences. The first sentence describes the government’s general disclosure obligation, which says it must disclose information it intends to use at trial “during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed . . . .” The second sentence, which is a more specific disclosure obligation related to evidence the government intends to offer regarding the defendant’s mental condition, only references evidence the government “intends to use . . . at trial.” This second sentence makes no specific mention of rebuttal evidence. Judge Bates asked whether the two sentences should be made parallel by adding language about the rebuttal to the second sentence. He suggested that the more specific provision regarding evidence of the defendant’s mental condition should not be narrower than the general disclosure provision. Could the difference in the language cause problems?

Professor Beale said this point warranted discussion because the Committee had not previously focused on this language. Insanity defenses are relatively infrequent in the federal system. Normally, the insanity defense is raised by the defense during its case-in-chief, and then the government addresses it on rebuttal. The question for the Committee was whether the general disclosure sentence and the specific sentence on evidence relating to mental condition should be parallel so that the second sentence explicitly mentions rebuttal evidence. This made the issue potentially relevant for a defendant’s surrebuttal.

A member pointed to an additional difference between the two sentences. The first sentence refers to testimony, but not to evidence. In contrast, the second sentence says: “testimony the government intends to use *as evidence* at trial” (emphasis added). “Testimony” in the first sentence, without the “as evidence” language, is arguably broader because it could potentially include impeachment evidence. This member thought that leaving “at trial” in the second sentence was helpful because it also could include impeachment. Her question thus centered on clarifying what role “as evidence” played in the sentence. Judge Kethledge responded the words “as evidence” referred to the particular species of evidence to which the particular disclosure reference applies—namely, evidence as to mental condition. Professor Beale observed that this difference between the two sentences preexisted the current proposed Rule 16 amendments. She thought Federal Rules of Evidence 702, 703, and 705 would cover evidence, and so the Committee could have deleted “as evidence” in the second sentence on lines 26–27 to make it parallel. She noted the Committee should not change any more than necessary to effect the desired changes. Even so,

the phrase “as evidence” appears to be redundant if the evidence is already being used under Federal Rules of Evidence 702, 703, and 705. Professor King reminded the Committee that the reporters and subcommittee had not previously discussed or focused on this portion of (a)(1)(G)(i).

Professor Struve commented that Judge Bates’s earlier point about the erroneous cross-reference could be helpful to this discussion. The cross-reference to (b)(1)(C)(ii) is in the existing rule. And the provision to which it points will become the second bullet point under (b)(1)(C)(i), not (C)(i) in its entirety. It is about giving notice of intent to present expert testimony as to the defendant’s mental condition under Rule 12.2. So maybe that would be a built-in limitation on when the scenario in the second sentence of (a)(1)(G)(i) arises.

Turning back to the linguistic difference between the two sentences in (a)(1)(G)(i), Professor Beale noted that the general disclosure obligation on lines 14–15 is currently limited to evidence the government intends to introduce in its case in chief, and the amendment broadens it to include rebuttal of evidence the defendant has timely disclosed. The second sentence, lines 17–28, refers to disclosures regarding the defendant’s mental condition. Rule 12.2 imposes a special discovery obligation when the defendant’s mental condition is going to be at issue. Professor Beale noted her opinion that the current draft language was adequate and that the two sentences do not need to be parallel. The language “at trial” on line 27 includes the case-in-chief and rebuttal. Judge Bates agreed about the breadth of the language “at trial.” But if that is true for the second sentence, it would be true for the first sentence. So why have the two be different? Professor Beale noted that the present text already distinguishes general disclosure from disclosures regarding the defendant’s mental condition, and as to the latter “at trial” could include surrebuttal. The Committee decided not to include surrebuttal in the general disclosure provision. And the government’s obligation to disclose rebuttal evidence is applicable only for evidence the defendant has timely disclosed. The second sentence is very targeted at a species of evidence regarding the defendant’s mental condition that has its own discovery schedule under Rule 12.2. This was a reason the rule distinguished initially, and it is not too jarring to have a difference between the two sentences.

A subcommittee member agreed with Professor Beale on the background of the rule. He added that at the miniconference, a number of defense lawyers expressed frustration that they had been sandbagged with disclosures in connection with rebuttal. That point of emphasis motivated the addition of the obligation to disclose rebuttal evidence to the general provision. The member then suggested a change to make the two sentences more parallel by deleting “as evidence at trial” and then inserting “at trial” after “the government intends to use” in line 24 of the draft rule. This would make them parallel in form, while retaining the language about rebuttal in the general provision.

Professor King noted one consideration to support the deletion of “as evidence” is that the committee note for the 2002 amendments states the Committee took “introduced as evidence” out and substituted it with “used,” illustrating this kind of change had been made before. Professor King noted she would prefer removing “as evidence” rather than adding language about rebuttal to the second sentence of (a)(1)(G)(i). Judge Kethledge added that he also disfavored adding language about rebuttal to the second sentence because that would change the scope of the

government's obligation. The Committee had not thought about such a change with respect to mental condition, and he thought it would be unwise to make changes on the fly. Professor Beale also noted that no comments came in about mental condition cases. The phrase "at trial" has been in the rule for a substantial period of time and has caused no problems. In contrast, the limitation to evidence the government intended to present in its case in chief was causing problems, which the amendment addressed with precision, covering only rebuttal to evidence the defendant had timely disclosed. The current amendment was narrowly focused and balanced. But Judge Dever's suggestion described in the previous paragraph would bring greater clarity.

Judge Bates added that the last full paragraph of the committee note on page 123 of the agenda book says the provisions in (a)(1)(G) refer to the case-in-chief and rebuttal. The Note thus seems to apply to both the general and mental capacity provisions without recognizing a distinction between them, despite the textual differences in the rule.

A member moved to insert "at trial" after "to use" on line 24 of the draft rule and to delete "as evidence at trial" on lines 26–27. Two members seconded, and the motion passed unanimously.

*G. Possible Different Meanings of the Term "the Disclosure"*

Judge Bates noted that in several places, the term "the disclosure" is used, but that the term is used to mean different things. For example, in (a)(1)(G)(ii) the disclosure refers to the entirety of what the government is doing—that is, referencing all of the government's disclosures, even if they are many—but in (iii), the term is used differently to refer to a specific disclosure with respect to a specific witness. Because the government may have more than one disclosure in some cases, this inconsistent usage of a single term could create confusion. Judge Bates illustrated the point by raising a hypothetical scenario. Say that in the last four years the government made a disclosure including an expert report, but then the defendant pleaded guilty, and the case never went to trial. As a result, the expert never testified. Judge Bates asked whether that would be a publication that would then need to be disclosed in a later case involving the same expert. The original report was never made generally available to the public because of the plea, and there was no testimony. Should there be disclosure of the report, and, if so, does the rule capture that? Judge Bates observed that the earlier-disclosed report might not be a publication, and the case might not have to be listed in the Rule 16 disclosure in a later case because the expert never testified.

Professor Beale responded that the hypothetical and Judge Bates's observation about the outcome were accurate. The report was not a publication, there was no testimony, and there would be no disclosure under the amendment. But if the report somehow contained *Brady* material, then it would have to be disclosed. She noted this was not necessarily a bad outcome. The rule only requires listing the cases in which the witness testified but does not require providing the testimony. Judge Bates responded that nothing here would made the defendant aware of the report. Professor Beale agreed, and noted she thought the civil rules have the same phrase and would reach the same result. If Judge Bates believed the report should be disclosed, that would require a major change in the proposed rule.

Judge Kethledge asked the reporters whether the committee note should specify that prior reports are not publications, or whether it was obvious enough as is. Professor King replied that the additional change to the committee note already before the Committee would likely address that concern. Later in the meeting, the Committee discussed Note language intended to address that issue.

Turning back to Judge Bates' concern about the different uses of the term disclosure, Professor King noted the rule is structured so that it sets up the duty to disclose "any testimony" for each expert. From that point on, the rule refers to disclosures for that individual expert. The same language appears in the sections outlining the disclosure obligations of the government and the defense. Professor King asked Judge Bates whether, in light of the rule's structure, he read the rule as talking about multiple disclosures and then moving to a single disclosure, or whether the structure component in conjunction with the "any testimony" language addressed his concern.

Judge Bates responded that his concern was one of style. The term "the disclosure," whether it is in the headings or in the body of the text, refers to two slightly different things. The language to which Professor King pointed does not refer to different things. The rule says, "the disclosure," but multiple disclosures can happen in any given case. He noted language like "any disclosure" or "each disclosure" would work well in many places, but it was ultimately a style concern.

Professor Beale suggested one possibility would be to delete "the" in lines 29 and 32, and to do the same for the parallel provision for the defendant. But she thought this was only a style issue that can be taken up again with the style consultants, asking them whether it is preferable to delete the article or to make some other adjustment.

The Committee agreed to pass the issue along to the style consultants for further consideration.

#### *H. Specifying the Identity of the Witness at the Eve of Trial*

A member raised a question regarding circumstances where the government does not know the identity of the witness until the eve of trial. She noted that Rule 16 strikes a balance between identifying and correcting deficiencies in the current rule, but that it must create flexibility for all kinds of situations during criminal cases. One of the differences in the new rule is that the witness has to sign the disclosure. But there are circumstances where the government may know the content of the expert testimony at the time of the disclosure deadline, but it may not know the identity of the expert witness. This would most often arise with forensic experts, such as fingerprint experts. Usually, the government is only able to give a more generalized disclosure until closer to trial, and then the disclosure becomes more specific.

Professor King replied that the government need not have the witness sign if the government can provide a reason why, through reasonable effort, no signature is available. This would arise if the witness is adverse or if it is impossible to identify the witness at that point in time. Professor Beale added that this point had been discussed in connection with forensic firearms

experts because often the government does not know until closer to trial who the particular expert would be. But under the amended Rule 16, the government will have to disclose the content of the testimony, even if the witness remains unidentified.

The member who raised the issue followed up to confirm that the government can meet the generalized disclosure at the deadline set by the judge, and then give more specific information on the eve of trial. Professor Beale said that was essentially the balance the rule strikes. But at some point, the government must ask the court to limit the required discovery. If the government does not know what it will do as the trial date approaches, the question is whether the defense can adequately prepare on the eve of trial. It is a problem if the defense does not yet have the information at such a late stage in its preparations. Professor King pointed the Committee to page 125 of the agenda book, where the committee note discusses this particular scenario, at least when the expert's identity is not critical to the opposing party's ability to prepare. In that circumstance, the disclosing party may provide a statement of the witness's opinions without specifying the witness's identity. To give such a disclosure, the party wishing to call the expert would seek an order under Rule 16(d) to modify discovery. Professor Beale added that the party would, in effect, be asking the judge for the ability to wait until closer to trial to provide information on the witness's identity but to disclose the content now. The central issue then becomes whether the identity of the witness is critical to the opposing party's trial preparation, and that will depend on the nature of the testimony. Professor Beale also noted that Judge Furman had previously raised this issue, and the note language was the result of that discussion. A party may leave out parts that may not be critical to preparation but must do so under an order allowing it to restrict discovery in that way.

At the close of the discussion of Rule 16's text, a member moved to accept the text with the changes discussed during the meeting as well as the authority to address the style issue of how to cross-reference the bullet points in (b)(1)(C)(i).<sup>2</sup> Mr. McQuaid seconded.

The motion passed unanimously. Judge Kethledge thanked the subcommittee and the reporters for their work on Rule 16. He also thanked the DOJ and the defense bar for their notable good faith, understanding, and input throughout the process.

### **Discussion of Public Comments to Rule 16's Committee Note**

Judge Kethledge turned the Committee's attention to the public comments received regarding the committee note to Rule 16. He asked Professor Beale to guide the Committee in a discussion of those comments.

#### *A. Proposals from FMJA and NACDL*

Professor Beale explained that the FMJA suggested making clear in the committee note that the rule does not change anything about the government's obligation under *Brady* and the Jencks Act. She reported that the subcommittee did not think this was a serious concern. The rules,

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<sup>2</sup> As noted, *supra* page 6, this issue was resolved during the meeting with the assistance of the style consultants.



by default, cannot change constitutional or statutory requirements, and the Committee does not usually provide a disclaimer to that effect in the committee notes.

Further, Professor Beale explained NACDL's proposal to go into more depth about what information is required in the disclosure. Specifically, NACDL proposed that the committee note state the rule should not be read as requiring disclosure sufficient to withstand a challenge under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The NACDL proposal also asked for an explicit reference to a Tenth Circuit decision on this issue. The subcommittee, relying on the Committee's practice not to cite cases in the committee notes, declined to pursue this suggestion. Professor Beale further noted that the Committee has already cut back on any kind of in-depth language about how this rule could be distinguished from civil cases, and adding the suggested material would be inconsistent with that decision.

Judge Kethledge asked for comments on either of these two proposals. Hearing none, the Committee declined to take up either of them.

*B. Proposed Language Excluding Internal Government Documents from the Definition of "Publications"*

The DOJ proposed adding language to the committee note. Although this provision was considered during the discussion of Rule 16's text, the discussion is reflected here in order to present together all aspects of the discussion of the committee note.

Prior to the meeting, Mr. Wroblewski had relayed a concern from the Drug Enforcement Agency ("DEA") regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The details of that concern are presented in pages 111–12 of the agenda book. The outcome was that the subcommittee decided to revise the committee note to add: "The rule provides that the disclosure regarding the witness's qualifications include a list of all publications the witness authored in the previous 10 years. The term 'publications' does not include internal government documents."

Responding to this new language, a member stated he did not fully understand DEA's concern, because the ordinary understanding of "publication" does not include internal government documents. Thus, if you add the proposed language to the committee note, it suggests the word "publications" is broader than people normally understand it to be, hence the need for a carve out. The member questioned whether the Committee should further explain the term, given the implication of the additional language. Judge Kethledge observed that as an interpretive matter, ordinary meaning is the way the text of a rule or statute is often understood. He gave an example of an opinion in which the positive meaning of the scope of a provision was dictated by the exceptions. The exceptions defined the sphere of the rule. If the new language to the committee note is representative of what is *not* a publication, it implies some other things *are* publications. That could raise concerns.

Judge Kethledge asked the DOJ representatives for input. Mr. Wroblewski thought the concerns just raised were legitimate. He noted DEA had a couple of specific examples of cases they wanted to bring to the Committee's attention that would be implicated by the rule. Mr. Wroblewski did not think adding the language to the committee note was a pivotal provision from the DOJ's perspective, though it addressed something that concerned DEA. He reiterated that the concerns were legitimate, and he was now on the fence about the new language. Judge Kethledge wondered if it might be necessary to include a positive definition of publication if the Note included this language. Mr. Wroblewski explained the positive definition of "publication" the DOJ had also offered. There is very little caselaw on the meaning of that word. If the Committee were to define it, the definition would focus on whether the document had been made available to the public. For instance, there was a case where a doctor spoke at a conference and that was considered a publication. Mr. Wroblewski noted he was unsure whether it would be more helpful to define "publications" or to remove the suggested language from the committee note.

Judge Kethledge observed that the proposed addition could create more problems for the government than it solved. Internally, the government calls some things "publications" that ordinary people would not think of that way.

A member commented that it seemed too difficult to define "publications," and doing so would be a much broader undertaking than the concern that prompted the new language. She also added that this discussion implicated Judge Bates' hypothetical about expert reports developed and produced to the other side for an expert that does not testify. In the member's view, that disclosed report is not an internal government document and thus could be subject to production depending on what the document says. That example, she concluded, puts the Committee in a difficult zone if it were to try to define what is and is not an internal government document.

A subcommittee member stated that when the subcommittee discussed this issue, the discussion centered on *deliberative* internal documentation. But the language proposed for the committee note was broader. Disclosures between agents in the government could arguably be discoverable if they covered the exact topic to which the expert would testify. The language "internal documents" goes further than the deliberative process documents that the member had understood to be the original concern. She also commented that in the civil rules, parties only receive notice of prior deposition or trial testimony. The criminal rule would mirror that. But reports that never saw the light of day through testimony are not subject to being identified as prior testimony, unless the topic of the report implicated the Jencks Act. The member saw no need to change the current proposed rule with regard to disclosing prior reports.

A judge member observed that references to "publications" have been in the civil rules for a long time. The committee notes accompanying those rules do not define it either negatively or positively, which supported the point that including the DOJ's suggested language could create confusion. This judge stated his preference for the committee note without the added language. And if *Brady* or the Jencks Act are implicated by a report, the government will have to comply. He added that if the DOJ is now on the fence about the added language, it might be worth taking it out and not changing the committee note.

Professor Dan Coquillette, who described himself as a note fanatic, strongly urged the Committee not to add the proposed language to the committee note.

A member moved to reject the addition to the committee note, and there was a second. The motion passed unanimously.

*C. Discussion of the Committee Note's Language Concerning the (a)(1)(G)(i) Disclosures*

As explained above, Judge Bates raised the issue that even though the text of the general provision and the specific provision about mental conditions in (a)(1)(G)(i) are intended to mean different things, the committee note appears to treat them the same way. The Committee returned to this issue during its discussion of the committee note. Judge Bates observed that there was nothing wrong with the language of the committee note, so long as its meaning is what the Committee intended. Professor Beale suggested that in light of the insanity provisions in Rule 12.2, the interlocking discovery rules, and the fact that the government ordinarily presents mental capacity evidence during rebuttal, the committee note was fine as written.

Professor Beale also suggested adding the word “general” to the paragraph to specify that it applied only to the general provision in (a)(1)(G)(i). Judge Bates replied that then the committee note could be read as implicitly saying there is no disclosure obligation in rebuttal for evidence related to mental capacity, which is not the Committee’s intent.

The Committee decided to make no changes to that paragraph of the committee note.

There was a motion to transmit the committee note to the Standing Committee. The motion was seconded, and it passed unanimously.

**Discussion of the Text of Draft Rule 62**

Judge Kethledge turned the Committee’s attention to the draft of new Rule 62. He then turned the discussion over to Judge Dever, the Rule 62 subcommittee chair. Judge Dever thanked the members of the subcommittee and the reporters for their work on the new rule. He noted the goal was to approve a draft for public comment. He asked Professor Beale to guide the Committee through the memorandum in Tab 3A of the agenda book.

The discussion of new Rule 62 at points covered a variety of topics. For the sake of clarity, these minutes present the discussion topically, rather than in the chronological order in which each point was raised.

*A. Discussion of Subsections (a) and (b)*

Professor Beale noted that the changes were to the text of the uniform provisions in subsections (a) and (b) resulted from negotiations between the various Committees and the style consultants. The subcommittee was not seeking to make any adjustments for the conditions of an emergency or how an emergency should be declared. Professor Beale asked Professor Capra if he

had anything to add. He mentioned that subsections (a) and (b) are now essentially uniform across the emergency rules to the extent the Standing Committee wanted them to be. Any variations for the criminal rules have been approved after extensive discussion in the Standing Committee. There is one variance in the civil rules that has yet to be explained to the Standing Committee, but from the criminal perspective, uniformity is established to the extent the Standing Committee wanted it.

Professor Beale further explained that the “no feasible alternative” language has been retained. That is one difference from the other committees’ rules, and the other committees do not object to there being a difference in light of the different policy and constitutional implications inherent in the criminal rules. It is important to have this separate, hard check to ensure the criminal rules are not relaxed or modified when they do not need to be. Professor Beale said that outside of this, a few words were deleted as being unnecessary. Otherwise there were no other changes for the Committee to review in subsection (a).

Subsection (b) provides for declarations of emergency. Subsection (b)(1) had no changes. Professor Beale reminded the Committee of its earlier discussion about whether the language should be “court or courts” or should say “locations,” which the Bankruptcy Rules Committee had suggested. That language has now been standardized to refer to the court or courts affected. All the committees agreed that 90 days would be the maximum stated period. Earlier, the Committee had wanted mandatory language stating that the Judicial Conference must terminate the declaration for one or more courts before the termination date if the emergency conditions cease to exist. This Committee and the Standing Committee both discussed this issue extensively, especially noting the undesirability of saying the Judicial Conference *must* do something. Who would enforce that? The Judicial Conference has discretion to act, so is there really any reason to have a mandatory obligation? Thus, the language now reflects the uniform decision across the committees that this language should be discretionary, reflecting trust in the Judicial Conference. Professor Capra added that the Judicial Conference has discretion to declare any emergency in the first place. But they do not have to. That same discretion is thus retained in the power to terminate it early. Professor Beale noted that even if some members felt it was preferable for the language to be mandatory, a lot of thought had gone into it, and the direction from the Standing Committee and the other committees was very strong on this point.

Further, this Committee and the Standing Committee were concerned that any additions, extensions, or expansions to a declaration of emergency must meet all the requirements in subsections (a) and (b). At one point we had cross references to both (a) and (b), but after review by the style consultants, the language reads “may issue additional declarations under this rule.” “Under this rule” includes both subsections (a) and (b). There is no possibility of using a different standard.

Framing the remaining discussion, Judge Dever emphasized that the subcommittee started with the premise that the rules safeguard critical rights as originally drafted. The Committee has a mandate under the CARES Act to create emergency rules. The subcommittee used a bottom-up process, and it worked to address fundamental issues in subsections (a) and (b) before getting into the details of the emergency procedures.

*B. Discussion of the “Soft Landing” Provision*

Professor Beale noted the subcommittee had extensive discussion about the “soft landing” provision, subsection (c), which reflects the notion that in certain cases, it might be important and desirable to use the emergency rules to complete a particular proceeding that is already underway once the emergency declaration terminates, when it would be too difficult to resume compliance with the non-emergency rules for the rest of the proceeding. The language, Professor Beale noted, is intended to restrict this fairly narrowly.

Professor Capra added that other committees do not have independent “soft landing” provisions. The appellate rules already include a provision to suspend the rules. And the Bankruptcy and Civil Rules Committees tied the soft landing to extending time limits, within the particular provisions. In contrast, draft Rule 62 has a freestanding provision, and it is important for that to be so in light of public trial and other constitutional rights attendant to criminal proceedings. Professor Beale added that if the emergency ends, the emergency procedures can continue only with the defendant’s consent. Why should a defendant be forced to proceed with what he might consider an inferior process if he could revert to more robust procedures?

Professor King relayed how the subcommittee discussed the costs of insisting on the defendant’s consent and the costs of not requiring that consent. It concluded that the soft landing provision would not be invoked very often. First, most proceedings for which video and telephone conferencing are authorized under the rule will not be multi-day proceedings that would trigger this provision. Trial is not included. Second, the 90-day termination date for a declaration will be well known to judges. As a result, judges could avoid scheduling multi-day proceedings on the cusp of a potential termination. Further, it is not likely that the defendant would refuse to consent, and would instead insist that a proceeding be delayed until live witnesses were brought into the courtroom, or that the courtroom would have to be opened for in-person presence. And if a defendant did not consent to finishing under emergency procedures, it would not take all that long to resume normal procedures after a declaration terminates if indeed the emergency no longer substantially impairs the ability to function under the existing rules. Accordingly, the subcommittee thought it was important to insist that the defendant consent to the continuation of the use of emergency procedures after the emergency declaration is terminated, in order to address any constitutional concerns raised by the continued use of emergency procedures beyond the termination of the declaration.

Professor King went on to explain there had been three changes to section (c) of the rule since the Committee last saw it. First, it was moved to a different position in the rule because of confusion about the language “these rules” when it had been placed after a long list of emergency provisions. Moving it up in the rule helps clear up that confusion. Second, the consent requirement was added. And finally, the language “resuming compliance” was added to emphasize that the rule is talking about resuming compliance with the regular, existing rules.

A member asked how this would play out practically. First, there has to be a finding, based on a fairly high threshold, that it is not feasible and would work an injustice to resume compliance with the rules. Then, the judge must get the defendant’s consent. But in subsection (e), the court

already had the defendant's consent for the substantive provisions in (e)(2), (3), and (4), so it would not affect (e) at all. Thus, the new consent is focused on subsection (d). Subsection (d)(2) already requires the defendant's consent by signature. That leaves public access and alternate jurors and Rule 35. For alternates, what if you've impaneled more than six, and you're going forward, and now you're down to one or two? Do you have to dismiss alternates at that point if you don't get the defendant's consent? The member expressed concern about the practical effect of the defendant's consent under (c) to continue the proceedings after termination of the emergency declaration, when that consent only seems to affect two provisions.

Professor King responded that the subcommittee considered the premise that the prior consent for the emergency procedures would be the same as the consent required here. However, it believed that consent to emergency procedures when a declaration is in place does not necessarily include consent to the continued use of emergency procedures after the declaration ends. There were different views on this, but there was enough concern that the calculus of the defense would be sufficiently different once a declaration ends that an additional consent requirement was not redundant. Professor King stated that the subcommittee did not talk about the alternate jurors scenario presented and suggested the Committee might want to discuss that further. As for public access, the defendant's consent would not address any first amendment problem with the public access provision in the emergency rule, which is in subsection (d)(1). But the subcommittee decided that there would be no serious constitutional concern if public access continues under the emergency rules for a procedure that began under those rules, so long as a reasonable, contemporaneous mode of alternative access is provided.

A member noted that, for a video conference, consent is required for each proceeding. He assumed the defendant must give consent proceeding by proceeding. Professor Beale responded that the question is whether, if a defendant consented to the emergency procedure with the understanding the emergency was continuing, but then the situation changes significantly, the defendant must re-consent under those new circumstances for the proceeding to continue under the emergency rule. Of course, the parties could structure the original written consent to include both situations. But if they did not, the subcommittee's view was that when conditions changed that much, a new consent should be required.

Judge Dever posed a hypothetical scenario. Although multi-day sentencing hearings do not happen often, they do occur. Consider the situation where there is a multi-day sentencing hearing. The first day of the proceeding is during a period of time when an emergency declaration is in effect, and the defendant consents to use Rule 62 emergency procedures. The proceeding goes ahead, and considerable evidence comes into the record. Then, under Rule 32(h), the judge informs the parties he is contemplating a variance from the Guidelines. Suppose, pursuant to *Irizarry v. United States*, 553 U.S. 708 (2008), that the defendant then asks for a continuance. The judge grants it, but he has another trial already scheduled so that it takes another two weeks or a month for the sentencing to resume. If the resumed sentencing hearing was then outside the period of the emergency declaration, the defendant would then need to consent under (c) to continue the sentencing hearing under the emergency procedures. Judge Dever further explained he did not envision defendants needing to consent each day of a multi-day video-conference sentencing hearing when all of those days fall under the time period of an emergency declaration. But if a

delay puts the continuation of the hearing outside the time period of that declaration, the defendant should have the option to insist on being in the court room, in person, with the judge and his family members present, and not consent to continuing the sentence by videoconference. Judge Kethledge thanked the member who had raised the issue for that very helpful exchange.

The Committee returned to section (c) later in the meeting. For coherence, that later discussion has been placed here.

A member raised a further question about the interaction of the “soft landing” provision section (c) with the impaneling of alternate jurors. Subsection (c) refers to continuing the proceeding after the emergency has ended. The consent in subsection (c) is the consent to continue the proceeding, not the particular departure. The member pointed out that a trial cannot be done remotely. Judge Dever agreed. The member responded it could be a problem for an in-person trial in which extra alternates have been impaneled under the emergency rule and the declaration terminates before the end of the trial. What if a defendant does not consent for the proceeding to continue, even though the departure—namely, impaneling an extra alternate juror—happened before? If the defendant does not like how the trial is going, he could say “I don’t consent to continuing this proceeding.” The member stated that it was worth considering that this could raise a Double Jeopardy issue because jeopardy has attached.

Professor King observed that if the extra alternate could be dismissed when the declaration ended, “resuming compliance” would be feasible. But if the trial was two weeks along and you’ve used all the additional alternates, and they have taken the place of jurors that have left, then resuming compliance is not feasible. Must the defendant consent in that scenario?

Judge Dever replied that this might also be a question to send out for public comment. His sense was, as a practical matter, that if a court uses all the alternates and they are already in the box, then they have become the twelve jurors prior to the emergency ending. Once the alternates are there, they are impaneled, and a defendant could not remove consent to block alternates from being placed on a jury that dropped below the requisite number. The member who had raised the concern responded that the difficulty is whether that “proceeding,” namely the trial, can continue if the alternates are already being used.

Professor King suggested that rather than make any change to subsection (c), the Committee might reconsider the alternate juror provision in subsection (d)(3). Judge Kethledge responded that if jurors are getting sick on a rapid basis during an emergency, the authority to impanel alternates quickly is important. Judge Dever noted a recent trial in front of another judge where six jurors were lost. He added that attendees at the miniconference discussed the need for additional alternative jurors, which is an important concern.

A member stated she thought the alternate juror issue was not as big as it seems. Once the jurors are impaneled, the departure from the rules has already been completed. After the emergency ends, the court would not go back and revisit what already occurred. The rule is clear that authority exists to impanel them. Once that happens, it’s done. The defendant’s consent is not needed after the initial decision to impanel. It is not a decision to continue to allow them staying on the jury.

As long as the Committee agrees with that reading of it, then the action is completed once the impaneling occurs.

A second member agreed that this reading of the alternate juror provision was the most natural one. If the defendant is unwilling to waive his speedy trial rights, then the rule needs to give district judges the tools to evaluate emergency conditions, get alternate jurors, and ensure that trials can go forward. It is particularly important to have a specific provision in here allowing the district judge—who is in the best position to evaluate the emergency conditions—to impanel ten or twelve alternate jurors, if necessary. The district court can then troubleshoot problems as they arise. If we are three weeks into a six week trial, the district judge can figure that out. The second member concluded it is important to strike the balance in favor of impaneling jurors at the outset.

The Standing Committee liaison stated his strenuous opposition to removing the alternate juror provision. He had conducted a number of trials during the pandemic and having enough jurors had been a challenge. But, he said, he had been persuaded there is an issue because of the language in subsection (c). There is at least an argument that once the declaration terminates, the proceeding cannot be completed without the defendant's consent. Because there is a textual basis for that argument, and the Committee does not intend that result, the Committee should be clear about it. The liaison suggested adding language to the committee note that it doesn't affect an ongoing trial, but if there is ambiguity, it may be better to clear it up in the rule. One option would be to change "may be completed" language to reference departures already adopted and say that those departures can continue. Alternatively, he also suggested adding an additional sentence specific to jurors, saying that any trial that has begun under the authority of this rule may be completed notwithstanding the termination of the declaration.

Professor Capra responded that this should be dealt with in the committee note. He did not think the ambiguity was that dramatic. When the proceeding of empanelment is finished, then it is finished. And this should be stated in the committee note. The member who had raised the concern expressed his support for having the note specify that the procedure is the empanelment, not the trial. Professor Beale suggested that adding something about this in the committee note's discussion of subsection (c) could be difficult, especially because the language in the rule is "proceeding" not "procedure." The member who had raised the issue replied that if the rule is read to mean that the proceeding is the empanelment, not the trial, then that would clear up the issue. Judge Kethledge added that in subsection (c), the rule is saying that the proceeding may continue. But what the Committee is really saying is that the non-compliance under the emergency rules can go forward with the defendant's consent. The Committee is assuming the proceeding will move forward either way.

Professor Coquillette agreed with Professor Capra that the committee note is the proper place to address this. Also, this is an area where the Committee should learn a lot during publication.

Judge Kethledge suggested that the reporters work on language for the note that could be reviewed after lunch or circulated by email for approval after the meeting if necessary. During the lunch break, a working group including the reporters, Judge Kethledge, Judge Dever, and Professor



Capra, worked out draft language for the committee note on this issue. After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group on this issue.

The suggestion was to add to line 77 of the Note: “It does not terminate, however, the court’s authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3).” This language is targeted at the specific problem, and preferred by the working group over other language that would have been broader. Judge Kethledge added that the next sentence would start with “In addition,” to make sure this is a separate point, and would convey that the suggested language clarifies that the termination does not affect this authority of the district judge and that subsection (c) is doing something different, carving out things that otherwise would have been affected by the termination.

Judge Dever asked for reactions to this proposal, specifically whether any of the members objected to it. No one did. Professor Beale asked whether the new language should explicitly refer to jurors who have “previously been” or “already been” impaneled, to drive home the idea this has already been done, but she noted that the sentence is already in the past tense. Judge Dever agreed that the additional language was unnecessary given that it already refers to jurors “who have been” impaneled. Judge Kethledge added that it referenced (d)(3) which is something that happened in the past. And Professor Beale added that it was referring to an ongoing trial so it would be clear that this happened in the past. Judge Kethledge said that adding this to the committee note was the way to go because it would be a misinterpretation of the rule to read it to mean something else, so there is no need to amend the rule itself. But this addition would help avoid the possibility of misinterpretation.

*C. Discussion of the Emergency Departures from the Rules Authorized by the Declaration*

Professor King then turned the Committee’s attention to subsection (d). The reporters’ memorandum outlines the changes that responded to the concerns from the Standing Committee and other issues that had arisen since the previous Committee meeting. Professor King explained that in subsection (d)(1), focusing on public access, two changes were made. First, on line 33 of the draft rule the term “preclude” was changed to “substantially impair.” This change was intended to ensure that the court provide reasonable alternative access even if emergency conditions provide for some public attendance, but not all. If there was a partial closure caused by the emergency conditions, the court must provide reasonable alternative access. Second, the language “contemporaneous if feasible” was added to line 35. The subcommittee thought it was important that public access would be contemporaneous, if feasible, not a transcript or recording provided after the fact. This additional language reflects that intent.

Professor King explained that the only other change other than deleting the bench trial provision, was to subsection (d)(2), which is the signature provision. This provides an alternative way to secure the defendant’s signature for the court when it is difficult to get a signature because of the emergency conditions. Language was changed on lines 36–37 to say: “any rule, including this rule.” This was prompted by a concern that (e)(3)(B) requires a request from the defendant in writing. Just as (d)(2) allows for an alternative process for getting a writing under the existing

rules, it also should apply to the writing designated in (e)(3)(B). As a result, the language on lines 36–37 was changed to explicitly reference “any rule, including this rule.”

Mr. Wroblewski asked how the affidavit requirement in (d)(2) is triggered. Professor King responded that if the defendant is live before the judge on a video conference, and the judge can see and hear the defendant’s consent, then the defense counsel can sign on the defendant’s behalf. The judge can be fairly sure the defendant is actually giving consent. Lines 41–42 with the affidavit address the situation where the defendant is not in front of the judge. The judge may not be able to see or hear the defendant, but defense counsel is nonetheless signing for the defendant. This suggested procedure came from the miniconference, at which lawyers and judges talked about how they were managing difficulties during the pandemic. Using affidavits was how they were managing it, and there were no real concerns arising from that practice.

Judge Bates offered two observations. First, he noted his agreement with the Committee’s decision to delete the bench trial provision, which was a change in response to concerns from the Standing Committee. Second, Judge Bates asked whether line 49 of the draft rule should include the word “any” to make it the same as Rule 45(b)(2) to mimic the provision Rule 35 which includes the words “any action.” Professor Beale noted that it was probably edited out by the style consultants because they would think “an action” is “any action,” making the “any” redundant. But that was a guess. The Committee was unsure whether “any” was edited out or had never been in the rule to begin with. Mr. Wroblewski responded that he didn’t think there was an intent to limit anything.

The Standing Committee liaison agreed with Judge Bates on deleting the bench trial provision. He asked whether a letter could not suffice instead of an affidavit. Is having all the formal trappings of an affidavit or a declaration really necessary here? A member suggested “affidavit” be modified to say “declaration.” A formal document is good, but a declaration is easier because you don’t have to go find somebody to notarize it, the lawyer can attest to it herself, and it would be less formal. The Standing Committee liaison replied there is a statute saying a declaration essentially means the same thing as an affidavit. Where an affidavit is required, a party can file a declaration and vice versa. But he was not sure whether the rules elsewhere say something different. He reiterated that his question was more about whether the Committee wanted to require something very formal, or whether the letter would suffice.

A judicial member commented that she felt strongly that the writing should be formal. Declarations and affidavits get filed and put into the record. A letter might not. She said it could be a document that the lawyer could attest to, but it should at least have the formality of a declaration. Professor King agreed, noting that there are two reasons for the requirement, not only to make sure that the defendant actually consents, but also to ensure the document is filed in the record. Having that record going forward is important. Judge Kethledge added that if the issue of consent went up on appeal, the appellate court must look at the closed universe of the record. If it was less formal and didn’t make it into the record and there was litigation about consent that would be an awkward situation. Professor Beale noted that the rules use “affidavit” a number of times, but not “declaration.” The Standing Committee liaison noted that in his district letters are filed on

the docket, but if that is not the case elsewhere, he agreed that the document should be a part of the docket, and if it takes saying “affidavit” to accomplish that, then so be it.

Another member noted 28 U. S. C. § 1746 already equates declarations with affidavits, and agreed the declaration is simpler. Judge Dever agreed § 1746 makes the terms interchangeable. A lawyer could file a declaration, but the rules use “affidavit” in light of what the statute says. He said he thought lawyers would know this. He often receives declarations where the rules use “affidavit.” It would create a style consistency issue if the Committee used “declaration” here where all the other instances in the rules say “affidavit.”

Judge Bates suggested the Committee could change the language to “a written confirmation of the defendant’s consent.” This would allow something other than an affidavit or declaration, but it would be something that has to be filed on the record. Judge Dever asked for discussion of this suggestion. He pointed out that circumstances vary significantly across districts. In his district, it is highly unusual to have a letter filed on the docket, but not an affidavit. The original language was intended to stress the importance and significance of the defendant’s consent. A member noted that in her district, if a party wants to use an affidavit or declaration, they can file it electronically. In theory, they could electronically file a letter, but they aren’t commonly put on the docket. A letter sent through U.S. mail may not get to the court quickly, and it might not arrive before the proceeding it was intended to support. Professor Capra noted that the conversation seemed to be a dispute over what happens on the ground. That is a matter for public comment. He suggested the Committee publish the rule with the “affidavit” language and hope for or invite public comment on it. Judge Dever expressed agreement with that idea.

Judge Dever then invited any other discussion of subsection (d). Hearing none, Professor King moved on to subsection (e).

#### *D. Discussion of the Subsection (e) Teleconferencing Provisions*

Professor King began with the recommended changes listed on pages 133–34 of the agenda book. The first change was in subsection (e)(2) on line 70 of the draft rule. The word “preclude” was changed to “substantially impair.” Professor King highlighted a similar change discussed earlier. The idea behind the change was to give district judges more flexibility to use emergency procedures when their ability to hold in-person proceedings is impaired by emergency conditions, not only when in-person attendance is precluded entirely. In this part of the rule, the chief judge makes a finding for the whole district. Second, there was a minor change to subsection (e)(3) on line 82 to specify a reference to (e)(2)(B) as well as (A). Third, the chief judge parenthetical was removed. Fourth, line 84 was amended to say “substantially impair” instead of “preclude.” Fifth, in line 86, the phrase “within a reasonable time” was added. The subcommittee originally preferred including that phrase, but it had inadvertently been left out of the draft.

Several additional changes were made to subsection (e)(4). Earlier, members had wondered why a finding of serious harm or injustice was not required before pleas and sentences could be conducted by teleconference, and why written consent was not required. The changes to (e)(4) were intended to address those concerns. Subsection (e)(4) now separates out into subdivision (A)

the command that every requirement for videoconferencing must be met before teleconferencing can be authorized. This is in lines 94–97 of the draft rule. Further, in lines 99–100, the phrase “particular proceeding” was added to make it clear that the required findings are proceeding specific and that they cannot be made for the whole case or for multiple cases.

The “reasonably available” language in (e)(4)(B)(i) is new and is explained in the committee note. The concern was that other language, such as “cannot be provided for within a reasonable time,” would not address all the reasons judges might use teleconferencing instead of video, including the situation where the video shuts off during a videoconference and the parties want to finish on the telephone rather than start over at a later date. Professor King added that the rest of subsection (e)(4) is the same, with new lettering and numbering to account for separating out the requirement that is now (e)(4)(A).

Judge Bates raised two concerns about subsection (e)(4). First, the paragraph says that the requirements under “this rule” have to be met. But for (e)(1), it is not only the requirements of “this rule” that apply. Rather, it is the requirements of Rules 5, 10, 40, and 43(b)(2) that matter. For Rules 5, 10, 40, the only requirement is consent. For Rule 43(b)(2), the case must involve a misdemeanor and there must be written consent. Judge Bates wondered whether saying “this rule” on line 45 in subsection (e)(4) was broad enough to include the requirement that these other rules must also be satisfied.

Professor King said that the subcommittee had considered this issue. Its conclusion was that the language in subsection (e)(1) sufficiently refers to the requirements of Rules 5, 10, 40, and 43(b)(2) so as to dispense with an express reference to those rules in (e)(4). At one point, the draft rule contained brackets listing the other rules. The subcommittee removed the bracketed language, thinking what is now lines 53–62 was sufficient incorporation of the requirements in the other rules to dispense with expressly stating them elsewhere. Judge Bates stated he understood the other rules had to be met under (e)(4), but he wondered whether the language of that provision was sufficient to encompass that.

Judge Kethledge added that Judge Bates’ technical point was probably accurate. If a Rule 5 proceeding was held with videoconferencing in violation of Rule 5, you could say there was a violation of Rule 5 but would not say there was an independent violation of (e)(1). There is a reference in (e)(1) but not an incorporation. Judge Kethledge suggested saying “these rules” instead of “this rule.” Professor King responded that the problem with using the phrase “these rules” is that the first paragraph of the committee note makes clear that “these rules” refers to all the rules *except* for Rule 62. So any change would have to use some other language or add some other requirement on lines 95–97 to get to Rules 5, 10, 40, and 43(b)(2).

Judge Dever questioned whether the subcommittee had already dealt with this issue in lines 164–74 of the committee note, or at least tried to address it. He thought we clarified this issue in the note.

Professor Beale noted that in (d)(2), which deals with rules requiring the defendant’s signature or written consent the Committee used the phrase “any rule, including this rule.” The

Committee could use the same phrase in (e)(4)(A) to specify requirements under which proceedings for video conferencing have been met. It is not elegant, but it is exactly what the Committee did where both Rule 62 and other rules require something to be in writing. That would be one way to make it explicit here.

Judge Bates added that in the committee note for subsection (e)(4), specifically line 255, the Committee could add a sentence that would take care of this issue and leave the language of the rule the same. Adding something there would be a sufficient way to take care of it. But, Judge Bates emphasized, it should be a part of the committee note on (e)(4)(A), not a part of the committee note on (e)(1). Professor King responded that a change to the rule's text might be preferable given that people sometimes do not read the committee notes, but that the language that Professor Beale suggested could go on lines 255 and 256 of the note: All the conditions for conducting a proceeding by videoconferencing under any rule, including this rule, must be met.

Judge Kethledge agreed with Judge Bates that (e)(4)(A) does not bring the other requirements of the other rules into Rule 62. He expressed support for putting "any rule, including this rule" into the text of (e)(4)(A), so that people don't have to hunt around in a long note. Professor Beale similarly noted her preference for putting that language in the rule itself, or even adding back the bracketed language that had been removed that specified Rules 5, 10, 40, and 43(b)(2) so that parties would not be left to guess what other rules would have some limits. Judge Kethledge suggested that adding "any rule including this rule" is cleaner, and the specific rules could be added to the committee note. Judges Dever and Bates both expressed agreement with both adding this language to line 95 of the text and putting something more specific in the committee note. Judge Dever observed it would make it similar to line 37. Judge Kethledge said without that phrase, if he were interpreting this rule he would assume that the drafters knew how to say that and chose not to do so. Judge Dever agreed that making the text more similar to line 37 would ensure people would not look at the rule and wonder whether there was a difference between what the two provisions require.

Judge Bates' second point concerned his experience when conducting remote proceedings in which someone has a technological issue and needs to continue by telephone. Sometimes it was the defendant in jail, other times it was the government or the defense counsel, if the latter was not co-located with the defendant. Judge Bates said he has normally allowed that one person to continue by phone, with the defendant's consent, while everyone else remains on video. He questioned whether the proceeding would at that point be a proceeding "conducted by teleconferencing" under Rule 62. If so, would the requirements of the teleconferencing rules kick in, so that the defendant has to have an opportunity to consult with counsel, which may mean you have to have a separate telephone call, if they are in the jail, because they are in the jail and other people would see or hear it? This is a fairly common occurrence with remote proceedings.

Professor King noted the subcommittee did not consider the requirements to apply differently depending on who loses visual contact and has to revert to audio only. The subcommittee was thinking more about the judge, defendant, defense counsel, or a witness under oath dropping off the video, not just anyone who might happen to be on the video call. But she agreed that this was not clear from the rule, and if the Committee was going to limit those to whom

the requirements would apply to if they lost video contact, it might be very difficult to agree on that list.

Mr. Wroblewski added he thought the subcommittee was thinking that if *anyone* loses video, then the proceeding becomes a teleconference. He thought Judge Bates' example had been raised at the miniconference and otherwise and that this was the conclusion. Professor King thought Judge Bates' question was about whether anyone, even a minor participant, lost visual contact, the additional teleconferencing procedures applied. She thought the subcommittee did assume these would apply to anybody who dropped off video, but that Judge Bates was questioning whether this was good policy.

Judge Bates clarified that he only meant that this situation comes up regularly, and clarity would be helpful so that judges know whether they have to stop the proceeding, allow the defendant to consult with counsel, and get the defendant's consent before going forward. He emphasized the need to send a clear message to judges for what they have to do in this common situation.

Judge Dever suggested clarifying this issue in the committee note. Judge Bates agreed that it could go in the committee note and suggested that putting something in the rule's text could overcomplicate it. Professors Beale and King suggested "all participants" or "one or more participants" as being options that could be added to lines 264–67 of the draft committee note. This would trigger the expectation that everybody should be on video, or else you have to go through the teleconferencing requirements. Judge Kethledge asked whether anything in the rules defines "participants" to be limited to only parties and counsel, or whether it includes family members, a victim that will allocute, or some other broader set of people on the call. Professor King replied that nothing defines the group.

The Standing Committee liaison noted that the suggested language in the committee note would not solve the issue that Judge Bates flagged because it is still subject to the rule requiring defense consent *after* consultation with counsel. He suggested that when one person is not able to connect it should be clear that the judge does not have to stop, require consultation, and start over. And this is definitely a commonplace problem. It happens not only in the middle of proceedings, but also at the beginning, when someone cannot get on in the first place, and after much waiting somebody says, "why don't we proceed with me only on audio?" He thought in those circumstances the defendant can consult with counsel before it starts. Professor Beale asked the Standing Committee liaison what he thought the ideal policy should be, less formality before moving to teleconferencing. He responded that he typically tells the defendant if you want to speak with your lawyer at any point, we will make that work. So, in these circumstances he would assume that if the lawyer or client wanted to consult with one another before deciding whether to continue, they would say that, and otherwise continuing with the defendant's consent would suffice without putting them in a breakout room. In his view, confirming consent to continue the proceeding without everyone being on video would be sufficient, even if the defendant did not want to consult with counsel.

Judge Bates added that he thought the importance of getting the defendant's consent to continue could vary depending on who had dropped off the video call. If the defendant can only continue by telephone, then consent is essential. If the defendant's counsel could only participate by telephone, then consent would be a good idea. But if it is the government that can only proceed by telephone, then consent may not be a big issue. If it was the judge at a sentencing hearing, the defendant's consent would again be very important. So, it is going to vary, which makes it complicated to write into the rule. The Standing Committee liaison replied he did not think there was any harm in requiring the defendant's consent in all of these cases. Presumably if it is the prosecutor, it is hard to imagine the defendant not consenting. Mr. Wroblewski thought the defendant's consent was required in all those circumstances. He noted that for the video conference, even before a circumstance needing a teleconference, consent is required. The only additional requirement for the teleconference is that the defendant has an opportunity to consult with his lawyer to decide whether to withdraw consent at the point someone becomes unavailable to continue by video. Judge Bates agreed that consent would be required in all of those circumstances, if you view anyone participating by teleconference to be a proceeding conducted by teleconferencing. Mr. Wroblewski noted that even if you called it a videoconference, you would still need the defendant's consent.

The Standing Committee liaison suggested amending subsection (e)(4)(C) to say the defendant consents after being given an *opportunity* to consult with counsel. The other rules require consultation with counsel anyway. That would mean that in the middle of the proceeding you would say would you like to speak with counsel, let me know. Professor King noted that several places in Rule 62 require consent *after* consultation, and asked if the suggestion was to make (e)(4)(C) the only one requiring consent with simply an opportunity for consultation rather than actually requiring the consultation to occur. Judge Dever noted that the subcommittee changed "opportunity to consult" to "consult" at Judge Kaplan's suggestion because the subcommittee wanted actual consultation.

Professor King asked whether it would be undesirable if the Committee made no change and simply said that any proceeding with even a single audio participant is a teleconference. It just requires the defendant to consult with counsel and consent. The Standing Committee liaison asked whether that meant a court would have to halt an on-going proceeding when one person loses video, provide an opportunity to consult, and then get consent. He noted there is a strong argument that the current text requires that, if we are construing teleconference to be anytime one participant is on audio. But the technological problem often occurs during the middle of the proceeding.

Judge Kethledge noted that the rule is trying to deal with two quite different situations. The first when, before the proceeding commences, the defendant decides to conduct the whole proceeding by teleconference. The second is when someone drops off during what people had hoped would be a video conference. Judge Kethledge suggested that a small group could work on this issue during the lunch break and then report a suggestion back to the Committee.

After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group as a solution to the consent-after-consultation issue, which she said was based on a suggestion to make it explicit that the defendant only needs an opportunity to consult

with counsel if the interruption in the video feed happens during a proceeding. On line 105 of the rule text, the group suggested breaking (e)(4)(C) into two subdivisions. The proposal would change the text to say:

- (C) the defendant consents—
  - (i) after consulting with counsel, or
  - (ii) if the proceeding started as a video conference and has not been completed, after being given the opportunity to consult with counsel.

Professor Beale noted that this change was to respond to the concern that when video breaks down in the middle of a proceeding, it is too cumbersome to stop everything, allow separate consultation with counsel, then come back. The group thought in the separate situation where everybody is planning on a telephone only proceeding that has not yet started, there should be advance consultation with counsel about such a dramatically different format.

Professor King further explained that the group also suggested changing line 94 to insert the phrase “in whole or in part” after “proceeding” so it would read: “A court may conduct a proceeding, in whole or in part, by teleconferencing if ...”

In addition, the group suggested, in line 95, to replace “this rule” in (e)(4)(A) with the phrase “any rule, including this rule” so that the first requirement for teleconferencing would read “the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing have been met ...”

Finally, the group put forward the proposal that line 99 include the phrase “all participants in the proceeding” instead of merely saying “the proceeding” so that it would read “the court finds that: (i) videoconferencing is not reasonably available for all participants in the proceeding . . .”

Judge Dever explained that this was an attempt to address a number of the issues raised by Judges Bates and the Standing Committee liaison, including the common occurrence of when one person falls off the video conference during the middle of the proceeding. It also addresses the process for obtaining the defendant’s consent when the proceeding has already started and then the issue arises, namely that the judge at that point gives an opportunity to consult with counsel.

Mr. Wroblewski asked about the phrase “in whole or in part” on line 94, whether “in whole” means that everyone is on the teleconference and “in part” means some people are on teleconference and some people are on video. Judge Dever said that was correct. Mr. Wroblewski thought that was not obvious. Professor Beale said she thought that it meant as well that a court could do a part of the proceeding by video and part by audio. Professor King said she had not assumed “in whole or in part” meant some not all participants, but that “in whole or in part” was getting at the preference for the entire proceeding to be by video. The issue of less than all participants was addressed by the changes to lines 99–100. So if a proceeding was going to be partially by teleconference, the court must still go through the (e)(4) consent procedures. Professor King said that if that is not clear, different language may be needed.



A member suggested changing line 94 to say: “a court may conduct a proceeding, or a part of a proceeding, by teleconferencing if . . .” Judge Dever and Mr. Wroblewski both expressed support for this change.

Professor King asked Mr. Wroblewski if the change on lines 99–100 — “videoconferencing for all participants in a proceeding”—reflects what he thought the policy should be. Mr. Wroblewski said yes, the point is to provide an avenue for the proceedings to continue when someone drops off. A member asked for clarification on whether this means it is an all or nothing proposition—either everyone participates by video or everyone participates by phone. Professor King replied that as drafted, the rule says that if anyone needs to participate by phone, then the requirements in (e)(4) kick in. Professor Beale suggested that perhaps it should say “any” and not “all.” Professor Capra agreed.

Another member asked for further clarification of what happens when a participant drops off video. If, in the middle of a videoconference, the AUSA drops off, does the defendant get another opportunity to weigh in, object, or consent? Or can the judge just proceed? Does the judge have to make an additional finding that video is not reasonably available for that AUSA after giving him another chance to sign on? Which subparts are triggered in terms of new finding and new consent? Professor King responded that, as drafted, the requirements in (e)(4)(B)—findings that videoconferencing is not reasonably available, and defendant will be able to consult confidentially—kick in whenever there is *anyone* participating by teleconference. On consent, the suggestion is to have a different rule for consent depending on whether the need for telephone occurs before the proceeding begins or after the proceeding started as a video conference. If it started as a videoconference and is not completed at the time the technological problem occurs, all the judge has to do is ask the defendant and counsel if they need an opportunity to consult about consent. So, when a single person drops off, and that person needs to participate by telephone, the defendant must consent. That is how the rule reads. Professor Beale said that is the policy we were asked to draft, so one question is whether this captures that policy. Another is whether that is the right policy.

The Standing Committee liaison stated that he liked the suggested language in (e)(4)(C) on the consent issue. He went on to note that in addressing the situation where the proceeding is a videoconference, but one or more participants can only connect via audio, the rule as drafted could allow a judge, with the defendant’s consent, to do the whole proceeding by phone because one person cannot be on video. That might not be the policy the Committee wants. The Committee might prefer that the proceeding goes forward with as many people on video as possible, only allowing telephone participation for the one person that has to be on the phone. It now allows the judge to conduct the entire proceeding by phone if just one participant cannot participate by video. Judge Kethledge responded that he thought the “in whole or in part” language spoke to that, but after hearing the discussion, he was no longer sure. Judge Dever and Professor Beale reiterated they understood the Committee’s preference, as a policy matter, was that everyone be on video who can be, even if some participants can only participate by telephone.

Professor Struve suggested solving the problem by changing the language in (e)(4)(B)(i) to say: “the court finds that: videoconferencing is not reasonably available as to the participants

who will participate by teleconference.” She thought the Committee was attempting to permit teleconferencing for the one person for whom videoconferencing was not reasonably available. Judge Kethledge agreed this suggestion would narrow it that way. Professor King suggested change “as to” to “for.” The Standing Committee liaison suggested changing “the participants” to “any participant.” Several members thought “would” makes more sense than “will” or “can only” or “could” because it would suggest the decision has not been made yet. Professor Capra said “participant” should be “person” to avoid “participant who would participate.” After changes, the substitute language for (B)(i) at lines 104-106 read: “videoconferencing is not reasonably available for any person who would participate by teleconference.”

Circling back to the introductory language in (e)(4)(A), Professor Struve also suggested that it should say “all rules including” instead of “any rules including” this rule. Even though the phrase “any rules including” replicated language in lines 36–37, Professor Struve observed that (e)(4)(A) is structurally different than those lines. Lines 36–37 say “any rules” because Rule 62 has multiple rules that require the defendant’s consent. And for any rule that has that requirement, it should be followed. But in (e)(4)(A), the point is that *all* the rules for videoconferencing must be met, in addition to the teleconferencing rules in (e)(4). As a result, “all” might be more appropriate. She suggested that if (e)(4)(A) said “any,” it could be misinterpreted to require a court to comply with only one of the videoconferencing requirements. A court must comply with all of them before then also complying with (e)(4) if the proceeding will be by teleconference. Judge Kethledge said he thought that here “any” means “all,” and he thought it was unlikely that there would be an issue when more than one rule would prescribe requirements for a particular proceeding. It could create confusion as to which other rules are implicated. Later in the meeting, a participant observed that for this addition to be parallel to its earlier appearance in the rule, the words “including this rule” should be set off by commas.

Going back to the new language on lines 104–06 regarding the finding about the availability of videoconferencing, Mr. Wroblewski raised the concern about how the rule would apply if the defendant doesn’t want it to be half teleconference and half video. For example, the defendant may want everyone on teleconference if the defendant has to be on audio, and he doesn’t want the victim and prosecution would to be on video while he is on audio. He could refuse to consent to half and half, but the rule does not appear to allow the judge to have it all by teleconference under those circumstances. Judge Kethledge replied that the Committee could leave this to the discretion of district judges instead of proscribing an outcome that most judges will not pursue anyway. Most judges will not automatically switch to doing the entire proceeding by telephone unless there is a good reason. Professor King wondered if this provision should be built around the defendant’s choice of who should be on the phone and who cannot; it should be up to the judge, and the defendant consents. The policy preferred by the subcommittee is that participants should be on video when they can be, and the judge should not be able to shift to phone without these findings.

Judge Kethledge added that the provision is trying to accomplish a lot. It is trying to deal with premeditated teleconferenced proceedings, and also with people falling off and coming and going in videoconferencing. At some point, he said, the Committee has to trust the district judge to react appropriately to what is happening in the courtroom. Professor Beale added she thought

earlier they may have to bifurcate the procedures for the premeditated teleconferencing from the on-the-fly situations, then one of the judges mentioned that sometimes a person who thought he could get on the video from the outset is unable to. So there are these middle cases, where you think you have a premeditated situation, but it does not work out as planned. Judge Kethledge observed that the Committee might need to go back to the language about videoconferencing not being reasonably available for all participants. The language might leave a small gap for someone to do something crazy, but a district judge probably isn't going to do something crazy.

A member stated her view that to accomplish the policy goals, a clearer, shorter rule would be helpful to make the point that teleconferencing is not ideal, but the court can adopt it if it is necessary in some way and the defendant consents. She noted that the rule now has a lot of clauses and subparts, but something simpler could be better. She liked interpreting "in whole or in part" as meaning both a proceeding that starts out on the telephone and a proceeding that starts out as video. Now it sounds as if the court cannot choose to start a proceeding where one party is by the phone. In her district the federal prosecutors were never on video because they weren't allowed to use that on their computers for months. So they came in by phone, and the defendants were consenting to video. No one asked the defendants "Do you care if the prosecutor is by phone?" Or "Do you care if the court reporter is not visible?" She didn't think we want to list all the people who have to be on video. Going back to the judge's discretion, she proposed substituting: "A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements under these rules have been met for videoconference, and a party is not able to participate by videoconference." If the requirements under these rules for videoconferencing have been met, then the defendant has consented. Judge Kethledge said he understood "in whole or in part," to speak to both a segment of the proceeding and to different participants.

Professor King asked how this proposal would handle a situation where a judge drops off the videoconference in the middle of sentencing. The member replied that at that point, the whole proceeding stops until the judge gets back on by phone. The court would likely ask the defendant if he wants to continue this way, and the defense counsel would likely have advice for the defendant on how to handle that situation. She doubted the sentencing would continue if the judge could not see the defendant. That would be a pretty big break from the usual procedure. Professor King responded that her question was geared towards understanding how the suggested provision would operate without the requirements in (e)(4)(B) (findings that video is not reasonably available, and that defendant will be able to consult confidentially with counsel). Absent those requirements, Professor King continued, if the judge or even the defendant dropped off the video, the judge could decide to continue the sentencing by telephone if the requirements of videoconferencing had been met, without those additional findings. She concluded that the policy question is whether the Committee wants to restrict in that way the options available to those who some on the Committee have in the past termed "the weaker players."

The member responded that the question was whether during a teleconference the defendant will have the opportunity to consult confidentially with counsel by phone. She thought usually that was not true, they do not have the opportunity to consult very easily.

Judge Kethledge wondered if the rule should require only (B)(i) and the defendant's consent under (C). Professor Beale thought it was important to the subcommittee that the defendant be able to talk confidentially with counsel, and it recognized that could be difficult if there is only one phone line. That led to the requirement in (ii).

A judge member suggested the rule should leave to the judge's discretion what must happen if the judge drops off video. She noted she had dropped off during a plea proceeding once. That is a situation where it is very important for the defendant to see her. In her view, unless something extraordinary occurred, the video would have had to be restarted. In the proceeding where she dropped off, she told the parties to wait a few minutes while she got back into the video conference. But perhaps a proceeding is nearly finished, she continued, and it is in the defendant's advantage to wrap it up then and there. In many instances, that would not be the case, but it should be more open in that situation.

Professor Beale observed that these cases differ in multiple ways. The problem may arise at different times in the proceeding, such as the beginning, middle, or the very end. Beyond that, there is the issue of which parties are not able to continue by video. Professor Beale questioned whether the Committee should return to the guiding principles. The Committee had said that as much should be done by video as possible, but the Committee also wants the defendant to be in the driver's seat. It might be to the defendant's advantage to do the whole thing by teleconference sometimes, or in other instances the defendant would not consent if the person who would participate by phone is really critical. Professor Beale thought the Committee agreed these limits apply when even one person drops off, and only that person participates by phone, but was unsure the rule as modified by the suggested language addressed that. Judge Kethledge thought that the language suggested by Professor Struve for (e)(4)(B)(i) —“not reasonably available for any person who would participate by teleconference”—addressed it.

The member who had proposed simplifying (e)(4)(B) then suggested different language for the Committee to consider:

A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements of this rule for videoconferencing have been met but the use of videoconferencing is not readily available to one or more participants, the defendant will have the opportunity to consult confidentially with counsel during the proceeding, and the defendant consents.

Judge Dever replied that something like this language could be helpful because the rule needs to prepare courts for the next emergency. The rule needs elasticity, and the Committee should be able to trust the discretion of district judges within the framework of the rule.

The member who had proposed this language said she suggested “this rule” instead of “any rule, including this rule” because that allows the videoconferencing under Rule 5 to have been met then allow you to switch to teleconferencing. It should be this rule because it allows for videoconferencing after consent after consulting with counsel.

Professor King noted the differences between the proposed language and the current draft. The first part is what had been suggested before, the court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements for videoconferencing have been met – assuming agreement on whether it should be “this rule” or “any rule, including this rule.” The second requirement is that videoconferencing not be reasonably available for one or more participants, which is (B)(i) rephrased. The other requirement is the defendant will have the opportunity to consult confidentially with counsel during the proceeding, which is (B)(ii). But the proposal removes the need for the judge to make findings as to these requirements. And it includes the defendant’s consent, which is in (C). Essentially, the proposal modifies the structure somewhat, rephrases some wording, and omits the addition to the consent provision that was added in response to the Standing Committee liaison’s suggestion that if the proceedings started as a video conference the defendant needs only to be offered an opportunity to consult with counsel in advance of consent.

On the consent wording, Judge Kethledge agreed that the suggestion elides the consulting with counsel requirement in (e)(4)(C), which had addressed the Standing Committee liaison’s concern, but Judge Kethledge said it was another matter whether it overshoots that concern. However, he also thought this could be an example of how the rules can trust the district judge to make on-the-ground decisions to give the defendant an opportunity to consult with counsel. He thought nearly all judges would at least ask the defendant if he wanted to talk to his lawyer in situations like this.

The member who had proposed the new language commented that saying a defendant “will have” the opportunity to consult confidentially with counsel suggests that you are planning to use teleconferencing and know the attorney or defendant will be by phone, but it doesn’t require the defendant’s consent in advance if somebody drops off. The lawyer should be able to ask the defendant, “This is a new proceeding, do you mind?” They could do that on the record, with everyone present, or could consult confidentially. But it does not require the defendant and his counsel to have talked about it in advance. It does not answer what happens if the judge wants to appear by teleconferencing when video is not readily available for the judge. Mr. Wroblewski observed that this still allows the defendant to not consent to that. It allows more flexibility for the judge about who is going to participate by audio or video, and it allows a little more flexibility about the opportunity to consult. That is the advantage and it simplifies the whole thing.

Several members agreed that the language the member had proposed must be modified to read: “the use of videoconferencing is not *reasonably* available to one or more participants” instead of “readily” available.

The Committee then returned to whether (e)(4)(A) should say “this rule,” “these rules,” or “any rule, including this rule.” After some discussion, the Committee affirmed its earlier decision to say, “any rule, including this rule.” The member who proposed the new language thought if you complied with (e)(1) and (e)(4) you could use teleconferencing under Rule 5. Judge Kethledge said you need the additional language “any rule including this rule” to say what the Committee intends. Professor Beale noted that the Committee had decided earlier that the requirements for videoconferencing in Rule 5, 10, 40 and 43(b)(2) existed outside Rule 62 and must be met as well.

Professor Beale also suggested that maybe the rule should just say “requirements for conducting the proceeding by videoconferencing have been met” and leave it at that. Judge Kethledge pointed out that this is the second time in the call the Committee is talking about this same point. He suggested keeping the language on the screen and moving forward. [On the screen at that time was the language, “the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing.”] And if there were lingering doubts, Judge Kethledge added, the language still has to go to the Standing Committee and the style consultants, and it could be worthwhile to let them have a pass at this language. Judge Dever agreed.

Professor Struve noted an alternative phrasing in the meeting chat that specifically listed the several rules with requirements for videoconferencing, in the text of (e)(4). Professor King responded that this enumeration would be much clearer, but it might create problems in the future because if one of the other rules were changed, it might also require an amendment to this rule.

Judge Dever suggested that considering the member’s proposed language had brought the Committee back almost to where it had started. Considering the text of what we have right now on the screen, would probably be the most straightforward thing, then sending that out for public comment, after it is reviewed by the style consultants. It attempts to address the situation where the prosecutor drops off and couldn’t be on videoconference, and the defendant’s consent is the most critical part.

Discussion continued regarding whether the draft on the screen should be modified as the member had proposed. Judge Dever noted that the proposed alternative did not set off the requirement in (e)(4)(A) as a separate gate to pass through, and setting it out separately was important to the subcommittee.

Judge Kethledge then suggested modifying the draft on the screen, at line 96, to say “in whole or in part” on line 96, earlier instead of “or part of a proceeding,” which would restore (e)(4)(A) as it was earlier. He suggested revising the member’s proposed language of (e)(4)(B) to say:

The court finds that:

- (i) videoconferencing is not reasonably available for one or more participants; and
- (ii) the defendant will have an opportunity to consult confidentially with counsel before and during the proceeding.

Finally, Judge Kethledge suggested that (e)(4)(C) simply say “the defendant consents,” as the member had proposed. Professor Beale noted this would replace the new language suggested after lunch, which had created two subdivisions in (C).

The Standing Committee liaison commented that where one or more participants cannot participate by video, these changes would still leave room for someone to construe this as allowing the whole proceeding by phone, instead of keeping on video those who could be by video. The

Standing Committee liaison said he thought that was fine, but it deviates from the policy preference for keeping people on video.

Professor Beale suggested the issue could be clarified in the committee note as an explanation for the language “in whole or in part” on line 96. Possibly the note could say if some of the participants could proceed by video, the prosecutor could proceed by phone only, for example. In the note, she said, the Committee could make the point that it should be done only to the extent it needs to be done. Mr. McQuaid added that the Committee could trust the district courts to ensure proceedings were fair, and allowing some leeway in the rule was an acceptable risk from the DOJ’s perspective. However, he stressed the DOJ’s preference for language in the committee note making clear the policy favors videoconferencing.

The Committee briefly considered then declined Professor Beale’s suggestion to add introductory language on line 95 that would say: “Though video conferencing is preferred a court may . . .” after Judge Kethledge noted that the criminal rules do not typically use hortatory language. There was a suggestion that this is the sort of thing that goes in the note.

Judge Kethledge then suggested that to address the Standing Committee liaison’s point that this language would allow courts to conduct the whole proceeding by phone, instead of keeping on video those who could be by video, the language “persons who would participate by telephone” could be restored. As to the concern about the defendant not consenting if the prosecution cannot be on video, Judge Kethledge wondered whether that issue would ever arise. If the defendant has requested in writing that this proceeding happen remotely, and now to some extent it has to proceed by teleconference, how often would the defendant say “No, not if the prosecutor can’t be on video”? It may be a null set scenario here. If we want to follow the policy, we stated earlier that we should limit teleconferences, we could restore the language we had earlier, that Professor Struve suggested for (4)(B)(i). This language, he said, would make it clear you ought to keep teleconferencing to a minimum, and then leave it to the judge’s discretion. After some attempt to specify exactly what that language was, Professor Beale stated that the original language to be added back in to (B)(i) was “for any persons who would participate by teleconference.”

A member asked for clarification on the scope of the parties this covered. He asked whether the rule covers victims and others present. Professor Beale said that the rule would cover the victim speaking at sentencing. Professor King added that even if the victim was merely observing, the rule would cover that person. It covers anyone on the video call. Judge Kethledge replied that the word “participate” means the person must have a role in the proceedings. Professor King did not think the rule said that and suggested the Committee define “participate” if it intends a more specific definition. Does it include someone with a right to speak even if they don’t plan to? Professor Beale did not think this was an issue. Judge Dever added that the issue again goes to the judge’s discretion. If there were a large number of victims, a judge might switch to telephone rather than stopping the proceeding. He emphasized that the “may” at the beginning of (e)(4) does a lot of work. A judge doesn’t have to do this.

Judge Kethledge stated that what is on the screen at that point reflects the policy view of the Committee, and Judge Dever agreed. At that point (B)(i) read “videoconferencing is not

reasonably available for any persons who would participate by telephone conference.” Judge Kethledge suggested it was time to decide about sending this out for comment.

Professor King turned the Committee’s attention to a member’s earlier question why the colloquy requirement in the committee note is not in the rule itself to ensure that there is consent and there is something in the record in case the defendant later challenges whether the defendant ever discussed this with counsel. Professor King noted that the subcommittee thought it was better to leave it to the judge to decide how to ensure the defendant’s consent is voluntary and knowing. The subcommittee did consider including it in the rule, but ultimately decided in favor of the judge having discretion as to what would constitute true consent. The member had also raised other questions about the consent provisions earlier in the meeting, but she said further discussion was not needed at this point.

Judge Dever then suggested the committee decide whether it agreed with the Rule text, with the changes to part (4) to be sent out for public comment.

The member who had proposed a shorter simpler text asked whether there was any interest in having the rule presented as a paragraph, not broken out into various subparts. Judge Kethledge noted that the subcommittee thought it was important to have (e)(4)(A) broken out as a separate component, because we had such confusion on that point and that clears it up. He also noted, and Professor Beale agreed, that even if the Committee voted on it as a paragraph, the style consultants would likely break it up again anyway.

A member then moved to have the language on the screen to be adopted as the Committee’s draft and sent forward, and there was a second. The motion passed with one member voting in opposition.<sup>3</sup>

### **Discussion of the Draft Committee Note for Rule 62**

Professor King guided the Committee through various changes to the committee note accompanying Rule 62. After running through several corrections to cross references in the version of the Note that appeared in the agenda book, Professor King explained the various changes to the Note described in the reporters’ memorandum on pages 134–35 of the agenda book.

In response to the language added to lines 4–6 of the note, a member pointed out instances on lines 168 and 209 where “new rule” had not been changed to “this rule” or “this emergency rule.” These were corrected. There were no additional comments from the Committee about the changes reviewed in the memo.

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<sup>3</sup> The initial vote on the text had no opposition. However, later in the meeting, when the Committee considered a motion to approve the note language as revised, Ms. Hay expressed her opposition to adopting any emergency rule, and her statement is included in the minutes at that point. Judge Kethledge responded that in light of Ms. Hay’s position, she should be shown as voting against the adoption of the text as well as the Note, and she agreed, stating she meant to oppose both text and note.



Professor King then explained changes to the note suggested or raised after the memorandum had been submitted for the agenda book. On line 26, Judge Bates suggested adding the word “even” between “that” and “if” so that it would read “that even if the Judicial Conference determines . . . .” In lines 31–32, Judge Bates suggested “period” be changed to “periods” and Professor Struve suggested substituting “extensive” for “substantial.” Judge Bates also suggested that line 89 use the word “term” instead of “phrase,” thinking that was more apt. There were no objections to these changes. Professor Struve had also suggested taking out the language about whether the chief judge is unavailable leaving only the reference to the U.S. Code, given the chief judge’s availability is implicit in the statutory reference. Professor King noted the Committee had already considered and voted on changes to lines 76–78 regarding alternate jurors, and noted that new language would be drafted in lines 270–75 to explain the changes to (e)(4).

A member suggested that line 112 should say “the defendant’s consent” not “defense consent.” The defense is about the whole team, but the focus of that provision is on the defendant. That change was accepted.

The Committee discussed the addition to lines 141–43 regarding Rule 35. A member expressed concern that the second clause after the comma in that sentence may not have been approved by the subcommittee and is a point contested by defense attorneys. It said that Rule 35 was “intended to be very narrow and to extend only to those cases in which an obvious error and mistake has occurred.” She urged that we should not have a statement in this Note about the scope of Rule 35. If Rule 35 is to be interpreted narrowly or broadly, it should be in the note to Rule 35. This note, she suggested, could just say “Nothing in this provision is intended to expand the authority to correct a sentence under Rule 35.” Professor Beale asked whether that line only referred to Rule 35(a), the clear error provision, which is the only thing covered by Rule 45(b)(1). The member said that even so, if this line was about the scope of Rule 35, she did not think it was needed. Mr. Wroblewski commented that he thought he had copied that line directly from the existing committee note in Rule 35. Professor King confirmed that the language is, in fact, in the Rule 35 Note. The member who had raised the issue reiterated that if the Rule 35 Note already includes this information, then there was no reason to repeat it in the Rule 62 Note. Judge Kethledge said that if the sentence is deleted as the member suggested, then the Note is talking about Rule 62. The disputed clause is about Rule 35, and that seems gratuitous. Professor Beale noted that she supported deleting the sentence.

Another member agreed with the concern that had been raised, and she suggested adding “under Rule 35(b)(1)” to fix a missing the parallel reference. Earlier in the same paragraph, the committee note referenced Rule 35(a)’s fourteen-day limitation. The material in question here referred to Rule 35(b)(1)’s one-year limitation. Adding the reference made the two parts of the paragraph parallel. Judge Dever and Professor Beale agreed. The member who had initially raised the issue replied that the sentence still might be unnecessary given the previous sentence is about time periods. Judge Kethledge thought having the sentence was helpful to disabuse anyone from trying to use a creative interpretation to bypass Rule 35’s restrictions. Judge Dever then suggested: “Nothing is intended to expand the authority to correct or reduce a sentence under Rule 35.” That would capture both Rule 35(a) and (b), and would delete the additional clause that was causing

concern. Both the DOJ and the objecting member agreed to that change, and Judge Dever's suggestion was accepted.

Finally, Professor Beale commented that Judge Bates had suggested adding references to Rules 5, 10, 40, and 43(b)(2) on lines 255–59. Because other changes would already have to be made to that part of the Note, Professors Beale and King agreed to consider the issue in the new draft discussing the changes in (e)(4), which they would circulate to the Committee.

There was a motion to approve the committee note with the changes adopted during the meeting and with the recognition that the Committee would still need to approve additional language regarding (e)(4).

Ms. Hay stated that she appreciated all the work that has gone into the rule and wanted to explain why she would vote against it. In her view, an emergency rule is not needed. Through many emergencies the courts have managed without an emergency rule. Congress was able to pass the CARES Act fairly quickly, it is a deliberative, representative body. In addition to being unnecessary, an emergency rule creates a dangerous precedent. The emergency procedures become the new norm against which later incursions on rights will be measured. These emergency measures will become measures of convenience, she warned, and we will start to treat rights less seriously because we've seen how they can be encroached upon. Last, she objected to having the judiciary declare its own emergency. These are very important rights we are protecting in the rules, she said, and the people's representatives in Congress should be the ones to determine whether there is an emergency that should change the legal process. The judiciary itself should not declare the emergency that causes us to limit some of the rights these rules protect. For all those reasons—which she set out a letter that is in the record<sup>4</sup>—she said she was going to vote against the rule and the note. She also said, however, that if we are going to have an emergency rule, this reflects the best protection of rights that we could have wanted. Judge Kethledge then noted that Ms. Hays' no vote would be shown for the text as well as the note, and she agreed. The motion to approve the note was seconded, and it passed, with Ms. Hay voting against the motion.

Judges Dever and Kethledge expressed their gratitude to the incredibly hard work of the subcommittee members and the reporters on this effort.

Later in the meeting, Judge Kethledge recalled that the Committee's discussion of Rule 62 had not considered the reporter's memorandum regarding whether there should be emergency rules for cases arising under §§ 2254 and 2255. No members suggested that the Committee pursue such rules.

### **Report of Rule 6 Subcommittee**

After completing its work on Rules 16 and 62, Judge Kethledge asked Judge Garcia to report on the miniconference conducted on April 13 by the Rule 6 subcommittee.

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<sup>4</sup> Ms. Hay's objections appear following page 193 in the Committee's November 2020 agenda book. [https://www.uscourts.gov/sites/default/files/2020-11\\_criminal\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2020-11_criminal_rules_agenda_book.pdf).

Judge Garcia turned the Committee's attention to the memorandum in Tab 4. He noted the Committee had now received several proposals related to the release of grand jury materials of historical or public interest. Although the Committee declined to act on a similar proposal in 2012, subsequent events have raised the issue again. Circuit decisions in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), had spurred the Committee to seek a broad range of opinions on the subject. The subcommittee hosted a full-day miniconference with four panels considering the various proposals, including both an exception to grand jury secrecy for materials of public or historical interest, and a proposal from the DOJ about delayed notice. The speakers included former prosecutors, representatives from the DOJ, academics, representatives from the Public Citizen Litigation Group and the reporters Committee for Freedom of the Press. There was also a speaker who had experienced the effects of improperly leaked grand jury information.

The miniconference provided perspectives on a number of issues, such as whether a rule amendment should set a floor, such as 20 or 30 years, below which material cannot be released.

Judge Garcia also commented that after the miniconference the Committee received a new proposal from the petitioners in *Pitch* that the subcommittee would also consider. Judge Garcia concluded that he hoped the subcommittee could provide recommendations on all the proposals at the Committee's meeting in the fall. Professor Beale commented that the subcommittee would have a great deal of work to do, and the reporters would be circulating materials, including the most recent proposal.

### **Discussion of New Suggestions**

The reporters guided the Committee through a discussion of each of the new suggestions submitted to the committee.

#### *A. Authority to Release Redacted Versions of Grand Jury-Related Judicial Decisions (Rule 6)*

Judge Kethledge asked Professor Beale to discuss this suggestion from Chief Judge Howell. Professor Beale explained that Chief Judge Beryl Howell and Senior Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia suggested consideration of an amendment allowing judges to release redacted versions of grand jury-related judicial decisions. Their concern, in light of the D.C. Circuit's decision in *McKeever*, was that their established practice of publishing redacted judicial decisions discussing grand jury materials could constitute a Rule 6 violation. The judges stated that so far *McKeever* has not led to any case in which there was a problem, but it could arise.

Professor Beale noted this proposal was related to the work the Rule 6 subcommittee was already doing to explore amending the rule in light of *McKeever* and *Pitch*. Judge Kethledge noted that this is a significant issue, concerning at least a potential conflict between Rule 6 and established judicial practices. The suggestion was assigned to the Rule 6 subcommittee for further consideration.

*B. Authority to Excuse Grand Jurors Temporarily (Rule 16)*

Judge Kethledge explained that the second suggestion came from former Committee chair Judge Donald Molloy to allow grand jury forepersons to excuse grand jurors on a temporary basis. Professor Beale added that this arose because of a surprisingly wide range of practices across the Ninth Circuit. Judge Molloy had assisted the reporters in gaining information about these practices. She suggested that if the Committee has the capacity to handle the suggestion, it might be worth considering. The lack of uniformity and the idea that forepersons were temporarily excusing people without knowing how that would affect the quorum made it an issue worth exploring. But, she noted, the issue might look very different if districts were facing very different problems.

Judge Garcia thought that it would be appropriate for his subcommittee to take the suggestion up, and it was assigned to the Rule 6 subcommittee for further consideration.

*C. Requiring Courts to Inform Prosecutors of Their Brady Obligations (Rule 16)*

Judge Kethledge noted that the third suggestion came from Judge Donald Molloy and lawyer John Siffert. As Professor King explained, they proposed that instead of allowing each district to promulgate a model order as required by the Due Process Protection Act's amendment to Rule 5, the Committee should adopt a uniform order regarding *Brady* obligations and locate it within Rule 16. Page 180 of the agenda book stated their proposed language for the model order.

Professor King noted that the question was whether to assign the proposal to a subcommittee for further consideration, but that the Committee also had another option of putting it on the "study agenda" rather than deciding one way or another at this meeting. She thought it could be helpful to ask the Rules Law Clerk to gather more information about the orders around the country as they are promulgated and then revisit the issue at a future date. Professor Beale added that there likely would not be enough information to revisit it at the November meeting. The timeline would likely be longer to see how everything would play out in local districts and then in the circuits.

Judge Bates added that the language Judge Molloy and Mr. Siffert were proposing was largely drawn from the local rule in the District of Columbia. Judge Bates noted that local rule was the product of a hotly contested multi-year process. And further, the orders required under the Due Process Protection Act are much shorter, and in fact, the District of Columbia was using the shorter orders to comply with the local rule. Some of the additional language in this proposal was drawn from Judge Emmet Sullivan's rule, which no other judge in that district employs.

Judge Bates further observed that if the Committee does consider this issue, it should be very careful to look at the Due Process Protection Act's language. The Act gives responsibility to the Judicial Council in each circuit to promulgate a model order, but then each individual court in the circuit may use the model order as it determines is appropriate. The Act allows for significant discretion and variety. Judge Bates urged care as to whether the Committee has the authority to embark upon a different course than the Act charts.

Judge Kethledge added that there is potentially a conflict between this Committee prescribing an order to be used nationwide and Congress's approach. He recommended putting the proposal on the study agenda for at least one year to see how everything unfolds and to consider further whether the Committee even has the authority to depart from the dispersion of decisionmaking Congress specified in the Act.

*D. Suggestion Regarding Closing Arguments (Rule 29.1)*

Judge Kethledge moved the discussion to the fourth suggestion, which suggested disallowing the government's rebuttal during closing arguments. Professor King explained that Mr. Ryan Kerzetski submitted the proposal based on a law review article by John Mitchell. The idea is that the defense should have the last word during closing arguments. The prosecution would speak, then the defense, and that would be it. To effectuate the suggestion would require the Committee to amend Rule 29.1 to eliminate subsection (c). Professor King stated her view that this likely did not warrant the Committee's attention at this time, in part because more than half the circuits have held that the government cannot bring up new topics on rebuttal. As a result, there should not be any new arguments the defense would need to rebut. Further, if the government does bring new information, some judges have allowed defendants an opportunity to respond to it.

Judge Bates suggested there was not a clear difference between this proposal and also getting rid of reply briefs and reply arguments on appeal and in civil cases. He did not see it being a viable proposal. Mr. McQuaid observed that given the structure of trials and the burden of proof, there are good reasons to give the government the opportunity to speak at the end and to rebut arguments raised by the defense. He recommended the Committee not pursue this proposal further. Additionally, a member noted that from the perspective of defendants, the proposal is an interesting idea. But she agreed that there are likely other topics on which the Committee should be focusing at this juncture that would also be protective of defendants' rights.

The Committee decided not to have a subcommittee pursue this proposal.

*E. Pleas of Not Guilty by Reason of Insanity (Rule 11)*

Judge Kethledge turned the Committee's attention to the final new suggestion, which concerned having a provision in the rules about pleading not guilty by reason of insanity (NGRI). Professor King elaborated that the proposal came from Mr. Gerald Gleeson, a lawyer who recently had a case where both the prosecution and the defense agreed that the defendant should be found not guilty by reason of insanity. However, Rule 11 does not provide for this type of plea, though some states do. Professor King reported that the Rules Law Clerk had researched this issue and found that seven circuits have at least implicitly endorsed a different procedure in these cases where both parties agree that an NGRI verdict is warranted but wish to avoid a jury trial. That different procedure is to have a bench trial at which all the facts are stipulated in advance. This satisfies the verdict requirement in the NGRI statute without using the Rule 11 plea procedure. The Federal Judicial Center and the DOJ had no internal training or other materials on this situation

or the procedure. She invited comments as to whether this was a problem warranting an amendment, or if the stipulated bench trial was adequate.

A member stated that the reason Rule 11 does not account for an NGRI verdict is that it would be difficult for defense counsel to meet Rule 11's requirements. The defendant, because of his mental state, may be unable to appreciate his role in the offense or to enter a plea knowingly and voluntarily. Instead, the alternate procedure is based on 18 U.S.C. § 4242, which allows a special verdict of NGRI at a bench trial. The parties can agree to the facts without the defendant's consent, and then the judge can find the verdict. Of course, there are some cases where the defendant is not competent at the time of the crime and then regains some competency. But the member would not support having Rule 11 contain an NGRI plea provision instead of requiring the current statutory procedure.

Mr. Wroblewski noted that the DOJ did look into this. Several lawyers in the criminal chief's working group had experience with this type of case. The workaround procedure of a bench trial on stipulated facts can be a bit cumbersome but is doable. He thought it could be worth exploring the issue further to see if the current alternative is the best way to handle these cases, or whether there might be another option.

Judge Kethledge asked the reporters if they had any thoughts on this proposal from the institutional perspective of the Committee's history. Professor King observed that the Committee's response over the years has been not to meddle with provisions that are not causing problems. To warrant devoting the resources of the Committee to a given issue, there is some burden to show that the status quo is really causing harm in some way. Is this proposal just an interesting question, or is there a problem that needs solving? Professor King further noted that there could be alternatives to a rule amendment that could similarly solve the problem. For example, the Committee has in the past recommended that the Federal Judicial Center add something to the Bench Book.

Professor Beale added that she was more interested in this idea for reasons similar to those Mr. Wroblewski mentioned. The current alternative seems cumbersome. Professor Beale thought there was a possibility of doing something with a negotiated factual basis for a plea while still ensuring the court could be confident that the defendant had sufficient mental competence. She also thought it was unlikely the government would too easily agree to such pleas. The question here is whether this is a high enough priority where an alternative already exists and even has some advantages (such as creating a better record)). She noted the issue did not seem urgent.

Judge Kethledge asked whether the Rules Law Clerk could look at this issue empirically to see what was happening across the country in these cases. Professor Beale noted that Mr. Crenny has already done some work on this issue but was primarily focused on appellate cases. She and Judge Kethledge agreed to get a fuller memorandum on the issue for the fall meeting.

## **Report on the Meeting of the District Judge Representatives to the Judicial Conference**

Judge Kethledge noted that Judge Bates presented to the meeting of the district judge representatives following the Judicial Conference meeting in March. Judge Kethledge asked Judge Bates to talk about feedback he received concerning remote proceedings.

Judge Bates explained that he was asked to address the question of further use of remote proceedings once the emergency proceedings used during the pandemic were no longer applicable. He gave them some history of the Committee's view on this issue. His takeaway from that meeting was that there are many judges who have liked the remote proceedings. They are comfortable with it, think it works, and think doing remote proceedings works no diminishment of the defendant's rights. There may be a little disconnect between the Committee's views and those of at least these district judges. Similar views have also been expressed in task forces and other contexts, but he could not say how strong or prevalent these views are. Judge Bates observed that the Committee might receive comments about this when the draft Rule 62 goes out for public comment. He urged that judges should be encouraged to bring these suggestions to the Committee and not to take the issue to Congress or try to accomplish it by some other method.

Judge Kethledge noted that multiple suggestions along these lines have come in over time. They usually come from judges, not litigants, and the Committee has always adamantly opposed them. The Committee is a steward not of judicial convenience but of the transcendent interests that are protected and made real by the criminal rules. Some of those are constitutional interests, or penumbras of constitutional interests, but they are interests critically important to the fairness and accuracy of the most important proceedings in federal court, especially ones where people lose their liberty. Acknowledging that he had personally never sentenced anyone, Judge Kethledge emphasized his view that sentencing is the most solemn procedure in federal court, and it is one of, if not the most, important days in a defendant's life. Often, the defendant's family members are present. The victims have the right to allocute in court, and often do so. Seeing all of this at one time in three dimensions, seeing the body language of the participants, and assessing the sincerity of the defendant during allocution are all part of one the most important decisions district judges make. And that decision is largely insulated from appellate review.

The Committee has held the line on this, but it welcomes suggestions, and more judges have now done remote proceedings and thought they went well. The Committee is here to listen and to consider any suggestions that come in. But institutionally, Judge Kethledge thought it was his duty to explain where the Committee has come down on these issues in the past.

Judge Kethledge thanked everyone for their contributions to the meeting. The meeting was adjourned.

# TAB 7



# TAB 7A

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

JOHN D. BATES  
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE  
APPELLATE RULES

DENNIS R. DOW  
BANKRUPTCY RULES

ROBERT M. DOW, JR.  
CIVIL RULES

RAYMOND M. KETHLEDGE  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Honorable John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Honorable Patrick J. Schiltz, Chair  
Advisory Committee on Evidence Rules

**DATE:** May 15, 2021

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

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**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met remotely on April 30, 2021. At the meeting the Committee discussed ongoing projects involving possible amendments to Rules 106, 615, and 702. It also considered items to be put on the agenda for further consideration by the Committee.

The Committee made the following determinations at the meeting:

- It unanimously approved proposed amendments to Rules 106, 615, and 702, and is submitting them to the Standing Committee with the recommendation that they be released for public comment;

- It agreed to consider possible amendments to Rules 611, 801(d), and 1006.
- It added, as agenda items, possible amendments to Rules 407, 613(b), 804(b)(3), and 806.
- It decided not to further consider amendments to Rule 611(a) and the Best Evidence Rule.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendments proposed as action items can also be found as attachments to this Report.

## **II. Action Items**

### **A. Proposed Amendment to Rule 106, for Release for Public Comment**

At the suggestion of Hon. Paul Grimm, the Committee has for the last four years considered and discussed whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. The Committee has considered whether Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers unrecorded oral statements, as well as written and recorded statements.

The courts are not uniform in the treatment of these issues. On the hearsay question, some courts have held that when a party introduces a portion of a statement that is misleading, it can still object, on hearsay grounds, to completing evidence that corrects the misimpression. Other courts have held essentially that if a party introduces a portion of a statement so that it can mislead the factfinder about the statement actually made, that party forfeits the right to object to the remainder that is necessary to remedy the misimpression. As to unrecorded oral statements, most courts have found that when necessary to complete, such statements are admissible either under Rule 611(a) or under the common law rule of completeness.

After much discussion and consideration, the Committee has unanimously approved, for release for public comment, an amendment to Rule 106 that would: 1) allow the completing statement to be admissible over a hearsay objection; and 2) cover unrecorded oral statements. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a “partial codification” of the common law --- meaning that the parties must be aware that common law may

still be invoked. One goal of the amendment is to displace the common law --- as it has been displaced by all the other Federal Rules of Evidence.

As to admissibility of out-of-court statements, the amendment takes the position that the proponent, by providing a misleading presentation, forfeits the right to foreclose admission of a remainder that is necessary to remedy the misimpression. Simple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand un rebutted. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact, or admissible for the more limited non-hearsay purpose of providing context. Either usage is encompassed within the rule terminology--- that the completing remainder is admissible “over a hearsay objection.”

As to unrecorded oral statements, the rationale for covering them is that most courts already admit such statements when necessary to complete --- they just do so under a different evidence rule or under the common law. The Committee was convinced that covering unrecorded oral statements under Rule 106 would be a user-friendly change, especially because the existing hodgepodge of coverage of unrecorded statement presents a trap for the unwary. As stated above, the fact that completeness questions commonly rise at the trial itself means that parties cannot be expected to quickly get an answer from the common law, or from a rule such as Rule 611(a), that does not specifically deal with completeness.

It is important to note that nothing in the amendment changes the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. So, the mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

*The Committee unanimously approved the proposed amendment to Rule 106. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.*

The proposed amendment to Rule 106, and the Committee Note, are attached to this Report.

## **B. Proposed Amendment to Rule 615, for Release for Public Comment**

Rule 615 provides for court orders excluding witnesses so that they “cannot hear other witnesses’ testimony.” The Committee determined that there are problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of

court, because exclusion from the courtroom is not sufficient to protect against the risk of witnesses tailoring their testimony after obtaining access to trial testimony. But other courts have read the rule as it is written.

After extensive consideration and research over three years, the Committee agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself is necessary. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube or daily transcripts.

At the Spring, 2021 meeting the Committee unanimously voted in favor of an amendment that limits an exclusion order to just that --- exclusion of witnesses from the courtroom. But a new subdivision would provide that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.”

The Committee also considered whether an amendment to Rule 615 should address orders that prohibit counsel from preparing prospective witnesses with trial testimony. The Committee resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

Finally, the Committee approved an additional amendment to the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion. There is some dispute in the courts on whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment clarifies that the exemption is limited to one officer or employee. The rationale is that the exemption is intended to put entities on a par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale.

***The Committee unanimously approved the proposed amendment to Rule 615. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.***

The proposed amendment to Rule 615, and the Committee Note, are attached to this Report.

### **C. Proposed Amendment to Rule 702, for Release for Public Comment**

The Committee has been researching and discussing the possibility of an amendment to Rule 702 for four years. The project began with a Symposium on forensic experts and *Daubert*, held at Boston College School of Law in October, 2017. That Symposium addressed, among other things, the challenges to forensic evidence raised in a report by the President’s Council of Advisors on Science and Technology. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensic experts, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; and 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a “zero error rate”, where that conclusion is not supportable by the methodology). The Committee heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert’s opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.

The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the expert’s opinion, and must find that the opinion actually proceeds from a reliable application of the methodology. The Committee unanimously approved a proposal that would amend Rule 702(d) to require the court to find that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” As the Committee Note elaborates: “A testifying expert’s opinion must stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.” The language of the amendment more clearly empowers the court to pass judgment on the

conclusion that the expert has drawn from the methodology. As such it is consistent with the decision in *General Electric Co., v. Joiner*, 522 U.S. 136 (1997), where the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied.

Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements can be read to misstate Rule 702, because its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But ultimately the Committee unanimously agreed that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee unanimously approved an amendment that would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d). The Committee Note to the proposal makes clear that there is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof to other rules --- emphasizing the preponderance standard in Rule 702 specifically was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.

***The Committee unanimously approved the proposed amendment to Rule 702. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.***

The proposed amendment to Rule 702, and the Committee Note, are attached to this Report.

### **III. Information Items**

#### **A. Possible Amendment to Rule 611 on Illustrative Aids**

The Committee is considering a proposal to adopt a rule on the use of illustrative aids at trial. The distinction between “demonstrative” evidence (used substantively to prove disputed issues at trial) and “illustrative aids” (offered solely to assist the jury in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. In addition, the standards for allowing illustrative aids to be presented --- and particularly whether illustrative aids may be sent to the jury --- are not made clear in the case law. The Committee has preliminarily determined that it would be useful to set forth uniform standards to regulate the use of illustrative aids, and in doing so to provide a distinction between illustrative aids and demonstrative evidence.

#### **B. Possible Amendment to Rule 1006**

The Committee has determined that the courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and that much of the problem here is that some courts do not properly distinguish between summaries of evidence under Rule 1006, and summaries that are illustrative aids and so are not evidence at all. Some courts have stated that summaries admissible under Rule 1006 are “not evidence.” Others have stated that the underlying evidence must all be admitted before the summary can be admitted. The Committee is considering an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposal to amend Rule 1006 dovetails with the proposal to set forth rules on illustrative aids.

#### **C. A Rule Setting Forth Safeguards When Allowing Jurors to Question Witnesses.**

There is controversy in the courts over whether jurors should be allowed to question witnesses at trial. The Committee is not seeking to resolve that controversy in a rule amendment. But the Committee has determined that it could be useful to set forth the minimum safeguards that should be applied if the trial court does decide to allow jurors to question witnesses. Standards regulating the practice can be found in some court of appeals cases, but the Committee has tentatively determined that it would be useful to have a single set of safeguards in an Evidence Rule --- most likely in a new subdivision to Rule 611. The Committee will consider a draft providing safeguards at its next meeting.

#### **D. Rule 801(d)(2) and Successors-in-Interest**

Where a person or entity involved in a dispute makes a statement that would be admissible against them as a party-opponent statement, there is a question of whether it remains admissible



against a successor-in-interest. For example, assume an estate brings an action on behalf of a decedent, who made a statement that would be admissible against the decedent as a party-opponent statement had he lived. Courts are in dispute about whether the statement is admissible against the estate. Some circuits would permit the statements made by the decedent to be offered against the estate as party-opponent statements under Rule 801(d)(2), while others would foreclose access to those statements because they are not statements of “the estate” that is technically the party-opponent in the case. The Committee is considering a possible amendment that would provide that the statement is admissible against the successor-in-interest --- on the ground that the successor-in-interest is standing in the shoes of the declarant. Moreover, a contrary rule would result in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement.

The Committee is considering a number of questions, including: 1) whether the issue arises with sufficient frequency to justify an amendment to Rule 801(d)(2); 2) how to choose appropriate amendment language or labels to cover all types of successorship relationships; and 3) how to apply the rule to all of the exceptions for party opponent statements under Rule 801(d)(2).

### **E. Circuit Splits**

At the Spring meeting, the Reporter presented the Committee with a memorandum on a number of circuit splits in interpreting the Evidence Rules. The purpose of the memorandum was to assess whether the Committee was interested in pursuing the possibility of amending the Evidence Rules to rectify some of these circuit splits. Out of the list, the Committee chose the following issues as warranting further investigation:

- Rule 407 --- does it exclude subsequent changes in contract cases?
- Rule 407 --- does it apply when the remedial measure occurs after the injury but not in response to the injury?
- Rule 613(b) --- to rectify the dispute in the courts on whether a witness must be provided an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence is admitted;
- Rule 804(b)(3) --- to specify that corroborating evidence may be considered in determining whether the proponent has established corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest in a criminal case;
- Rule 806 --- to rectify the dispute over whether bad acts that could be inquired into to impeach a witness under Rule 608(b) can be offered to impeach a hearsay declarant.

### **F. Issues the Committee Has Decided Not to Pursue**

After review of memoranda by the Reporter and by the Academic Consultant, the Committee decided not to pursue two possible amendments:

1. An amendment to Rule 611(a) to codify some of the actions taken by courts that might be outside the language of the current rule. The Committee decided that courts were not feeling constrained by the text of the rule; that any attempt to codify some of the actions taken by courts under the auspices of Rule 611(a) might be seen as an attempt to actually limit the rule; and that in any case a court's action under Rule 611(a) could probably be justified as within the court's inherent authority.

2. An amendment to the Best Evidence Rules to provide that recordings in a foreign language do not need to be entered into evidence. This amendment would address a Tenth Circuit opinion which reversed a conviction because the prosecution offered a transcript of a conversation in Spanish, but did not attempt to introduce the recording. The Committee determined that lawyers and federal courts are generally handling foreign-language recordings capably and that it would be prudent to wait to see how the Tenth Circuit opinion is received by other courts.

#### **IV. Minutes of the Spring, 2021 Meeting**

The draft of the minutes of the Committee's Spring, 2021 meeting is attached to this report. These minutes have not yet been approved by the Committee.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 106. Remainder of or Related ~~Writings or~~**  
2 **~~Recorded~~ Written or Oral Statements**

3       If a party introduces all or part of a ~~writing or recorded~~  
4 written or oral statement, an adverse party may require the  
5 introduction, at that time, of any other part—or any other  
6 ~~writing or recorded~~ written or oral statement—that in  
7 fairness ought to be considered at the same time. The  
8 adverse party may do so over a hearsay objection.

**Committee Note**

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that “[a] contrary construction

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party’s state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered

statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial—where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. The rule is expanded to now cover all writings and all statements—whether in documents, in recordings, or in oral form.

The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at \*7 (D.Md. Nov. 16, 2017) (“A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or

because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g., Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2nd Cir. 1995) (“While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.”). Nothing in the amendment is intended to limit the court’s discretion to allow completion at a later point.

The intent of the amendment is to displace the common law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988), the Court in dictum referred to Rule 106 as a “partial codification” of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent—especially when the rule is one, like the rule of completeness, that arises most often during the trial. Displacing the common law is especially appropriate because the results under this rule as amended will generally

be in accord with the common-law doctrine of completeness at any rate.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

- 1 **Rule 615. Excluding Witnesses from the Courtroom;**  
2 **Preventing an Excluded Witness's Access**  
3 **to Trial Testimony**
- 4 **(a) Excluding Witnesses.** At a party's request, the court  
5 must order witnesses excluded from the courtroom  
6 so that they cannot hear other witnesses' testimony.  
7 Or the court may do so on its own. But this rule does  
8 not authorize excluding:
- 9 ~~(a)~~**(1)** a party who is a natural person;
- 10 ~~(b)~~**(2)** ~~an~~ one officer or employee of a party that is  
11 not a natural person, ~~after being~~ if that officer  
12 or employee has been designated as the  
13 party's representative by its attorney;
- 14 ~~(c)~~**(3)** ~~a~~ any person whose presence a party shows  
15 to be essential to presenting the party's claim  
16 or defense; or

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.



- 17            ~~(d)~~(4) a person authorized by statute to be present.
- 18            (b) Additional Orders to Prevent Disclosing and
- 19            Accessing Testimony. An order under (a) operates
- 20            only to exclude witnesses from the courtroom. But
- 21            the court may issue additional orders to:
- 22            (1) prohibit disclosure of trial testimony to
- 23            witnesses who are excluded from the
- 24            courtroom; and
- 25            (2) prohibit excluded witnesses from accessing
- 26            trial testimony.

**Committee Note**

Rule 615 has been amended for two purposes. Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a “Rule 615 order” extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial—and that

purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) (“The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript.”). On the other hand, a rule extending an often vague “Rule 615 order” outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the Rule’s policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. However, an order governing counsel’s disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only witness-agent is exempt at any one time. If an entity seeks to have more than one witness-agent protected from exclusion, it is free to argue under subdivision (a)(3) that the additional agent is essential to presenting the party's claim or defense.

Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3). *See, e.g., United States v. Arayatanon*, 980 F.3d 444 (5th Cir. 2020) (no abuse of discretion in exempting from exclusion two agents, upon a showing that both were essential to the presentation of the government's case).

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 702. Testimony by Expert Witnesses**

2 A witness who is qualified as an expert by  
3 knowledge, skill, experience, training, or education may  
4 testify in the form of an opinion or otherwise if the proponent  
5 has demonstrated by a preponderance of the evidence that:

6 (a) the expert's scientific, technical, or other  
7 specialized knowledge will help the trier of  
8 fact to understand the evidence or to  
9 determine a fact in issue;

10 (b) the testimony is based on sufficient facts or  
11 data;

12 (c) the testimony is the product of reliable  
13 principles and methods; and

14 (d) ~~the expert has reliably applied~~ expert's  
15 opinion reflects a reliable application of the

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

16 principles and methods to the facts of the  
17 case.

**Committee Note**

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that Rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000. But of course other admissibility requirements in the rule—such as that the expert must be qualified—are governed by the Rule 104(a) standard as well. The amendment focuses on subdivisions (b)-(d) because those are the requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable to evaluate

meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert's basis and methodology.

The amendment’s reference to “a preponderance of the evidence” is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not.



# TAB 7B

**Advisory Committee on Evidence Rules**  
Minutes of the Meeting of April 30, 2021  
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 30, 2021 via Microsoft Teams.

*The following members of the Committee were present:*

Hon. Patrick J. Schiltz, Chair  
Hon. James P. Bassett  
Hon. Shelly Dick  
Hon. Thomas D. Schroeder  
Hon. Richard J. Sullivan  
Traci L. Lovitt, Esq.  
Arun Subramanian, Esq.  
Kathryn N. Nester, Esq., Federal Public Defender  
Elizabeth J. Shapiro, Esq., Department of Justice

*Also present were:*

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure  
Hon. James C. Dever III, Liaison from the Criminal Rules Committee  
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee  
Hon. Sara Lioi, Liaison from the Civil Rules Committee  
Professor Daniel R. Coquillette, Consultant to the Standing Committee  
Professor Catherine T. Struve, Reporter to the Standing Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Liesa L. Richter, Academic Consultant to the Committee  
Timothy Lau, Esq., Federal Judicial Center  
Andrew Goldsmith, Esq., Department of Justice  
Bridget M. Healy, Counsel, Rules Committee Staff  
Shelly Cox, Administrative Analyst, Rules Committee  
Brittany Bunting, Rules Committee Staff  
Julie Wilson, Administrative Office  
Kevin Crenny, Administrative Office, Rules Clerk  
Joe Cecil, Fellow, Berkeley Law School  
Sri Kuehnlenz, Esq., Cohen & Gresser LLP  
Amy Brogioli, Associate General Counsel American Association for Justice  
Abigail Dodd, Senior Legal Counsel Shell Oil Company  
Alex Dahl, Strategic Policy Counsel  
Sam Taylor, Managing Associate, CLS Strategies  
John G. McCarthy, Esq., Smith, Gambrell & Russell LLP  
Susan Steinman, Senior Director of Policy & Sr. Counsel, American Association for Justice  
Lee Mickus, Esq., Evans Fears & Schuttert LLP  
Leah Lorber, Assistant General Counsel, GSK  
Shawn Meehan, Esq., Guidepoint  
Andrea B. Looney, Executive Director, Lawyers for Civil Justice

James Gotz, Esq., Hausfield  
Mark Cohen, Esq., Cohen & Gresser LLP  
Jessica M. Ochoa, Esq.  
John Hawkinson, Freelance Journalist  
Sai, Pro se Litigant

## **I. Opening Business**

The Chair opened the meeting by welcoming everyone and by introducing two new members of the Committee, the Honorable Richard J Sullivan and Arun Subramanian, Esq. The Chair also noted that a new Department of Justice representative would soon join the Committee, John Carlin, Esq.

The Minutes of the Fall 2020 meeting of the Evidence Advisory Committee were unanimously approved. Thereafter, the Chair gave a brief report on the January 2021 Standing Committee meeting. He explained that the Evidence Advisory Committee had no action items before the Standing Committee, but that the Committee had provided an update on the ongoing work on FRE 106, 615, and 702. He further noted that work on emergency rules was on track and that he was hopeful that emergency rules would be released for public comment. The Chair also informed the Committee that there was significant support from district judges at the March 2021 meeting of the Judicial Conference for the continued use of virtual platforms for preliminary criminal proceedings, sentencings and other proceedings post-pandemic. The Chair noted that all judges had realized significant savings in time and resources in utilizing virtual platforms for some of these preliminary proceedings.

## **II. Federal Rule of Evidence 702**

The Chair opened the discussion of Federal Rule of Evidence 702 by noting that the Committee had been discussing and studying potential amendments to Rule 702 for many years --- starting when the Committee began investigating the challenges to forensic evidence. The Chair reminded the Committee that two alternative draft amendments to Rule 702 had come from that lengthy consideration: 1) one that would make a modest change to the language of existing Rule 702(d) to focus the trial judge on the opinion expressed by an expert, as well as on the reliability of principles and methods and their application and 2) another that would add a new subsection (e) to the Rule to regulate “overstatement” of conclusions by expert witnesses. Both drafts would add language to the beginning of the Rule alerting trial judges that they must find all requirements of Rule 702 satisfied by a preponderance of the evidence according to Rule 104(a) before admitting an expert opinion over objection --- this language is intended to address the separate concern that many courts have found that the questions of sufficiency of basis and reliability of application are questions of weight and not admissibility.

The Chair noted that Committee sentiment was divided on the draft that would add a new subsection (e) to Rule 702, with some Committee support but also strong opposition, both on the Committee and in the stakeholder population. Given the lack of consensus on the draft that would add an “overstatement” limitation to the Rule, the Chair suggested that the Committee focus its discussion on the draft that would modify the language of existing Rule 702(d) and expressed hope

that some consensus might be achieved on that draft. The Committee unanimously agreed to focus its discussion and efforts on the draft that would alter Rule 702(d), and to reject the addition of a new subsection (e).

The Reporter then suggested that the Committee discuss the text of a proposed amendment to Rule 702 before proceeding to any discussion of the accompanying Committee note. The Reporter also alerted Committee members that prior drafts of the Rule 702(d) amendment had alternated between language “limiting” an expert’s opinion and language requiring that the expert’s opinion “reflect” a reliable application of principles and methods. The Reporter explained that the “limiting” language was considered precisely because it would signal a restriction on the expert’s ultimate opinion. But he noted that the Department of Justice had objected to the “limiting” language and that he had replaced it with the “reflects” language in the discussion draft for the meeting. The Reporter acknowledged that such a change to the Rule would be mild, but suggested that it could be helpful in getting courts to focus on the opinion ultimately expressed by the expert. He further noted that there had been questions prior to the meeting about amendment language requiring judicial findings by a preponderance “of the evidence.” Of course, he acknowledged, trial judges are not limited to admissible “evidence” in making Rule 104(a) preliminary findings, and there was some concern expressed that including the term “evidence” in rule text could undermine the well-settled judicial flexibility to utilize whatever information is appropriate under Rule 104(a). The Reporter suggested that the “preponderance of the evidence” language would not cause any confusion because it is a term of art well understood by all and because trial judges do consider “evidence” in a *Daubert* hearing – even if it need not be otherwise “admissible” evidence. He stated that a passage was added to the draft Advisory Committee to clarify that the amended language “preponderance of the evidence” did not mean admissible evidence. With that introduction, the Reporter invited comments on the text of the draft amendment.

Judge Bates inquired as to why the draft amendment provided that expert opinion testimony could be admitted if “the court finds that” the requirements of Rule 702 are satisfied by a preponderance of the evidence. He inquired whether it was purposely added to emphasize gatekeeping or whether it was superfluous language that could be eliminated. The Reporter explained that the language as added to emphasize the gatekeeper function because some courts were delegating matters to the jury that the court must resolve itself. The Reporter opined that the amendment could function well without those four words requiring the court to “find” the requirements met. The Chair concurred, noting that the problem of punting to jurors was addressed in the draft Committee note. One Committee member inquired whether the language requiring the court to make findings could be problematic in circumstances in which expert opinion is admitted without objection. Could trial judges read the amendment to require findings on the record even in the absence of objection? The Reporter responded that none of the admissibility requirements in the Evidence Rules are triggered without objection and that Rule 702 would not require findings by the trial judge to admit expert opinion testimony without an objection by the opponent. Still, the Reporter suggested that the amendment could serve its purpose without the “finding” language, and that he would delete it as a friendly amendment if Committee members were in agreement. The Committee agreed to delete the words “the court finds that” from the draft amendment.

The Reporter then explained modifications made to the draft Committee note prior to the meeting. Both changes were made to the paragraph regarding application of the amendment to

forensic expert testimony. The first was a minor style change to make “forensic expert” the subject of a sentence in place of the ambiguous word “such.” The other was a suggestion by Judge Kuhl to include a sentence in the note acknowledging that substantive state law sometimes requires opinions to be stated to a “reasonable degree of certainty” and clarifying that the note language disapproving opinions stated to a “reasonable degree of certainty” would not affect cases in which state law governs and requires such opinion testimony. The Reporter noted that prior versions of the note had included such language and that he had added it back in to the draft Committee note.

Another concern expressed prior to the meeting was that the opening paragraphs of the note came down too hard on federal judges by suggesting that they had “failed” to apply certain requirements or “ignored” them. The Reporter explained that it was important to emphasize that the courts that sent Rule 702 admissibility questions, such as the sufficiency of an expert’s basis, to the jury were incorrectly applying the Rule. It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule. He further noted that there was no intention to come down too hard on federal judges and that suggestions from stakeholders to include more aggressive disapproval of specific federal opinions in the Committee note had been rejected for that very reason.

Finally, the Reporter stated that the Department of Justice had objected to a sentence in the eighth paragraph of the draft Committee note suggesting that jurors are “unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion and lack a basis for assessing critically the conclusions of an expert that go beyond what the expert’s basis and methodology may reliably support.” The Reporter suggested that the sentence needed to remain in the Committee note because jurors’ inability to spot overstatement by experts was the reason for the proposed amendment and because Committee notes must explain the rationale for any change. The Reporter then invited discussion on the draft Committee note.

Ms. Shapiro explained that the Department felt that jurors *are able to* evaluate expert testimony once it clears gatekeeping and is admitted by the trial judge and are frequently called upon to do so. The Reporter responded that this is true so long as the trial judge has first performed appropriate gatekeeping --- but that jurors are not able to make a meaningful evaluation of expert testimony without real gatekeeping. The Chair suggested that changing the language in the note to “may” could help, suggesting that jurors “may lack a basis” for evaluating expert opinion testimony rather than that they “are unable to evaluate” expert opinion testimony. Mr. Goldsmith agreed that the change to the word “may” would be helpful but argued that the paragraph would still go too far. He noted that the Reporter had emphasized that jurors may be unable to evaluate expert opinion without adequate gatekeeping and that this qualifier should also be added. The Reporter agreed that the whole point was to tie gatekeeping to the concern about jurors’ inability to evaluate expert opinion testimony. Mr. Goldsmith suggested adding language, such as: “Judicial gatekeeping is critical because jurors may be unable....” Committee members agreed that language emphasizing the connection to gatekeeping was helpful and the language “Judicial gatekeeping is essential” was added to the eighth paragraph of the note along with the change to “may”.

Another Committee member suggested that the first sentence of the same paragraph -- “Testimony that mischaracterizes the conclusion that an expert’s basis and methods can reliably support undermines the purposes of the Rule and requires intervention by the judge” -- was

superfluous. The Committee agreed to delete that sentence and to bring the revised remaining sentence up into the preceding paragraph. Ms. Nester suggested that the sentence about expert mischaracterization of conclusions was important in order to articulate the concern about expert overstatement addressed by the amendment. She noted that the draft amendment adding a new subsection (e) prohibiting “overstatement” explicitly in rule text had been dropped and that retaining this crucial limit in the Advisory Committee note was important. The Chair suggested that other language in the note emphasized that experts must stay “in bounds” with their expressed conclusions and that judicial gatekeeping is “essential” --- offering strong support for regulation of overstatement. The Reporter suggested that the word “should” could be changed to “must” in the sentence that read: “A testifying expert’s opinion should stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.” This would provide an even stronger admonition regarding unsupported conclusions by experts. Committee members agreed to delete the first sentence of the eighth paragraph, to move the revised second sentence of the eighth paragraph up into the seventh, and to replace “should” with “must” in the sentence regarding experts staying “within bounds” in expressing an opinion.

Another Committee member expressed concern about the example given in the fourth paragraph of the Committee note regarding matters that may continue to go to the weight, rather than the admissibility, of expert testimony. The draft note stated: “For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility.” The Committee member suggested that this particular example could be capable of mischief and noted the recurring situation in which there are 20 studies on a particular matter, only four of which an expert has consulted and which reach conclusions unsupported by the other 16. The Committee member suggested that such a circumstance could go to the admissibility of the expert’s opinion under Rule 104(a) and not just to the weight of the opinion, and that the example in the Committee note could be utilized to suggest otherwise. The Committee member recommended finding another example to avoid affecting this common scenario. The Reporter explained that the note needed to provide some example to illustrate that there still may be matters of weight even after proper application of the Rule 104(a) preponderance standard by the trial judge. After some Committee discussion of this example, the Chair suggested revised language stating: “For example, if the court finds by a preponderance of the evidence that an expert has a *sufficient basis* to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility.” This language would avoid study counting and would emphasize the need for the trial judge to first find a “sufficient basis” for an opinion before passing it on to the jury to resolve remaining questions of weight. The Committee member who raised the concern agreed that this revised language would be less troubling. Committee members were generally in agreement that the Chair’s modification should be adopted.

Judge Bates raised the first paragraph of the draft Committee note that may treat federal judges too harshly in connection with their application of Rule 702. He suggested that the final six words of the first paragraph “and are rejected by this amendment” could be eliminated to soften the note without effecting a substantive change. The Reporter noted that it is not uncommon to explain in a Committee note that an amendment is designed “to reject” a certain application of the Rule. Judge Kuhl also highlighted language in the second paragraph of the draft note suggesting that

judges have “ignored” the Rule 104(a) standard in applying Rule 702. She suggested that the proper standard might not have been briefed and that judges may not have actively ignored the controlling standard. Another Committee member noted that trial judges may have improperly deferred to the adversarial process due to language in *Daubert* emphasizing matters that should be left to the jury, rather than ignoring the Rule 104(a) standard. The Chair suggested that the note might state that judges “have incorrectly applied” the standard, rather than stating that judges have ignored the standard. The Reporter explained that it’s not that some judges have applied Rule 104(a) “incorrectly” – rather, they have not applied the Rule 104(a) standard at all. Committee members then discussed appropriate modifications to the note language, ultimately determining that it would be most accurate to note that judges have “failed to correctly apply” Rule 104(a) to the admissibility requirements of Rule 702. Thus, the Committee agreed to remove the “and are rejected by this amendment” language from the first paragraph of the note and to replace the “ignored” language with “failed to correctly apply.”

Another Committee member queried whether a litigant would still be permitted to allow her opponent’s “mickey mouse” expert to take the stand notwithstanding a failure to satisfy Rule 702, in the hopes of exposing the inadequacy of the expert’s opinion on cross-examination before the jury. A Committee member asked whether the amendment should be qualified with language, such as “upon invocation” or “in the event of an objection” to preserve a litigant’s ability to make this strategic choice. The Reporter reiterated that *all* the Federal Rules of Evidence assume an objection that triggers the trial judge’s obligation to apply the admissibility limits, and that nothing in the proposed amendment to Rule 702 would require a trial judge to make *sua sponte* findings of admissibility in the absence of an objection to an expert’s opinion. The Chair agreed, noting that there might be negative implications for other rules if such a proviso were added. The Chair suggested publication of the proposed amendment without such language and that the Committee could revisit the issue if the concern were to be raised in public comment.

**Thereafter, the Advisory Committee unanimously approved publication of the proposed amendment to Rule 702 and accompanying Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.**

The Chair remarked on the unique difficulty in achieving consensus on a rule as important as Rule 702, and commended the Committee, the former Chair Judge Livingston, and the Reporter on remarkable work. The Reporter thanked Ms. Shapiro from the Department of Justice for all of her work prior to the meeting to help bring the Department on board. Another Committee member noted the important contributions made by Judge Collins before he left the Committee as well. The Chair opined that the proposal would make real improvements to Rule 702 practice.

The proposed amendment to Rule 702 and the Committee Note are attached to these Minutes.

### **III. Rule 106**

The Reporter introduced the discussion of Rule 106, the rule of completeness, noting that the Committee had been exploring potential amendments to the rule for several years. He explained that the draft amendment included in the agenda addressed two concerns. First, the amendment would allow completion over a hearsay objection to the completing portion of a statement. The

Advisory Committee note would leave it up to the trial judge whether to allow the completing statement to be used for its truth or only for context, as may be appropriate in the particular circumstance. But the amendment would prevent a party who had presented a statement in a misleading manner from foreclosing completion with a hearsay objection. Second, the amendment would permit completion of oral statements under Rule 106. The Reporter reminded the Committee that the majority of federal courts already permit completion of oral statements under their Rule 611(a) discretion or through the remaining common law of completion. The Reporter highlighted the benefits of avoiding a hodgepodge approach to completion of oral statements and noted that the Committee generally favored adding oral statements to Rule 106 to create a streamlined and more trial-friendly approach.

The Reporter noted that the proposed text of the amendment to Rule 106 had not changed since the circulation of the Agenda and invited discussion of the text of proposed Rule 106. Hearing no discussion of the proposed text, the Reporter turned to discussion of the draft Committee note. The Reporter highlighted two changes to the Committee note suggested prior to the meeting. First, he explained that a short paragraph had been added at the end of the note explaining that the amendment to Rule 106 would serve to displace the remaining common law of completeness. Second, the Reporter explained that the original draft Advisory Committee note had a paragraph at the end cautioning courts that the amendment would not affect the narrow fairness trigger that permits completion only if the proponent of a partial statement creates a misleading impression of the statement. The Reporter informed the Committee that the Department of Justice had asked that this cautionary paragraph be moved to the beginning of the draft Advisory Committee note. The Reporter opined that he would prefer to keep the cautionary paragraph concerning the fairness trigger at the conclusion of the note and explained that there is precedent for such a placement. For example, the Reporter explained that there was concern about expansive application of amended Rule 801(d)(1)(B) in 2014 that might have permitted admission of an avalanche of prior consistent statements. The Committee placed a cautionary paragraph at the conclusion of the Committee note to address that concern, after fully describing the operation of the amendment.

The Chair stated that it did not make sense to place the limiting paragraph at the beginning of the Committee note – such a placement would tell the reader what the amendment does *not* do before advising her of what the amendment *does* do. The Chair further opined that a judge or lawyer who consults the brief Committee note for guidance is likely to read all the way to the end and to encounter the cautionary paragraph. Ms. Nester suggested that the language in the cautionary paragraph noting that the amendment “does not change the basic rule” was ambiguous and that a reader might be confused about which “basic rule” the note refers to. The Chair suggested that the sentence might be redrafted to state that the amendment “does not change the rule of completeness, which applies only...”

Ms. Shapiro expressed the Department of Justice concern that trial judges do not always adhere to the narrow fairness trigger in Rule 106 in practice. She suggested that it could be considered easier to allow the defense to “complete” to avoid an issue on appeal than to enforce the strict fairness limit in the Rule. The Department suggested moving the cautionary paragraph to the beginning of the note to allay concerns that an amendment could raise the profile of Rule 106 and exacerbate this problem in practice. But Ms. Shapiro offered that the cautionary paragraph could serve that important function if it were placed at the very end of the Committee note as well. All



agreed that the cautionary paragraph would serve its purpose and be most powerful at the very end of the Committee note.

Ms. Shapiro also noted that the Reporter had removed the word “extreme” from the Committee note’s discussion of Rule 403 at the Department’s suggestion. Finally, she noted that the Department has suggested adding a sentence to the note emphasizing that a party who wants to complete with an oral statement must have admissible evidence that the completing oral remainder was made.

Another Committee member noted that placing the cautionary paragraph at the very end of the Committee note would make the paragraph on *Beech Aircraft* and the displacement of the common law the penultimate paragraph. This Committee member suggested a mechanism for a smooth transition into that penultimate paragraph which was generally accepted by the Committee. Another Committee member noted with approval that a citation to the *Williams* case out of the Second Circuit had been added to the final cautionary paragraph to highlight the much more common circumstance in which completion is *not* required.

Another Committee member noted that the current Rule 106 text refers to “writings” but that the amended Rule 106 would speak of “written or oral statements.” The Committee member pointed out that litigants frequently seek to complete with portions of documents – like contracts – that might not be thought of as “statements” per se and queried whether removing the term “writings” from Rule 106 could improperly signal that completion of documents is no longer permissible. The Committee member suggested that the amended rule retain the nomenclature “writings or oral statements” to ensure that litigants know that they can seek to complete documents like tax records or a deed of sale. The Reporter responded that documents do qualify as “written statements” that would be subject to completion under the amended rule and that there was absolutely no intent to make a substantive change with respect to the completion of documents. Nonetheless, the Reporter thought the amendment could refer to “writings or oral statements” if that would avoid confusion. That would mean simply eliminating the word “recorded” in rule text and replacing it with the word “oral.” The Reporter suggested that the Committee could await public comment to ascertain whether there would be any confusion regarding writings. The Chair opined that the concern could also be handled in the Committee note by clarifying that the amendment “covers any writing.”

Ms. Shapiro inquired about the elimination of the word “recorded” from the amended rule, asking whether a recorded statement would now be treated as an “oral statement” for purposes of completion. The Chair suggested that it may be important for the Committee note to provide that the amendment covers everything – documents, recorded statements, oral statements, etc. Another Committee member suggested that the text of the amended rule should be altered to reflect its coverage, opining that Rule 106 could continue to cover “writings” and “recorded statements” and that the amendment could simply add the modifier “oral” to statements as well to indicate added coverage and that nothing has been taken away.

Committee members ultimately determined that, with respect to “writings,” it would be best to leave the text of the proposed amendment unchanged and to add a sentence to the draft Committee

note clarifying that the completion right applies to all forms of writings and statements – whether written, recorded or oral.

**The Chair then asked for a vote on publication of the proposed amendment to Rule 106 with the accompanying Advisory Committee note, as modified. The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.**

The proposed amendment to Rule 106 and the Committee Note are attached to these Minutes.

#### **IV. Rule 615**

The Reporter introduced the proposal to amend Rule 615 on witness sequestration. He explained that the existing Rule language covers only the physical exclusion of witnesses from the courtroom and does not address witness access to trial testimony outside the courtroom. The Reporter noted that a circuit split had arisen over the Rule. Some courts interpret Rule 615 according to its plain language and hold that an order entered under the Rule operates only to exclude witnesses physically from the courtroom. Although these courts recognize trial judges' discretion to enter additional orders extending protections outside the courtroom, they hold that no such protections apply in the absence of an express, additional order. Conversely, other federal courts hold that even a basic Rule 615 order extends automatically beyond the courtroom, reasoning that sequestration fails to serve its purpose if witnesses may freely access trial testimony from outside the courtroom.

The Reporter explained that the draft amendment would specify that an order of exclusion would apply only to exclude witnesses from the courtroom; but the amended rule would state that the trial judge could enter additional orders extending protections beyond the courtroom on a discretionary basis. The Reporter explained that the draft of proposed Rule 615(b) regarding additional discretionary orders breaks down the distinct ways in which a witness might access trial testimony from outside the courtroom – either by accessing it themselves or having it provided to them by another. The Reporter then solicited Committee feedback on the proposed text of an amended Rule 615.

One Committee member noted that it is subsection (a) of the draft Rule that mandates physical exclusion from the courtroom, but that it is the first sentence of subsection (b) governing “additional orders” that explains the effect of orders entered under subsection (a), providing that “An order under (a) operates only to exclude witnesses from the courtroom.” The Committee member contended that it is unusual to have rule text devoted to what a provision does not do. The Chair explained that the problem in the existing caselaw is that courts are applying Rule 615 orders more expansively than they are written, and that a draft amendment needs to specify its effect in order to address that problem. The rule needs to be written to assist neophytes, and a specific statement about the limits of the first provision would be useful to those unfamiliar with the basic rule. The Committee member queried whether it would be better to place the sentence regarding the effect of an amended Rule 615(a) in subsection (a) rather than as the opening sentence of subsection (b). The Chair suggested that the first sentence of the draft of subsection (b) might be removed from rule text entirely with the issue of the effect of a basic Rule 615(a) order addressed

in the Committee note. Ms. Nester remarked that she would be concerned about removing the limiting first sentence of subsection (b) from rule text. She explained that lawyers assume they have taken care of witness sequestration issues when they simply “invoke” Rule 615. If that simple invocation does not include extra-tribunal protections and lawyers need to seek “additional orders” to obtain those protections, the rule needs to spell that out clearly. Otherwise it becomes a trap for the unwary. The Chair acknowledged that Rule 615 is a courtroom rule and not an office rule and needs to be drafted very clearly for use on the fly in court.

The Committee member who raised the issue suggested that, in light of the concerns raised, it might be best to retain the limiting first sentence in the draft of subsection (b). Judge Bates inquired what the outcome would be if a lawyer using the rule on the fly in court as is commonly done “invokes” both subsections (a) and (b) of an amended Rule 615. If the court grants the request, does that lawyer now enjoy extra-tribunal protections to prevent witnesses from accessing testimony outside the courtroom? The Chair suggested that the lawyer would not enjoy any such protection as the draft currently stands; additional orders extending protection beyond the courtroom would need to be written to provide proper notice.

A Committee member again suggested moving the limiting first sentence of subsection (b) up into subsection (a) which it limits. He suggested it could be placed at the end of subsection (a). The Reporter noted that placing the sentence at the end of subsection (a) would create a hanging paragraph, which presents a style problem. The Reporter suggested that public comment might provide helpful feedback on the limiting first sentence currently in subsection (b). The Committee concluded that it would be best to leave the text of the draft amendment unchanged and to evaluate any feedback on the first sentence of subsection (b) from public comment and from stylists.

Ms. Shapiro turned the discussion to the witnesses exempted from sequestration under subsection (a)(1)-(4) of the draft amendment, noting that the exception for designated entity representatives was limited to “one” in the draft amendment. Ms. Shapiro suggested that there was no strong reason to limit entity parties to a single designated representative, that there was not a true “circuit split” on the issue, and that in certain situations individual parties are allowed multiple representatives. She offered the example of a class action suit against the government, in which each individual class member would have a right to be in the courtroom, while the government would be entitled to only a single representative.

The Reporter responded that the purpose of the automatic exemptions for parties was to offer one representative per party and that limiting entities to a single representative, in the way that individual persons are limited to one, is consistent with the purpose of the existing Rule. He further explained that the party exemptions from sequestration operate “automatically” and that there is no basis or methodology for a trial judge to utilize in deciding to permit more than one entity representative to be “designated.” Another Committee member inquired as to how an entity exemption limited to one designated representative would operate in the context of an eight-week trial during which no single corporate representative could remain for the entire trial. The Committee member suggested that there ought to be an escape clause allowing a trial judge to permit entities to “swap out” designated representatives in such a circumstance. Another Committee member echoed that concern, noting that it is often impossible to have one designated representative in lengthy corporate trials. The Reporter explained that the draft Committee note

contained two bracketed options addressing swapping out – one permitting it and one prohibiting it under the automatic exemption for designated entity representatives. He agreed that the note would have to address the issue of swapping out representatives were the Committee to propose a limit of “one” designated entity representative. Ms. Nester emphasized the importance of sequestration for effective cross-examination and noted that meaningful cross-examination is severely undermined when the government is permitted to have all five case agents in the courtroom listening to all the testimony during trial.

In response to this discussion, the Reporter asked the Committee whether an amendment to the text of Rule 615 specifically limiting entity parties to “one” designated representative would cause more trouble than it was worth. He noted that most of the caselaw limits entities to a single representative and suggested that the Committee could rely on caselaw to regulate the issue. One Committee member responded that amending the entity representative exemption to limit it to “one” would be fair and appropriate given that it is a provision that operates as of right. The Committee member further noted that Rule 615 allows parties to make a showing of “essentiality” to exempt additional witnesses beyond those automatically exempt from sequestration. The Committee member opined that a party could make the necessary essential showing even to justify swapping out representatives during a lengthy trial. Another Committee member agreed that “one” designated representative made sense, with the option to “pitch” for more under the essentiality exemption. Two additional Committee members promptly agreed that a limit to one designated entity representative would be optimal, with the option of seeking the ability to swap out representatives in appropriate circumstances. The Chair noted that a majority of the Committee favored limiting entities to one designated representative with a swap-out option. There was some discussion of whether “swapping” representatives would occur under Rule 615(a)(2) or whether an entity would have to make the “essential” showing required by (a)(3) to swap designated representatives throughout a trial. Though all agreed that the trial judge would need to approve swapping out, the consensus was that trial judge discretion to do so should exist under Rule 615(a)(2). The draft Committee note was modified slightly to reflect this consensus.

Ms. Shapiro stated that the Department of Justice would not object to the change but that it did not feel that the change was necessary or justified. She suggested that the sentence in the draft Committee note stating that the change would “provide parity” for individual and entity parties should be removed because the exemptions would be capable of operating unfairly as her class action example showed. The Reporter responded that it would be inappropriate to remove that sentence because it explains the reason for the amendment. The Chair also responded that the “parity” described by the draft note is parity *per party* and not parity across the “v” – as drafted, the amended rule would treat all parties alike by giving each a single representative in the courtroom as of right. The Reporter suggested that the sentence in the note could be softened to state that limiting entity parties to one designated representative “generally provides parity” to address the Department’s concern.

The Chair next called the Committee’s attention to a slight change in the draft Committee note concerning the application of the amended Rule to counsel. The draft note previously stated that the amendment did not “address” admonitions to counsel about providing witnesses access to trial testimony. Although the amendment does not dictate to trial judges how to handle counsel, the amendment technically could apply to counsel by allowing additional orders preventing witness

access to testimony outside the courtroom. To better capture the import of the amendment as to counsel, the Chair proposed revised language for the Committee note, stating: “Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness.” The amended Rule does not tell trial judges to apply protections to counsel, but nor does it prohibit such action. Rather, it leaves the matter to judges on a case-by-case basis considering the ethical and constitutional implications unique to each case.

A Committee member queried whether the Committee should reconsider the language of Rule 615(a) that mandates exclusion from a physical “courtroom” in light of the increase in virtual trials in which there is no physical courtroom from which to be excluded. Another Committee member suggested that the term “courtroom” in Rule 615(a) could be changed to “proceedings” to eliminate a physical component to exclusion. The Reporter explained that the issue of a virtual proceeding was addressed by language in the draft Committee note directing trial judges to utilize their discretion to enter “additional orders” under subsection (b) to tailor exclusion from virtual proceedings. The Chair suggested that trial judges should not have to enter an “additional order” under subsection (b) to keep testifying witnesses out of virtual proceedings and that a basic sequestration order under subsection (a) should operate automatically to exclude testifying witnesses from the virtual proceedings just as they would be excluded physically from courtroom proceedings. Committee members agreed that a Rule 615(a) order should operate automatically to prevent testifying witnesses from accessing virtual proceedings. The Committee agreed that the text of Rule 615(a) did not need to be changed to address virtual proceedings; instead, the Committee note would be altered to clarify that Rule 615(a) orders block witnesses from trial proceedings – whether in a physical courtroom or on a virtual platform.

The Chair then asked for Committee members to vote on approving Rule 615 and the accompanying Advisory Committee note, as modified at the meeting, for publication. **The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.**

The proposed amendment to Rule 615 and the Committee Note are attached to these Minutes.

## **V. The Best Evidence Rule and Foreign Language Recordings**

The Chair next turned the Committee’s attention to the possibility of pursuing an amendment to Article X of the Federal Rules of Evidence to exempt foreign-language recordings from the Best Evidence rule. Professor Richter introduced the issue concerning the application of the Best Evidence Rule, found in FRE 1002, to writings and recordings made in a language other than English. She noted that the application of the Best Evidence Rule to English language writings and recordings is well-settled and requires a party seeking to prove the content of such writings or recordings to offer an “original” or “duplicate” into evidence. Although transcripts are often used to assist jurors in deciphering a conversation originally recorded in English, transcripts are only an aid to understanding and jurors are instructed that the original recording is the primary evidence upon which they should rely in determining content.

Foreign-language recordings present a unique problem in the federal court system because proceedings are conducted in English and because jurors cannot decipher content from original recordings for themselves. In the case of foreign-language recordings, two questions arise: 1) whether the original foreign-language recordings must be admitted into evidence and presented to the jury and 2) whether an English translation transcript may be offered as substantive evidence of content rather than merely as an aid to understanding. Professor Richter explained that the majority in the recent Tenth Circuit opinion in *United States v. Chavez* performed a plain language interpretation of Rule 1002 and held that the Best Evidence rule applies to foreign-language recordings in the same way that it applies to English language recordings, requiring admission of the original recording as primary evidence with an English transcript offered only as an aid to understanding. The majority reversed a drug distribution conviction where the trial court permitted the prosecution to admit an English transcript of a mostly Spanish recording as substantive evidence without admitting the original recording itself.

Professor Richter noted that there was a lengthy dissent in *Chavez*. The dissent pointed out the common-sense impossibility of requiring English-speaking jurors to rely upon a foreign-language recording as primary evidence. It further noted that, while an original foreign-language recording might be relevant and helpful in resolving disputes about the identity of speakers or the general tenor of a conversation in some cases, foreign-language recordings might be excluded as irrelevant or as unduly prejudicial in others. The dissent further pointed out that an English translation may nonetheless be admitted as substantive evidence because it qualifies as an expert opinion grounded in specialized knowledge of the foreign language at issue. The fact that the original recording might be excluded would not prevent the expert translator from relying upon it as basis because Rule 703 permits an expert to rely on inadmissible information so long as other experts in the field would reasonably rely on the information. Finally, the dissent pointed out that the Advisory Committee's note to Rule 1002 acknowledges an expert's ability to rely upon an original writing, recording or photograph without violating the Best Evidence rule. In this way, the dissent argued that an English transcript could be offered as substantive evidence of the content of the conversation captured on the recording without running afoul of the Best Evidence rule.

Professor Richter explained that the majority and dissent in *Chavez* also disagreed sharply over the treatment of foreign-language recordings by the federal courts. She stated that she had researched federal cases on the admissibility of foreign-language recordings and English translation transcripts and had discerned several patterns: 1) there are many federal opinions regarding the admissibility of foreign-language recordings, suggesting that this issue arises at trial with some frequency; 2) there is very little discussion or analysis of the Best Evidence rule in the federal cases dealing with foreign-language recordings; 3) most federal courts acknowledge the distinction between English and foreign-language recordings and permit English transcripts of foreign-language recordings to be admitted as substantive evidence, rather than as aids to understanding only; 4) most federal cases involve the admission of *both* the original foreign-language recordings *and* the English transcripts into evidence; very few cases involve the *Chavez* scenario in which the English transcripts are admitted *in lieu of* the original foreign-language recordings; and 5) some federal cases have suggested that original foreign-language recordings may be "admitted" into evidence but withheld from the jury.

Based upon this research, Professor Richter opined that the Committee could refrain from any amendment to Article X. The federal courts seem to be handling the admissibility of foreign-language recordings appropriately and the dissent in *Chavez* set out a detailed path to the substantive admissibility of English transcripts that does not run afoul of Rule 1002. On the other hand, Professor Richter noted that the Committee could explore the addition of a new Rule 1009 to Article X that would exempt foreign-language writings and recordings from the ambit of the Best Evidence Rule if it were so inclined. She noted that such an amendment would be a narrow one. It would simply mean that a party (most often the government in a criminal case) seeking to prove the content of a foreign-language recording would not *be required* to admit the original recording as evidence of that content under Rule 1002. The parties could still seek admission of the original recording under Rule 402 to the extent that the recording might assist the fact-finder in resolving issues other than content, such as the identity of speakers, the tone of a conversation, or the timing of a recorded conversation. Thus, an amendment to Rule 1002 to remove foreign-language recordings would make their admission *discretionary* rather than *mandatory*. Professor Richter observed that an exemption for foreign-language recordings would be consistent with other exemptions from the Best Evidence Rule. Rule 1004 permits alternate proof of content where an original has been lost or destroyed and Rule 1006 permits summary proof of records too voluminous to be examined in court. An exemption for foreign-language recordings would be based upon similar pragmatic concerns – the inability of jurors to discern content from the original.

Professor Richter closed by emphasizing that *many* evidentiary problems remain with the admission of English translation transcripts that would *not* be addressed by an amendment to the Best Evidence rule. These issues include the admissibility of an expert translation, as well as issues of hearsay and confrontation where a transcript itself is offered as evidence of the expert's translation. She suggested that an Advisory Committee note would need to acknowledge the many remaining issues surrounding the admissibility of English language transcripts that are simply not addressed under Article X of the Evidence Rule were the Committee ultimately to proceed with a proposal to amend the Best Evidence rule.

The Chair began the discussion by noting that the issue of foreign-language recordings comes up most commonly in criminal cases and that the prosecutor and defense counsel typically work together to stipulate to an agreed transcript. He remarked that he had never had a translator qualified as an expert and that he would not wish to inject any requirement that translators be treated as Rule 702 experts into the Rules. Another judge on the Committee noted that he had not run into this issue either and that he was not persuaded of the overall need for an amendment. He opined that an original foreign-language recording should not go to the jury because jurors could try to translate it for themselves; the evidence should be the translation. Another judge on the Committee stated that he had encountered the issue frequently in connection with the translation of wiretap evidence and text messages in foreign languages. He explained that if there is no Rule 702 objection to the translator or to the accuracy of the translation, an English transcript comes in as evidence and there is no Best Evidence problem. The Chair added that if there is a dispute about the translation, both prosecution and defense translators testify, and the jury resolves the dispute. He noted that there were no expert reports or *Daubert* motions connected with the translation evidence. Another judge agreed, but noted that lawyers just do not object to translators under Rule 702. He suggested that there would need to be expert disclosures and other *Daubert* protections granted if an objection were to be raised. Judge Bates noted that many recordings are in multiple

languages – portions in English and portions in other languages. He observed that any amendment would need to deal with the issue of mixed recordings. Another Committee member counseled caution, noting that lawyers and federal courts are generally handling foreign-language recordings capably and that the admissibility of the recordings and the transcripts touched on many issues that an amendment would not want to address. Another Committee member agreed, suggesting that the *Chavez* opinion was an outlier and that the Committee might benefit from letting the issue percolate in the courts longer.

Ms. Nester suggested that federal defenders often litigate the accuracy of foreign-language recordings and that they do object to an English transcript being sent to the jury where there is a dispute as to its accuracy. That said, she noted that federal defenders attempt to reach an agreement with the government as to the translation where possible and try to get the original recording sent to the jury for its consideration. The Reporter commented that an amendment removing foreign-language recordings from the ambit of the Best Evidence rule would not prohibit admitting those recordings and sending them to the jury under Rule 402 in appropriate cases. It would just make their admission discretionary rather than mandatory. Ms. Nester suggested that she would like to check with her litigation team to ascertain whether there is a problem with admissibility of foreign-language recordings that might be addressed through an amendment.

Thereafter, the Committee agreed unanimously to table the issue of amending Article X to exempt foreign-language writings and recordings, pending some request by the Federal Public Defender to reconsider the issue.

## **VI. Rule 611(a)**

The Reporter turned the Committee's attention to Rule 611 and the Agenda memoranda describing possible amendments to that provision. He explained that there were three separate issues under Rule 611 to discuss: 1) the wide variety of actions trial judges take in reliance on Rule 611(a) and the possibility of amending the broad provision to better reflect practice under the Rule; 2) the possibility of adding some safeguards for federal judges to utilize when exercising their discretion to allow jurors to ask questions of witnesses; and 3) the possibility of providing guidance about the proper use of illustrative aids at trial.

First, the Reporter informed the Committee that trial judges rely upon Rule 611(a) to justify a wide variety of rulings, some of which do not fit neatly within the existing language of the Rule. He reminded the Committee that Rule 611(a) addresses things that a trial judge may regulate (e.g., the mode and order of examining witnesses) as well as the purposes for which a trial judge may act (e.g., to avoid wasting time). He observed that some actions -- such as authorizing a virtual trial as a result of covid to protect public health and safety -- might not fit neatly within the described justifications. He explained that the Agenda memo on Rule 611(a) was prepared to help the Committee think about whether to amend Rule 611(a) to add actions or purposes to the enumerated list to better capture what trial judges are already doing. The Reporter explained that he had prepared a draft amendment, in the agenda materials, to expand the list of actions and purposes authorized by Rule 611(a) for the Committee's consideration.



After conducting significant research, the Reporter opined that he was not persuaded that an amendment was necessary, because the trial court always possesses inherent authority regardless of the precise language of Rule 611(a). Further, he observed that Rule 611(a) does not appear to be causing any difficulties in practice, except potentially in rare areas where trial judges are using Rule 611(a) to countermand other evidence rules (e.g., Rule 613(b)). Finally, the Reporter expressed concern that trial judges might interpret an amendment further enumerating authorized actions as actually *limiting* their discretion when the purpose of an amendment would be exactly the opposite. One Committee member remarked that it was troubling for judges to rely upon Rule 611(a) to countermand other specific provisions, but agreed that amending Rule 611(a) would be opening a Pandora's box.

Ultimately the Committee decided not to proceed with an amendment to Rule 611(a).

The Committee next discussed the possibility of amending Rule 611 to add safeguards that trial judges could utilize if they were inclined to allow jurors to pose questions for witnesses. The Chair emphasized that an amendment would take no position on whether a trial judge should allow juror questions but would simply provide safeguards for judges who opt to do so. The Reporter agreed, noting that it would be inappropriate for the Committee to take a position on the controversial and political issue of jury questions, but that a new subsection (d) to Rule 611 could at least offer protections when jury questions are permitted. The Chair noted that many of his colleagues do permit jurors to pose questions and that the Committee might create some consistency and uniformity surrounding the practice with an amendment. Another Committee member stated her interest in placing the issue on the Committee's agenda, noting that trial judges might be more willing to consider allowing juror questions if there were some accepted safeguards surrounding the practice. Another Committee member suggested that the language of the tentative draft amendment that referenced "the" safeguards should be altered because it sounds as if the identified safeguards are exhaustive. He opined that any safeguards placed in an amended rule should be would establish a minimum protection, but trial judges would be allowed to exercise their discretion to add additional safeguards.

Judge Kuhl noted that there had been a long-standing push in the state courts to allow jurors to ask questions and that many state court judges permit juror questions. She explained that jurors were allowed to submit written questions to court personnel and that they were cautioned that questions ultimately might not be asked for many good reasons, and that jurors should draw no negative inferences from the fact that a juror question did not get asked of a witness. The Reporter inquired whether jurors are allowed to question parties or only witnesses. Judge Kuhl replied that juror questions were limited to witnesses and that the practice was about 90% jury management and about 10% evidence. Judge Kuhl also explained that she had been allowing juror questions for approximately 15 years and that she could count on one hand the number of times that jurors posed questions. She suggested that the practice was more about keeping jurors engaged in the trial than about eliciting important questions. Judge Lioi remarked that she, too, allowed juror questions in civil cases and that her experience was largely positive. She noted that jurors sometimes do come up with outstanding questions. The Chair concluded the discussion by promising the Committee that the Reporter would include a draft Rule 611(d) on jury questions, with an accompanying Advisory Committee note for the Fall meeting.

The Chair turned the discussion to the final Rule 611 issue – the proper use of illustrative aids at trial. He noted that illustrative aids are used in almost every federal trial and that they create a host of issues, such as: 1) is a particular exhibit illustrative only or does it qualify as “substantive” evidence; 2) is notice to the opposing party required before an illustrative aid may be used; 3) must the trial judge give a limiting instruction when an illustrative aid is used; 4) may illustrative aids go to the jury room; and 4) are illustrative aids part of the record on appeal? The Chair noted that illustrative aids are often prepared the night before they are used in court and that there are no Federal Rules of Evidence governing their use. He observed that trial judges often have different philosophies regarding illustrative aids and that a Federal Rule of Evidence providing guidance about their use might be helpful.

The Reporter explained that Maine has a specific provision -- Evidence Rule 616 -- that governs illustrative aids. He noted that the Maine rule was utilized as a starting point for crafting a potential federal rule. He explained that Maine Rule 616 distinguishes between illustrative aids and demonstrative evidence that can be offered as proof of a fact. He noted that the Maine Rule also offers significant instruction on the use of illustrative aids during trial proceedings.

The Committee agreed unanimously to keep the possibility of an amendment to govern illustrative aids on the agenda for the fall. All noted that the issue comes up routinely and that there is little uniform guidance on the treatment of illustrative aids. The Reporter promised to work up a draft amendment and Advisory Committee note for the next meeting.

## **VII. Rule 1006 Summaries**

The Chair next raised the related issue of Rule 1006 summaries and interpretive difficulties surrounding them, in order to gauge the Committee’s interest in exploring a possible amendment to that provision. Professor Richter, who had prepared the report for the Agenda materials, reminded the Committee that Rule 1006 is an exception to the Best Evidence Rule that permits a party to use “a summary, chart, or calculation” to prove the content of writings, recordings, or photographs that are too “voluminous” to be conveniently examined in court. She noted that the Rule requires that the underlying records be admissible, though they need not be admitted into evidence – the idea behind Rule 1006 is to permit alternate proof of the content of voluminous records. The underlying records must be made available to the opponent and the trial court has the discretion to order that they be produced in court.

Professor Richter pointed out several interpretive issues that plague Rule 1006 --- many of which arise due to the confusion of summaries offered under Rule 1006 and illustrative charts and summaries offered through Rule 611(a). The Rule 1006 interpretive issues include: 1) some federal courts erroneously hold that the summary itself is “not evidence” and that the trial judge must give a limiting instruction cautioning the jury against its substantive use; 2) some federal courts have held that the underlying voluminous records must be admitted into evidence before a Rule 1006 summary may be used; 3) other federal courts have held that a Rule 1006 summary may *not* be used if any of the underlying records have been admitted into evidence; 4) some federal courts have held that a Rule 1006 summary may contain argument and inferences and need not simply replicate or summarize underlying data; and 5) federal courts have authorized an oral “testimonial” summary of voluminous records by a testifying witness under Rule 1006. Professor

Richter pointed out that many of these holdings conflict with the letter or underlying purpose of Rule 1006 to permit proof of an accurate summary *in lieu of* proving voluminous writings, recordings, or photographs. Professor Richter directed the Committee's attention to a tentative draft of an amendment to Rule 1006 in the Agenda materials that would aim to correct and clarify the precedent under Rule 1006. She further noted that Rule 1006 speaks of records too voluminous to examine "in court" and of production of records "in court." Although this language has not caused any confusion in the reported federal cases to date, Professor Richter highlighted the locational nature of this language. She suggested that the Committee might consider altering the language in favor of something like "during court proceedings" to accommodate the possibility of virtual trial proceedings that do not take place "in court" if it were inclined to pursue other amendments to the Rule.

The Chair opened the Committee discussion by suggesting that a potential amendment to Rule 1006 could be a nice project to pair with consideration of Rule 611(a) illustrative aids given that much of the confusion in the federal courts stems from conflation of the two distinct types of summaries. He explained that the question before the Committee was whether to keep Rule 1006 on the Agenda for the fall. One Committee member suggested that this is an issue that causes confusion in practice, particularly with respect to how much inferential material can be added to a Rule 1006 summary. This Committee member opined that an amendment and Committee note that would help in drawing appropriate lines would be beneficial. Another Committee member stated that the use of overview witnesses is problematic in criminal cases and that clarifying whether and to what extent a Rule 1006 summary may be purely testimonial (as opposed to written or recorded) could help alleviate that concern. The Chair agreed, noting that it might be difficult to address line-drawing issues in rule text but that guidance could be offered in a Committee note. Thereafter, the Committee unanimously agreed that Rule 1006 should remain on the Agenda for consideration together with illustrative aids under Rule 611(a).

### **VIII. Party-Opponent Statements and Predecessors/Successors in Interest**

The Reporter next called the Committee's attention to a circuit split regarding Rule 801(d)(2) and statements made by a party's predecessor or successor in interest. The Chair explained that if the estate of deceased declarant were to bring suit against a defendant, some circuits would permit the statements made by the decedent to be offered against the estate as party-opponent statements under Rule 801(d)(2)(A), while others would foreclose access to those statements because they are not statements of "the estate" that is the technically the party-opponent in the case. He suggested that this issue rarely comes up, but that it has the potential to cause significant unfairness when access to highly relevant statements is foreclosed by a death or by something more intentional like assignment of a claim to another. With both federal and state courts in disarray on this point, the Chair suggested that the Committee might consider a potential amendment to Rule 801(d)(2) to address the question.

The Reporter agreed with the Chair, noting that the rule should be that the statement of a predecessor in interest, like the decedent in the Chair's example, should be admissible against a successor like the estate. In considering whether to amend Rule 801(d)(2) to resolve the circuit split in that way, the Reporter suggested that the Committee would need to consider a few issues, including: 1) whether the issue arises with sufficient frequency to justify an amendment to Rule

801(d)(2); 2) how to choose appropriate amendment language or labels to cover all types of successorship relationships; and 3) how to apply the rule to all of the exceptions for party opponent statements under Rule 801(d)(2). The Chair agreed, noting that there is a clear circuit split and also a clear answer; the only question for the Committee is whether the issue merits consideration. The Reporter stated that he felt that the rule was probably worth fixing given that the issue is capable of occurring in many contexts. The Committee members all agreed that it was worthy of consideration because a small tweak to the Rule could prevent an injustice. The Chair stated that the issue would remain on the Agenda for the fall.

## **IX. Circuit Splits**

The Chair reminded the Committee that the Reporter had prepared an extensive memorandum on all remaining circuit splits involving the Federal Rules of Evidence for the Committee's consideration. The purpose of the memorandum was to allow the Committee to identify splits, if any, that merit further consideration and placement on the Agenda. Because the memorandum addressed so many issues, the Chair requested that each Committee member make a note of all the splits that the Committee member would favor putting on the Agenda. Committee members expressed interest in the following circuit splits:

- Rule 407 --- does it exclude subsequent changes in contract cases?
- Rule 407 --- does it apply when the remedial measure occurs after the injury but not in response to the injury?
- Rule 613(b) --- to rectify the dispute in the courts on whether a witness must be provided an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence is admitted;
- Rule 701 --- clarifying the line between lay and expert testimony;
- Rule 804(b)(3) --- to specify that corroborating evidence may be considered in determining whether the proponent has established corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest in a criminal case;
- Rule 806 --- to rectify the dispute over whether bad acts that could be inquired into to impeach a witness under Rule 608(b) can be offered to impeach a hearsay declarant.

In addition, the Committee listed as “maybes” an inquiry into whether Rule 803(3) should be amended to limit state of mind statements to those that are spontaneous, and whether to prohibit admissibility of state of mind statements offered to prove the conduct of a third party; and a possible amendment to regulate admissibility of grand jury testimony being offered against the government under Rule 804(b)(1).

The Reporter noted that the Committee may want to hold off on placing Rule 701, involving the distinction between lay and expert opinion testimony, on the Agenda. He explained that prior Committees had worked to resolve this issue and that it may be simply impossible to articulate the line between lay and expert testimony in rule text --- any better than it had already been done in 2000. He suggested that continuing to monitor the cases while pursuing other issues might be the best course. The Chair and Committee agreed to hold off on Rule 701. The other items, referred to above, remain on the agenda.

## **X. Closing Matters**

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on Friday, November 5, 2021 in San Diego, with a Committee dinner to be held the night before. Both the Chair and Reporter commented on the remarkable accomplishment of the Committee in approving unanimously three amendments for publication, and thanked all involved in the lengthy and thorough process. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra  
Liesa L. Richter

Draft

# TAB 8

# TAB 8A

**Legislation that Directly or Effectively Amends the Federal Rules  
117th Congress**

(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	<a href="#">H.R. 41</a> <i>Sponsor:</i> Biggs (R-AZ)	CV 23	<b>Bill Text:</b> <a href="https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf">https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf</a>  <b>Summary (authored by CRS):</b> This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	<ul style="list-style-type: none"> <li>• 1/4/21: Introduced in House; referred to Judiciary Committee</li> <li>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet</li> </ul>
Injunctive Authority Clarification Act of 2021	<a href="#">H.R. 43</a> <i>Sponsor:</i> Biggs (R-AZ)	CV	<b>Bill Text:</b> <a href="https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf">https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf</a>  <b>Summary (authored by CRS):</b> This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	<ul style="list-style-type: none"> <li>• 1/4/21: Introduced in House; referred to Judiciary Committee</li> <li>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet</li> </ul>
PROTECT Asbestos Victims Act of 2021	<a href="#">S. 574</a> <i>Sponsor:</i> Tillis (R-NC)  <i>Co-sponsors:</i> Cornyn (R-TX) Grassley (R-IA)	BK	<b>Bill Text:</b> <a href="https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf">https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf</a>  <b>Summary:</b> Would amend 11 USC § 524(g) “to promote the investigation of fraudulent claims against [asbestosis trusts] ...” and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	<ul style="list-style-type: none"> <li>• 3/3/2021: Introduced in Senate; referred to Judiciary Committee</li> </ul>



## Legislation that Directly or Effectively Amends the Federal Rules

### 117th Congress

(January 3, 2021 – January 3, 2023)

<p><b>Sunshine in the Courtroom Act of 2021</b></p>	<p><a href="#"><u>S.818</u></a>  <i>Sponsor:</i>                      Grassley (R-IA)</p> <p><i>Co-sponsors:</i>                      Blumenthal (D-CT)                      Cornyn (R-TX)                      Durbin (D-IL)                      Klobuchar (D-MN)                      Leahy (D-VT)                      Markey (D-MA)</p>	<p>CR 53</p>	<p><b>Bill Text:</b>  <a href="https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf">https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf</a></p> <p><b>Summary:</b>                      This is described as a bill “[t]o provide for media coverage of Federal court proceedings.” The bill would allow presiding judges in the district courts and courts of appeals to “permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides.” The Judicial Conference would be tasked with promulgating guidelines.</p> <p>This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that “[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”</p>	<ul style="list-style-type: none"> <li>• 3/18/21: Introduced in Senate; referred to Judiciary Committee</li> </ul>
<p><b>Litigation Funding Transparency Act of 2021</b></p>	<p><a href="#"><u>S. 840</u></a>  <i>Sponsor:</i>                      Grassley (R-IA)</p> <p><i>Co-sponsors:</i>                      Cornyn (R-TX)                      Sasse (R-NE)                      Tillis (R-NC)</p> <p><a href="#"><u>H.R. 2025</u></a>  <i>Sponsor:</i>                      Issa (R-CA)</p>		<p><b>Senate Bill Text (HR text not available):</b>  <a href="https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf">https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf</a></p> <p><b>Summary:</b>                      Requires disclosure and oversight of TPLF agreements in MDL’s and in “any class action.”</p>	<ul style="list-style-type: none"> <li>• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees</li> <li>• 5/3/21: Letter received from Sen. Grassley and Rep. Issa</li> <li>• 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates</li> </ul>

## Legislation that Directly or Effectively Amends the Federal Rules

### 117th Congress

(January 3, 2021 – January 3, 2023)

<p>To prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes.</p>	<p><a href="#">H.R. 2438</a>  <i>Sponsor:</i>                      Takano (D-CA)</p> <p><i>Co-sponsor:</i>                      Evans (D-PA)</p>	<p>EV (new rules)                      CR 16</p>	<p><b>Notes:</b>  <b>Bill text is not yet available; however, this legislation was also introduced in the last Congress.</b> The stated purpose of that bill was, in part, “[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings. . . .” The bill introduced in the last Congress would have:</p> <ol style="list-style-type: none"> <li>1. Added two new Evidence Rules                         <ol style="list-style-type: none"> <li>a. Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software.</li> <li>b. Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence; and</li> </ol> </li> <li>2. Added a new paragraph (H) to Criminal Rule 16(a)(1): Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of</li> </ol>	<ul style="list-style-type: none"> <li>• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology</li> </ul>
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**Legislation that Directly or Effectively Amends the Federal Rules  
117th Congress  
(January 3, 2021 – January 3, 2023)**

			<p>the software, necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include—</p> <ul style="list-style-type: none"> <li>(i) the name of the company that developed the software;</li> <li>(ii) the name of the lab where test was run;</li> <li>(iii) the version of the software that was used;</li> <li>(iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs;</li> <li>(v) documentation of procedures followed based on procedures outlined in internal validation;</li> <li>(vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and</li> <li>(vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards.</li> </ul>	
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# TAB 8B

## JUDICIARY STRATEGIC PLANNING (ACTION)

Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, has requested information about Judicial Conference committee efforts to implement the [\*Strategic Plan for the Federal Judiciary\*](#) (*Plan*), while encouraging committees to take a fresh look at their implementation efforts in the light of the *Plan's* recent update. A memorandum from Chief Judge Howard to committee chairs is included as an attachment. Chief Judge Howard also invites committees to suggest topics for discussion at upcoming long-range planning meetings.

Below is background information about the *Plan*, the 2020 updates to the *Plan*, and the priorities set by the Executive Committee. Following this is a list of the seven initiatives identified by this Committee for the 2020-2025 time-period and the status of each initiative. The Committee is asked to review its initiatives in relation to the strategies and goals of the *Plan*, decide if they are sufficient, and consider whether additional initiatives are warranted. Finally, a proposed topic for this September's Long-Range Planning Meeting is provided at the end of this memorandum for consideration.

### Background

An update to the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference at its September 2020 session (JCUS-SEP 2020, pp. 13-14). The update followed assessments of the implementation of the 2015 *Plan*, an analysis of issues and trends, and the consideration of updates, revisions, and additions proposed by Judicial Conference committees.

The Judicial Conference's approach to strategic planning includes priority setting and the integration of the *Plan* into the work of Conference committees (JCUS-SEP 10, pp. 5-6). With suggestions from committees, the Executive Committee identifies strategies and goals to receive priority attention for the following two years. The approach also calls for Conference committees to integrate the *Plan* into committee planning and policy activities.

### Priority Setting

In March 2011, the Executive Committee identified four strategies and one goal from the *Plan* to receive priority attention over the next two years, and then in March 2013, affirmed those four strategies and one goal as priorities for the following two years. After the Judicial Conference approved an update to the *Plan* in September 2015 (JCUS-SEP 2015, pp. 5-6), the Executive Committee, in February 2016, added one new goal as a priority while reaffirming the strategies and goal previously identified. In February 2018 one core value and one goal were added by the Executive Committee, making a total of eight priorities for the next two years.

After the Judicial Conference approved the update to the *Plan* in September 2020, the Executive Committee considered which provisions of the updated *Plan* should receive priority attention. Based on input from Judicial Conference committees, the Executive Committee added seven new strategies (asterisked below) and affirmed four strategies and one goal previously identified to establish the following twelve priorities for the next two years:

Strategy 1.1	Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.
Strategy 1.2	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Strategy 1.3*	Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.
Strategy 2.1*	Assure high standards of conduct and integrity for judges and employees.
Strategy 2.4*	Encourage involvement in civics education activities by judges and judiciary employees.
Strategy 3.1	Allocate and manage resources more efficiently and effectively.
Strategy 4.1*	Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements.
Strategy 4.3*	Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.
Strategy 5.1	Harness the potential of technology to identify and meet the needs of judiciary users for information, service, and access to the courts.
Goal 5.1d	Continuously improve security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.
Strategy 6.3*	Promote effective administration of the criminal defense function in the federal courts.
Strategy 7.1*	Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

Chief Judge Howard encouraged committees to consider these planning priorities when setting the agenda for future committee meetings and determining which initiatives to pursue. He also suggested planning priorities be considered when assessing the impact of policy recommendations, resource allocation decisions, and cost-containment measures.

## Identification of Strategic Initiatives

The primary means for integrating the *Plan* into committee planning and policy activities is through the development and implementation of committee strategic initiatives: projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Plan*.

At prior meetings, this Committee identified the following strategic initiatives for the 2020-2025 period:

- Evaluating the Rules Governing Disclosure Obligations in Criminal Cases
- Evaluating the Impact of Technological Advances
- Bankruptcy Rules Restyling
- Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation

In addition, the Committee considered the following strategic initiatives from the prior period. These initiatives are general in nature and a continuous part of the work of the Rules Committee and its Advisory Committees. No further reporting is required.

- Analyzing and Promoting Recent Rules Amendments
- Improving the Public's Understanding of the Federal Judiciary
- Preserving the Judiciary's Core Values

At this meeting, the Committee is asked to review its strategic initiatives and provide a status update to the Executive Committee. The status of each initiative is listed below along with a note regarding which priority strategy is impacted, if any. In addition, the Committee is asked to consider adding a new strategic initiative: Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Strategy 5.1).

### On-going Initiatives

- Evaluating the Rules Governing Disclosure Obligations in Criminal Cases  
The Criminal Rules Committee has approved an amendment to Criminal Rule 16 (Discovery and Inspection) that clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial, while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. (Strategy 1.1).
- Evaluating the Impact of Technological Advances  
The e-signature rules were updated in 2018 and the Rules Committees continue to evaluate the effects of technology on court procedures and how to use technology most effectively. Specifically, the Bankruptcy Rules Committee is considering suggestions related to the expanded use of electronic signatures. (Strategy 5.1).

- **Bankruptcy Rules Restyling**  
The Bankruptcy Rules Committee has undertaken a multi-year process of restyling the bankruptcy rules to make them more user-friendly. The first set of restyled rules was published in August 2020, with the goal of having the entire set of restyled Bankruptcy Rules effective December 1, 2024. (Strategy 1.1).
- **Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation**  
The Civil Rules Committee will be completing a pilot project on mandatory initial disclosures in the next year. Following its completion, the committee will consider whether the results of the pilot project support broader changes and will continue to evaluate ways to improve the delivery of justice in civil cases. (Strategy 1.1).

### **Proposed New Initiative**

- **Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).** (Strategy 5.1).  
This is a new initiative.

It is anticipated that the Judiciary Planning Coordinator will also request information about the progress of the Committee’s proposed new and on-going initiatives during the summers of 2022, 2023, and 2024.

**Recommendation:** That the Committee approve the report regarding the seven strategic initiatives described above and determine if the emergency rules project related to the CARES Act should be added as a strategic initiative.

### **Long-Range Planning Meetings**

Since 1999, the approach to strategic planning for the Judicial Conference and its committees has relied upon the leadership of committee chairs, with facilitation and coordination by the Executive Committee.<sup>1</sup> On the afternoon before most Judicial Conference sessions, a long-range planning meeting is held to discuss selected strategic planning issues and the judiciary’s strategic planning efforts. A particular emphasis is placed on topics that cross areas of committee jurisdiction and responsibility. Participants in long-range planning meetings include the chairs of Conference committees, members of the Executive Committee, the Director of the Administrative Office, and the Director of the Federal Judicial Center.

For the September 2021 Long-Range Planning Meeting, Chief Judge Howard has proposed a discussion of the decision taken by the Executive Committee at its February 8-9, 2021 meeting: “that the strategic planning process is one effective mechanism for coordinating Conference committee planning to prepare the judiciary for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.” Committee members are encouraged to suggest additional discussion topics for future long-range planning meetings.

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<sup>1</sup> [\*The Judicial Conference and its Committees\*](#), August 2013, pp. 5-6.



*United States Court of Appeals  
For the First Circuit*

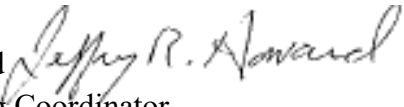
CHAMBERS OF  
JEFFREY R. HOWARD  
CHIEF JUDGE

55 PLEASANT STREET  
CONCORD, NEW HAMPSHIRE  
03301

March 31, 2021

MEMORANDUM

To: Conference Committee Chairs

From: Jeffrey R. Howard   
Judiciary Planning Coordinator

Re: **JUDICIARY STRATEGIC PLANNING (ACTION REQUESTED)**

**RESPONSE DUE DATE:** Following Summer 2021 Judicial Conference Committee Meetings

Each summer, the Executive Committee is provided with an update on the efforts of Judicial Conference committees to implement the *Strategic Plan for the Federal Judiciary (Plan)*. To assist me in preparing this update, I am requesting reports on the strategic initiatives that your committees are pursuing. These initiatives are critical elements of the judiciary's strategic planning approach, transforming high-level strategies and goals from the *Plan* into specific efforts with measurable outcomes.

As this summer's meetings will be the first after the *Plan* was updated and new priorities identified, your summer 2021 meetings will include a strategic planning agenda item inviting committees to refresh consideration of their respective strategic initiatives. This might include ending work on some initiatives that have run their course; identifying new initiatives; and/or reporting on the status of any on-going initiatives. The agenda materials for your summer meetings will provide further information detailing this request.

Also, thank you again for your suggestions about strategic planning priorities. As indicated in the Memorandum of Action from the Executive Committee's February 8-9, 2021 meeting, and discussed at our March 2021 Long-Range Planning Meeting, based on committee suggestions the Executive Committee added seven new strategies (asterisked below) and affirmed four strategies and one goal that had previously been identified as priorities for a total of twelve priorities for the next two years:

- Strategy 1.1 Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.
- Strategy 1.2 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
- Strategy 1.3\* Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.

- Strategy 2.1\*      Assure high standards of conduct and integrity for judges and employees.
- Strategy 2.4\*      Encourage involvement in civics education activities by judges and judiciary employees.
- Strategy 3.1      Allocate and manage resources more efficiently and effectively.
- Strategy 4.1\*      Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary’s future workforce requirements.
- Strategy 4.3\*      Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.
- Strategy 5.1      Harness the potential of technology to identify and meet the needs of judiciary users and the public for information, service, and access to the courts.
- Goal 5.1d      Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.
- Strategy 6.3\*      Promote effective administration of the criminal defense function in the federal courts.
- Strategy 7.1\*      Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

Please consider these priority strategies and goals when setting the agendas for future committee meetings and determining which initiatives to pursue. In addition, please consider these priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

Finally, I invite you to suggest topics for future long-range planning meetings of Judicial Conference committee chairs. As we briefly reviewed at our March 2021 Long-Range Planning Meeting, I propose, for our September 2021 Long-Range Planning Meeting, a discussion of the decision taken by the Executive Committee at its February 2021 meeting: “that the strategic planning approach would be one effective mechanism for coordinating Conference committee planning to prepare the judiciary for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.” I welcome your thoughts on other topics for discussion in September and beyond.

I encourage you to contact me or Lea Swanson, the AO’s Long-Range Planning Officer, if you have any questions about this summer’s planning agenda item or other planning matters.

cc: Executive Committee  
Committee Staff