COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 14-15, 2010

Volume II

TAB

7B

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 22-23, 2010

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 22nd and 23rd, 2010.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
Marjorie A. Meyers, Esq.,
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice
Landis Best, Esq., Representative of the ABA Section of Litigation

I. Opening Business

The Committee approved the Minutes of the Fall 2009 meeting. Judge Hinkle then reported on the January 2010 Standing Committee meeting. The Evidence Rules Committee had no action items at that meeting.

II. Restyling of the Evidence Rules

A. Introduction

At its Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. The Committee agreed upon a protocol and a timetable for the restyling project. Over the next two years, the Committee prepared restyled versions of all the Evidence Rules. The restyled rules were approved for publication by the Standing Committee and submitted for public comment. The public comment period ended on February 15, 2010.

The first draft of the restyled Rules was prepared by Professor Kimble. The Evidence Rules Committee has reviewed each Rule to determine whether any proposed change was one of substance rather than style — with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase." Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented.

At its Fall 2009 meeting, the Committee considered comments that it had received to that point on the restyled rules issued for public comment. The Committee tentatively approved some minor changes to the Restyled Rules. Then, after all the public comments were received, the Reporter reviewed them and provided recommendations to the Committee. The Style Subcommittee also reviewed the public comments and adopted certain changes.

At its Spring 2010 meeting, the Advisory Committee considered the public comments and the changes made by the Style Subcommittee. Each member also conducted a final, independent review of all the Restyled Rules. The goal of the Committee at the meeting was to prepare a final package of Restyled Rules, with the recommendation that they be approved by the Standing Committee and referred to the Judicial Conference.

The Advisory Committee approved a final package of Restyled Rules, and the Committee unanimously recommended that the restyling amendments be approved by the Standing Committee and referred to the Judicial Conference.

These minutes chronicle the Advisory Committee's review of the Restyled Rules as issued for public comment, the public comment received, and the determinations and suggestions of the Style Subcommittee and Professor Kimble. (The Style Subcommittee met by conference call after the Advisory Committee's meeting to review changes. The Style Subcommittee's review and determination will be included in these minutes under the discussion of individual rules.)

Given the scope of the project, the number of issues, and the fact that much work on the restyled rules had been done before the meeting, the Committee adopted the following protocol for its Spring 2010 meeting:

1) a public comment suggesting a style change that had been rejected by the Style Subcommittee would not be discussed at the meeting unless a Committee member affirmatively raised it;

2) if the Reporter determined, in his memo to the Committee, that a public comment called for a substantive change, it would not be discussed at the meeting unless a Committee member affirmatively raised it;

3) all changes adopted by the Style Subcommittee to the rules as issued for public comment (most of them being changes proposed by members of the public) would be considered and voted upon at the meeting;

4) any new change proposed by a Committee member to the rules as issued for public comment would require discussion and a vote at the meeting;

5) any change that had been tentatively approved by the Committee at the Fall 2009 meeting would be deemed finally adopted unless an objection was raised by a Committee member;

6) any public comment received after the Fall 2009 meeting that raised an issue already considered and voted upon by the Committee would not be discussed at the meeting unless a Committee member affirmatively raised it; and

7) any rule issued for public comment that received no public comment was deemed approved (as it had been approved in order to be so issued) unless a Committee member raised a concern about that rule at the meeting.

II. Consideration of Individual Rules

These minutes will set out, in side-by-side form, the original rule and the rule as issued for public comment, with the changes tentatively approved at the Fall 2009 Committee meeting in blackline. The Committee Notes to the respective rules will be set forth at the end of these minutes as they were separately considered by the Advisory Committee.

ARTICLE I. GENERAL PROVISIONS Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101 — Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material or other medium includes electronically stored information.

Committee Discussion:

1. Rule 101(a), proceedings before courts: A Committee member suggested that the phrase "these rules apply to proceedings *before* United States courts" would be more accurately stated as "these rules apply to proceedings *in* United States courts." The Committee unanimously agreed with this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

2. Rule 101(b)(6) "any medium": Professor Kimble suggested that the definition of written material in (b)(6) should refer to "*any* other medium." The Committee unanimously approved this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

Committee Determination: Restyled Rule 101 approved as issued for public comment, with changes to subdivisions (a) and (b)(6).

Rule 102. Purpose and Construction	Rule 102 — Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Determination: Restyled Rule 102 approved as issued for public comment.

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(1)** if the ruling admits evidence, the party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Discussion:

1. Rule 103(a): The existing Rule 103(a) is written in the passive voice. A claim of error is preserved if a "timely objection or motion to strike appears of record." The restyling changed it to the active voice: "the party, on the record, timely moves * * *."

A public comment noted that the change to active voice created an inadvertent substantive change, because the rule as issued for public comment provides that a claim of error is preserved only if "the party" moves for it. But in mulitparty cases, case law provides that if one party timely objects, a claim of error is preserved *for all identically situated parties.*

After discussion, the Committee determined that changing "the party" to "a party" in all appropriate places in Rule 103(a) would solve the substantive problem because it would not require every party to make an object and offer of proof if one party had done so. Accordingly, the Committee unanimously approved the following change to restyled Rule 103(a):

A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, ~~the~~ a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, ~~the~~ a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(That change was also approved by the Style Subcommittee.)

2. Rule 103(d), examples: The restyled Rule 103(d) deletes the examples provided in the original rule of situations in which a judge is to use all practicable efforts to prevent inadmissible evidence from being suggested to the jury. A public comment suggested that these examples were helpful and should be restored. One Committee member agreed, finding the examples useful. But other members noted that the examples were underinclusive and so could be misinterpreted. Others noted that the Evidence Rules rarely give specific examples.

As no motion was made to change the restyled Rule 103(d) as issued for public comment, the examples were not restored to the rule.

Committee Determination: Restyled Rule 103 as issued for public comment approved, with changes to subdivision (a).

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	**(b) Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	**(c) Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: **(1)** the hearing involves the admissibility of a confession; **(2)** a defendant in a criminal case is a witness and requests that the jury not be present; or **(3)** justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	**(d) ~~Testimony by~~ Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Discussion:

1. Rule 104(b): The Committee recognized that restyling Rule 104(b) raised many challenges. The Rule had to provide: a) the standard of proof for conditional relevance (evidence sufficient to support a finding; b) an emphasis that if that standard is met, the judge must find the evidence conditionally relevant, but also could find the evidence excluded on other grounds; c) a provision, consistent with current law, that the conditional relevance determination could be made at the time of

the proffer or at a later time; d) a distinction in the text between two kinds of evidence: the proffered evidence subject to the conditional fact and the evidence offered to prove that conditional fact; e) an indication that the evidence offered to prove the conditional fact would itself have to meet standards of admissibility (because the ultimate determination of the factual condition is for the jury); and f) a statement that the evidence offered to prove the conditional fact need not always be produced by the party who proffers the underlying evidence --- the review for conditional relevance can consider all the evidence presented in the case.

At its Fall 2009 meeting, the Committee determined that the rule released for public comment did not capture all the prerequisites of Rule 104(b), and therefore made a substantive change. For one thing, the rule did not specify that when the court finds evidence sufficient to support a finding of the conditional fact, it must find Rule 104(b) satisfied.

After discussing a number of drafts before the Spring 2010 meeting, the Committee reviewed the following revision (blacklined from the rule as issued for public comment):

> When the relevance ~~relevancy~~ of evidence depends on ~~fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence~~ whether a fact exists, proof must be introduced sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

In discussion, one Committee raised a question about the word "proof" and suggested the word "evidence" as an alternative. But other members pointed out that using the word "evidence" at that point would raise the confusion that the restyling has sought to avoid --- i.e., the confusion between the evidence the party wishes to introduce and the evidence of the conditional fact.

After further discussion, the Committee unanimously approved the proposed change to Rule 104(b). (The change had already been approved by the Style Subcommittee.)

2. Rule 104(c), hearings: This rule provides for certain "hearings" to be conducted outside the "hearing" of the jury. From a style standpoint, the challenge is the different usages of the word "hearing." Professor Kimble sought to remedy some of that awkwardness by referring to a hearing where the jury is not "present"--- but Committee members, at the Fall 2009 meeting, noted that this would be a substantive change because a hearing could be held with the jury present but unable to hear the proceedings.

Professor Kimble proposed the following version of restyled Rule 104(c) at the Spring 2010 meeting. It had been approved by the Style Subcommittee before the meeting.

Conducting a Hearing So That the Jury Cannot ~~Must Not~~ Hear It. ~~A~~ The court must conduct a hearing on a preliminary question ~~must be conducted outside the jury's hearing~~ so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests ~~that the jury not be present~~; or

(3) justice so requires.

Some Committee members suggested that the caption to the rule was awkward, but all recognized that any change would be a question of style --- and the Style Subcommittee had already approved the proposal. The Committee voted unanimously to approve the above change to the restyled version of Rule 104(c).

Committee Determination: Restyled Rule 104 approved with changes to subdivisions (b) and (c), and technical change previously approved at the Fall 2009 meeting.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Determination: Restyled Rule 105 approved as issued for public comment.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Discussion:

Members discussed the caption and agreed that it sounded awkward. A Committee member suggested the following change:

Rule 106 — ~~Rest~~ Remainder of or Related Writings or Recorded Statements

This was a suggestion for a return to the caption in the original rule. After discussion, the Committee unanimously approved a recommendation to the Style Subcommittee to consider a return to the caption of the original rule.

Committee Determination: Restyled Rule 106 approved with the suggestion to the Style Subcommittee to return to the caption of the original rule.

(The Style Subcommittee subsequently approved the suggested change).

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts	ARTICLE II. JUDICIAL NOTICE Rule 201 — Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed ~~fact~~. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Committee Discussion:

Rule 201(d), "the noticed fact": At the Fall 2009 meeting, the Committee agreed to change "the noticed fact" to "the fact to be noticed" in Restyled Rule 201(d). The reason for the change was that at the time of the hearing the fact will ordinarily not have been noticed --- the hearing is usually conducted to determine whether the court should take judicial notice. A member pointed out that it may occur that a court would take notice and *then* hold a hearing. After discussion, however, the Committee concluded that the term "the fact to be noticed" was sufficiently broad to include facts noticed before and after the hearing. No motion was made to reverse the change approved at the Fall 2009 meeting. So under the protocol adopted for the Spring 2010 meeting, the Committee approved the restyled Rule 201(d), with the change of "the noticed fact" to "the fact to be noticed" in Rule 201(d).

Committee Determination:

Restyled Rule 201 approved with the change to subdivision (d) as previously approved by the Committee.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL CASES **Rule 301 — Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of ~~going forward with~~ producing evidence to rebut the presumption. But this rule does not shift the burden of ~~proof in the sense of the risk of nonpersuasion; the burden of proof~~ persuasion, which remains on the party who had it originally.

Committee Discussion:

At the Fall 2009 meeting, the Committee considered a public comment suggesting that the language "the burden of proof in the sense of the risk of nonpersuasion" was awkward and that Rule 301 could be clarified by distinguishing the various burdens that are referred to in the rule. Committee members noted that the two sentences in the restyled Rule as issued for public comment address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301 --- as seen in the above blackline. Subsequently the Style Subcommittee approved those changes.

At the Spring 2010 meeting, the Committee considered a suggestion that "burden of persuasion" in the last sentence should be changed to "burden of proof." The Committee determined that burden of "proof" is usually applied to a question of sufficiency and not admissibility --- i.e., the burden of a party to persuade a factfinder that all of the evidence it has presented has proved its case. Burden of "persuasion" is the term that is more commonly used with presumptions. Accordingly, the Committee determined unanimously that no change should be made to the changes that had been tentatively adopted at the Fall 2009 meeting.

Committee Determination:

Restyled Rule 301 approved with changes previously approved (as indicated in the blackline).

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Determination: Restyled Rule 302 approved as issued for public comment.

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of "Relevant Evidence"	ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401 — Test for Relevant Evidence
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

Committee Discussion:

1. "than it would be without the evidence": The restyled version of Rule 401 as issued for public comment dropped the language "than it would be without the evidence." Some public comments disagreed with this change, arguing that the language is necessary to clarify and sharpen the definition of relevance. Without that language, a newcomer might think that evidence is relevant only when it makes the existence of a fact "more likely than not."

In response to the public comment, Professor Kimble suggested that Rule 401 should be restructured in a way that would include the language "than it would be without the evidence." That proposal was as follows (blacklined from the restyled rule as issued for public comment):

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable ~~the existence of a fact that is of consequence in determining the action~~ than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

The Style Subcommittee approved Professor Kimble's proposal. After discussion, the Advisory Committee unanimously approved the changes proposed by Professor Kimble. Members noted that the subdivisions are not freestanding. Subdivision (b), in referring to a "the fact," is referring to subdivision (a). Professor Kimble noted that the restyling frequently "build" one subdivision on another within a rule.

Committee Determination: Restyled Rule 402 approved, with changes from the Rule as issued for public comment — adding "than it would be without the evidence" and restructuring the Rule.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402 — General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Discussion:

Bullet points: The Committee reviewed once again its decision to use bullet points --- on a limited basis --- as part of the restyling. Committee members noted that previous restylings used bullet points as a way to organize lists and concepts, and to make a rule more user-friendly. Some have criticized the use of bullet points because they cannot be cited conveniently. But Committee members noted that the listed sources for excluding relevant evidence in Rule 402 cannot be individually cited at all in the current rule. So a citation to "the second bullet point" is an improvement under current law.

The alternative to bullet points is numbered subdivisions, but Committee members concluded that subdivisions would not work in Rule 402. For one thing, it would be odd to have subdivisions that are simply a list of phrases or words --- no verbs. For another, the use of subdivisions would make it difficult to deal with what would amount to a hanging paragraph at the end of the rule.

Members also noted that bullet points were being used only rarely in the restyled rules --- only where listed factors could not be set forth efficiently in numbered subdivisions. Finally, members noted that the use of bullet points was obviously a question of style and not substance --- and that the Style Subcommittee of the Standing Committee (which has the final word on questions of style), approved the use of bullet points in Rule 402 as well as in a few other rules.

Committee members unanimously approved the restyled Rule 402 as it was approved for public comment.

Committee Determination: Restyled Rule 402 approved as issued for public comment.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Determination: Restyled Rule 403 approved as issued for public comment.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions for a Defendant or a Victim in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged ~~crime~~ victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Discussion:

1. Rule 404(a)(2) caption.

At the Fall 2009 meeting the Committee agreed with Professor Kimble's suggestion to clarify the caption to Rule 404(a)(2) --- the clarification being that the exceptions set forth in that subdivision were with respect to "a defendant or a victim" in a criminal case. At the Spring 2010 meeting, Professor Kimble suggested that the "a" before victim should be dropped. The Committee agreed. The caption, as finally approved by the Committee, reads as follows:

Exceptions for a Defendant or a Victim in a Criminal Case.

(The Style Subcommittee subsequently approved this change).

2. Rule 404(b) — Notice Provision.

A public comment suggested that the restyled notice provision no longer conditioned admissibility of evidence on giving proper notice. The original rule states that uncharged misconduct may be admissible for a non-character purpose, "provided that" the prosecution properly notifies the defendant. The restyled provision sets the notice requirement in a separate sentence and says the prosecutor "must" give proper notice, without saying what happens if notice is not given.

Some Committee members noted that other notice provisions in the Rules had been set forth as mandatory requirements, without stating that evidence would be excluded for failure to comply --- and courts have read those provisions as precluding admissibility if notice is not given. Examples include Rules 412-415. That is a sensible reading of a notice requirement because the rules of evidence do not deal with sanctions --- they are all about admissibility, and so it should be assumed that failing to meet a requirement in a rule would render it inadmissible under that rule. Other Committee members noted that the restyled Rule 404(b) notice provision had been made consistent with the other notice provisions, and consistency is an important goal of the restyling project.

Two Committee members suggested that starting the sentence on notice with the word "But" would help to tie the notice requirement into admissibility. Other members responded that use of the word "But" would not be very clarifying in this instance, and it would mean that the Rule 404(b) notice provision would be different from all others. A motion to add "But" to the beginning of the notice sentence was made and seconded. Two members voted in favor, three against, and one abstained.

Committee Determination: Rule 404 approved with technical changes made at Fall 2009 meeting, and a minor change to the caption of Rule 404(a)(2).

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Determination: Restyled Rule 405 approved as issued for public comment, with the blacklined change approved at the Fall 2009 meeting.

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Discussion:

"Is relevant": A public comment expressed concern that replacing "is relevant" with "may be admitted" could result in an unintended substantive change---because "may be admitted" seems more conditional than "is relevant." The Committee discussed the matter and determined that no substantive change was made. The statement "is relevant" is itself conditional because relevant evidence is not always admitted --- it can be excluded under Rule 403, the hearsay rule, etc. Committee members concluded that "may be admitted" is in fact more helpful to the reader than "is relevant" because the reader might wonder why habit evidence --- which is obviously relevant to whether a person acted in accordance with the habit --- needs to be characterized as "relevant" under the rule.

Committee Determination: Restyled Rule 406 approved as issued for public comment.

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Discussion:

1. Bullet points: The Committee reviewed the use of bullet points in Rule 407 and found that they were helpful for understanding the permissible purposes under the Rule --- and also to avoid the anomaly of a hanging paragraph after any numbered subdivision. The Committee also noted that the use of bullet points presented a question of style not substance, and the Style Subcommittee had already approved restyled Rule 407.

2. Change from "controverted" to "disputed": A public comment contended that the word "controverted" in the original rule means that the defendant must put in some affirmative evidence contesting the point before the plaintiff can respond with subsequent remedial measure evidence. The comment suggested that the change from "controverted" to "disputed" was substantive on the ground that "disputed" was a less rigorous standard. But the Committee noted that the word "disputed" is an accurate description of the case law, and concluded that there is no substantive difference between "controverted" and "disputed." Case law does not require a defendant in all cases to introduce affirmative evidence contesting a point for subsequent remedial measures to be admissible. Committee members observed that as a matter of style, the word "disputed" is plainer and more common than "controverted" --- and the change was approved by the Style Subcommittee. No Committee member moved to change the language of the restyled Rule 407 as it was issued for public comment.

Committee Determination: Restyled Rule 407 approved as issued for public comment.

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Discussion:

A public comment suggested that the restyled language "in order to compromise the claim" would not cover statements and offers in settlement that were unsuccessful. The Committee considered whether to change the language to "in an effort to compromise the claim." But ultimately the Committee decided not to adopt any change to the Restyled Rule. Committee members noted that the Rule covers offers and promises without regard to whether the settlement actually occurs --- and the term "in order to compromise the claim" focuses on the intent of the offeror, not on whether any settlement is actually reached.

Committee Determination: Restyled Rule 408 approved as issued for public comment.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Determination: Restyled Rule 409 approved as issued for public comment.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410 — Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty which was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)** a guilty plea that was later withdrawn; **(2)** a nolo contendere plea; **(3)** a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. **(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together; or **(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Committee Discussion:

1. Rule 410(a)(3) — "a statement about either of those pleas"

At the last Committee meeting, the DOJ representative explained how the restyled language in Rule 410(a)(3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." As restyled, the phrase "regarding either of the foregoing pleas" modifies the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to *any* statements made during the defined proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would

be excluded. The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection.

For the Spring 2010 meeting, Professor Kimble prepared the following change to Rule 410(a)(3):

> (3) a statement made during a proceeding on ~~about~~ either of those pleas ~~made during a proceeding~~ under Federal Rule of Criminal Procedure 11 or a comparable state procedure;

The DOJ reviewed the proposal before the meeting and concluded that it solved the substantive concern that it had raised. The Style Subcommittee also approved the change.

At the meeting, the Committee unanimously approved the change, agreeing that the revision avoided any substantive change from the original rule.

2. Rule 410(b)(1), technical change:

A member of the public suggested the following change to Rule 410(b)(1) as issued for public comment:

> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness ~~both~~ the statements ought to be considered together; or

The Style Subcommittee agreed with this suggestion and the Advisory Committee approved it unanimously.

Committee Determination: Restyled Rule 410 approved as issued for public comment, with change to (a)(3) and technical change to (b)(1).

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Committee Discussion:

1. "did or did not have liability insurance": A public comment argued that the restyled language "have liability insurance" is not as comprehensive as the original language "insured against liability." It explained that "having liability insurance," in common language, is thought to mean having a liability insurance policy. But the phrase "insured against liability" has a broader connotation, including indemnity agreements that are not often thought of as liability insurance.

The Committee agreed with the public comment, and so approved the following change to the restyled rule as it was issued for public comment:

> Evidence that a person ~~did or did not have liability insurance~~ was or was not insured against liability is not admissible to prove * * *

(This change was also approved by the Style Subcommittee).

2. Addition of "if disputed": A public comment argued that adding the condition "if disputed" to the proper purposes set forth in the rule was a substantive change --- because there is no such requirement in the original rule.

Professor Kimble added "if disputed" to provide a parallel to Rule 407. But in discussion, the Committee determined that the two rules were not necessarily parallel. Given the dearth of case law on Rule 411, the Committee was unable to determine, with sufficient confidence, whether the addition of an "in dispute" requirement would mean a substantive change in Rule 411. The Committee unanimously determined that the prudent course would be to delete the "if disputed" language that had been added to the Rule. The language was therefore dropped from the restyled Rule 411. That change was also approved by the Style Subcommittee.

Committee Determination: Restyled Rule 411 approved with a change to the language on liability insurance; deletion of "if disputed"; and adoption of change approved at previous meeting, to prohibit proof of insurance when offered to show lack of negligence.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing.*** Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Committee Discussion:

1. Rule 412(b)(1)(B): "sexual behavior toward the defendant"

A public comment suggested that the phrase "sexual behavior toward the defendant" was incorrect. The Committee considered this comment and determined that the language was a substantive change, because the exception has been construed to allow evidence of a victim's sexual behavior even though it was not necessarily directed "toward" the defendant. The Committee discussed alternative language --- including "concerning the defendant," which was language proposed by the Style Subcommittee. In the end the Committee determined that the safest approach (i.e., the approach that could not lead to a substantive change) was to use the language from the original rule. The Committee therefore unanimously approved the following change to the restyled Rule 412(b)(2)(B) as released for public comment:

> evidence of specific instances of a victim's sexual behavior ~~toward~~ with respect to the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

2. Rule 412(b)(1)(B): Change from "the person accused of sexual misconduct" to "the defendant"

After the meeting, while implementing the above-discussed change to Rule 412(b)(1)(B), the Reporter noticed another substantive change in that subdivision. The original rule provides an exception for "evidence of specific instances of sexual behavior by the alleged victim with respect to *the person accused of the sexual misconduct* offered by the accused to prove consent or by the prosecution." The restyled rule as issued for public comment reads "evidence of specific instances of a victim's sexual behavior with respect to *the defendant*, if offered by the prosecutor or if offered by the defendant to prove consent." This change provides a more limited exception because it does not permit evidence of sexual behavior of the victim with respect to a *third party*, when offered to prove the victim's consent. An example would be a case in which the defendant was charged with aiding and abetting a sexual assault, and the defendant offers prior sexual behavior between the victim and the alleged perpetrator to prove consent with the alleged abuser.

In an email exchange after the meeting, the Committee agreed that the change was substantive, and approved a return to the wording of the original rule. Together with the already approved change to this subdivision, the restyled rule as approved by the Committee reads as follows:

> evidence of specific instances of a victim's sexual behavior ~~toward the defendant~~ with respect to the person accused of the sexual misconduct if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

Committee Determination: Rule 412 approved as issued for public comment, with changes to (b)(1)(B) as noted above.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413 — Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	(a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— (1) any conduct proscribed by chapter 109A of title 18, United States Code; (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body; (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	(d) **Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: (1) any conduct prohibited by 18 U.S.C. chapter 109A; (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body; (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Committee Determination: Restyled Rule 413 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414 — Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; **(2)** any conduct proscribed by chapter 110 of title 18, United States Code; **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child; **(4)** contact between the genitals or anus of the defendant and any part of the body of a child; **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415: **(1)** "child" means a person below the age of 14; and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; **(B)** any conduct prohibited by 18 U.S.C. chapter 110; **(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus; **(D)** contact between the defendant's genitals or anus and any part of a child's body; **(E)** deriving sexual pleasure or

	gratification from inflicting death, bodily injury, or physical pain on a child; or **(F)** an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

Committee Determination: Restyled Rule 414 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	(a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	(b) **Disclosure.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Discussion:

Heading of Rule 415(b), notice provision: Professor Kimble noted that while the headings to the notice provisions of Rules 413 and 414 had been changed at the previous meeting to make them more descriptive, the heading to Rule 415(b) had not. Professor Kimble proposed the following change to the heading, for parallelism with Rules 413(b) and 414(b):

Disclosure <u>to the Opponent</u>

The Advisory Committee unanimously approved this suggestion. It had been previously approved by the Style Subcommittee.

Committee Determination: Restyled Rule 415 approved as issued for public comment, with a change to the heading of Rule 415(b).

ARTICLE V. PRIVILEGES **Rule 501. General Rule**	ARTICLE V. PRIVILEGES **Rule 501 — Privilege in General**
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. Bullet points: As with Rule 402 and 407, the Committee unanimously determined that the use of bullet points was appropriate for the list set forth in Rule 501. The use of lettered subdivisions is unworkable for the same reasons as in those previous rules. The result would be subdivisions with dangling words, and a dangling paragraph at the end. And as with those other Rules, the Committee noted that the use bullet points was a question of style, and the Style Subcommittee to the Standing Committee had already approved the restyled Rule 501.

2. "other rules prescribed by the Supreme Court": A public comment suggested that the word "other" might be "misplaced." "Other" could not be referring to the prior bullet points, because the Constitution and Federal Statutes are not rules prescribed by the Supreme Court. It could be a reference to rules "other than Rule 501" --- which might make some sense now that there is a Rule 502. But Rule 502 already has a provision stating that it takes precedence over Rule 501, so the reference to "other" in Rule 501 is not necessary.

Professor Kimble agreed that the word "other" should be deleted, as did the Style Subcommittee. The Committee voted unanimously to delete the word "other" from the third bullet point.

Committee Determination: Restyled Rule 501 approved as issued for public comment, with the deletion of the word "other."

Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver	Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.	**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.
(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).	**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or **(2)** is not a waiver under the law of the State where the disclosure occured.	**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or **(2)** is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.	**(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.	**(f) Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.	**(g) Definitions.** In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Committee Discussion:

Rule 502 was drafted and revised in accordance with style guidelines during the process of its enactment in 2008. As it was approved by Congress and the styling of the rule was hard-fought, the Committee resolved not to propose any style changes to Rule 502 as enacted --- with the exception of a few capitalization changes.

Committee Determination: Rule 502 approved as issued for public comment.

ARTICLE VI. WITNESSES **Rule 601. General Rule of Competency**	ARTICLE VI. WITNESSES **Rule 601 — Competency to Testify in General**
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Committee Determination: Restyled Rule 601 approved as issued for public comment.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Committee Discussion:

Last sentence: After discussion, the Committee voted unanimously to change the last sentence as follows

> **This rule does not apply to an expert's testimony ~~by an expert witness~~ under Rule 703.**

This revision deletes the word "witness" on the ground that the expert has to be a witness when she gives "testimony." It also helps to clarify that the exception to personal knowledge applies only when a witness is testifying as an expert. If an expert also testifies as a lay witness, she must have personal knowledge.

(The Style Subcommittee approved this change).

Committee Determination: Rule 602 approved as issued for public comment, with a change to the last sentence.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Committee Discussion:

"give an oath": A public comment suggested that "give an oath" should be changed to "take an oath." But the Style Subcommittee rejected this change and the Advisory Committee deferred to --- and agreed with --- that determination.

Committee Determination: Restyled Rule 603 approved as issued for public comment.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Committee Determination: Restyled Rule 604 approved as issued for public comment.

Rule 605. Competency of Judge as Witness	Rule 605 — Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Committee Determination: Restyled Rule 605 approved as issued for public comment.

Rule 606. Competency of Juror as Witness	Rule 606 — Juror's Competency as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	**(a) At the Trial.** A juror may not testify ~~as a witness~~ before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Committee Discussion:

Rule 606(a), "as a witness": At the Fall 2010 meeting, the Committee agreed to the deletion of "as a witness" from Rule 606(a) as it was released for public comment. This was done at Professor Kimble's suggestion. His reasoning was that the language was superfluous because the only way that a juror could testify under the terms of the Rule is as a witness. Before the Spring 2010 meeting, the Reporter reviewed every use of the word "witness" in the Restyled Rules, in response to a public comment that broadly declared that every use of "witness" in the context of "testifying" was superfluous.

With respect to Rule 606(a), the Reporter suggested that there may be situations in which a juror could be asked to make a statement in front of the jury that could colorably be called "testimony" --- but where the juror is not actually called as a witness. If so, then the deletion of "as a witness" --- which is in the original rule --- would be substantive, because it could be read to prohibit a practice that is currently permitted.

Committee members unanimously agreed with this assessment, citing as examples voir dire and polling the jury. It therefore determined that the deletion of "as a witness" was substantive and voted to restore that language to the Restyled Rule. (The Style Subcommittee agreed with this change).

Committee Determination: Rule 606 approved as issued for public comment.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Determination: Restyled Rule 607 approved as issued for public comment.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	(a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. (c) **Privilege Against Self-Incrimination.** A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

Committee Discussion:

Rule 608(c): At the Fall 2010 meeting, the Committee determined that Rule 608(c), as issued for public comment, effected a substantive change. The second paragraph of the original Rule 608(b) allows a witness who testifies at trial to invoke the privilege when asked about bad acts that pertain only to the witness's character for truthfulness. As restyled, Rule 608(c) provides that if a witness testifies only to a character for truthfulness, that witness does not waive the privilege. This is incorrect because the original rule does not cover witnesses who testify to a character for truthfulness at all --- if it did, it would be included in Rule 608(a), not 608(b).

After discussion, the Committee voted unanimously that Rule 608(c) would have to be changed and that it would have to be placed --- as it was in the original --- as part of Rule 608(b). The language about the privilege modifies Rule 608(b) not Rule 608(a), as it is intended to protect a witness who testifies to factual issues and then is impeached with bad acts.

The Committee unanimously approved the following change to Restyled Rule 608(b)/(c):

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

~~**(c) Privilege Against Self-Incrimination.**~~

By testifying on another matter, a ~~A~~ witness does not waive ~~the~~ any privilege against self-incrimination ~~when being examined about a matter~~ for testimony that relates only to the witness's character for truthfulness.

(The Style Subcommittee agreed with this change).

Committee Resolution: Restyled Rule 608 approved, with change to the text of Rule 608(c), and return of that changed text to the end of Rule 608(b).

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or **(2)** the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible under this rule only if: **(1)** it is offered in a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** ~~a conviction of an adult~~ an adult's conviction for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine guilt or innocence.
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.	**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Discussion:

Rule 609(a)(1): references to the defendant in a criminal case: Before the meeting, the Reporter and the DOJ representative raised separate concerns about possible substantive changes to the Restyled Rule 609(a)(1). The Reporter noted that the balancing test for criminal defendants in Restyled Rule 609(a)(1)(B) referred only to "prejudicial effect" while the original Rule limits the consideration of prejudicial effect to the defendant who testifies. Under the Restyled Rule, a defendant could complain about prejudice he would suffer when *another* defendant is impeached with a prior conviction. That is not possible under the existing Rule.

The DOJ representative noted another problem with the Restyled Rule. The more protective balancing test applies to "the defendant in a criminal case" --- but under the restyled language it need not be the defendant in the criminal case in which the impeachment evidence is offered. Thus an argument could be made that a witness in one case who is a defendant in another criminal case would be subject to the more protective balancing test of Rule 609(a)(1)(B). That is not the current law and as a policy matter it makes no sense.

After extensive discussion at the meeting, the Committee voted unanimously that the Restyled Rule 609(a)(1) made two substantive changes, and unanimously approved an amendment to the rule as issued for public comment. The amendment, blacklined from the rule issued for public comment, is as follows:

> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which ~~if~~ the witness is not a defendant ~~in a criminal case~~; and
>
> **(B)** must be admitted ~~if the witness is a defendant~~ in a criminal case in which the witness is a defendant, if ~~and~~ the probative value of the evidence outweighs its prejudicial effect ~~on the witness~~ to that defendant; and
>
> **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(The Style Subcommittee approved these changes).

2. Rule 609(d)(4)—"admitting the evidence"

A public comment suggested that Restyled Rule 609(d)(4) should be changed as follows:

> ~~admitting~~ the evidence is necessary to fairly determine guilt or innocence.

The Advisory Committee voted unanimously against this change. The Committee reasoned that it is *admitting* the evidence it that is the important event that will affect the determination of determine guilt or innocence.

(The Style Subcommittee agreed to keep "admitting" in Rule 609(d)(4).

Committee Determination: Restyled Rule 609 approved, with changes to Rule 609a, and technical changes approved by the Committee at its Fall 2009 meeting.

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Determination: Rule 610 approved as issued for public comment.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions on cross-examination. And the court should allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Discussion:

1. Rule 611(a), "mode and order of questioning witnesses": The Committee noted that the use of the word "questioning" was substantively inaccurate, because the trial court has authority to regulate not only "questioning" but also anything addressed to the witness that is not in the form of a question. The Committee voted unanimously to change "questioning" to "examining." The Committee noted that "question" is used throughout Rule 611(c), but those references should not be changed because that subdivision is in fact directed only toward questions --- leading questions.

2. Rule 611(b), "a witness's credibility": A public comment suggested that "a witness's credibility" should be changed to "the witness's credibility" as it is only one witness referred to in the Rule. The Style Committee agreed with this suggestion and the Advisory Committee unanimously approved the change.

3. Rule 611(b), restoring "in the exercise of discretion": A public comment suggested that the language in the original rule --- allowing the judge "in the exercise of discretion" to expand the scope of cross-examination --- be retained in the restyled Rule 611(b). Professor Kimble opposed this suggestion on the ground that it would raise the question of what the unadorned use of *may* means everywhere else in the rule. "In the exercise of discretion" is considered a redundant intensifier. The Advisory Committee voted unanimously to reject the suggestion that "in the exercise of the discretion" be added to the Rule as issued for public comment.

4. Rule 611(c) --- "And the court should allow leading questions . . .": The Magistrate Judges' Association opined that the use of "And" to start the last sentence of Restyled Rule 611(c) did not establish a clear enough relationship between the two sentences of the Rule. Before the meeting, Professor Kimble restructured Ruled 611(c) to accord with the Magistrate Judges' suggestion. What follows is the proposed change from the Restyled Rule 611(c) as issued for public comment:

> Ordinarily, the court should allow leading questions:
>
> > (1) on cross-examination~~.~~ ; ~~And~~ and
> >
> > (2) ~~the court should allow leading questions~~ when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

This proposal was approved by the Style Subcommittee. The Advisory Committee reviewed the proposal and approved it unanimously. It noted that the word "ordinarily" now modifies the use of leading questions on cross-examination and when a party calls a hostile witness or an adverse party. But the Committee also noted that the restructuring accurately captured the case law: leading questions are ordinarily allowed in all the situations referred to in the Rule.

Committee Determination: Restyled Rule 611 approved with changes to all three subdivisions.

Rule 612. Writing Used To Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) before testifying, if the court decides that justice requires a party to have those options. (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. (c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Discussion:

1. Rule 612(a)(2) — "a party": Professor Kimble suggested a change from "a" party to "the" party, in order to properly connect to the reference to "an adverse party" in the first line of Rule 612(a). The Style Subcommittee agreed. The Advisory Committee unanimously approved the change.

2. Rule 612(b) --- two subdivisions? Two public comments suggested that Rule 612(b) be split into two subdivisions, because as written it covers two separate (but related) topics. The Committee unanimously rejected this suggestion. Members noted that dividing Rule 612(b) would require the duplication of a number of principles in two separate subdivisions.

3. Rule 612(c) — "justice" requires: The current rule provides for various remedies when a party fails to produce or deliver the writing used to refresh recollection; it refers to "justice" twice --- first in the reference to an order of the court, second in a reference to an order for a mistrial if the prosecution refuses to comply. The restyled version refers to "justice" only with respect to the order for

a mistrial. Two public comments suggested that "justice requires" should be restored to the provision governing court orders. Professor Kimble opposed this change. He stated that the other restylings generally refer to "any appropriate order" without intensifiers like "any order that justice requires" or "any order appropriate under the circumstances." But there is no comparable short form in the second sentence of Rule 612(c).

The Advisory Committee unanimously agreed with Professor Kimble's view. Several members noted that the restyled Rule 612(c) accurately describes the judge's options and obligations under the current practice.

Committee Determination: Restyled Rule 612 approved as issued for public comment, with blacklined change approved at Fall 2009 meeting, and with change from "a party" to "the party" in subdivision (a)(2).

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	(a) **Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, ~~the~~ a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Discussion:

Question/Examine: The Restyled Rule uses "questioning" in subdivision (a) and "question" in subdivision (b). A public comment suggested that "examine" would be a better word because people use the term "cross-examine" (not cross-question) and "examination" is an appropriately broader term than "questioning." The Style Subcommittee agreed with this suggestion and changed "questioning" to "examining" in (a) and "question" to "examine" in (b). The Advisory Committee unanimously agreed with this change.

Committee Determination: Restyled Rule 613 approved as issued for public comment, with technical change (blacklined) previously approved by the Advisory Committee, and changes from "question" to "examine" in the caption and in both subdivisions.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614. Court's Calling or Examining a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's ~~suggestion~~ request. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Questioning.** The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Discussion:

1. Questioning/Examining: As in Rules 611 and 613, the Style Subcommittee agreed with the suggestion from public comment that "examine" was a broader and more accurate word than "question." Thus a change was made to the title to Rule 614, the caption and text of subdivision (b), and the text of subdivision (c). The Style Subcommittee agreed with this change.

2. Rule 614(c), "when the jury is not present": The Style Subcommittee decided to change decided to change "at the next opportunity when the jury is not present" to "at the next opportunity when the jury cannot hear the objection." The Advisory Committee determined that this was a substantive change because it would mean that an objection that could be made under the current rule might be lost under the amended rule. It might require a party to request, or to object at, a sidebar right after the objectionable questioning --- and this could raise the negative inference that the Rule 614(c) timing rule is intended to avoid. The Advisory Committee recognized the rationale for the change --- to create parallelism with Rule 104. But that rule covers a different objection in a different context, and while "hearing" works there it does not work in Rule 614(c).

The Advisory Committee voted unanimously to restore the language of the Restyled Rule 614(c) as issued for public comment: "at the next opportunity when the jury is not present."
(In a subsequent telephone conference, the Style Subcommittee approved the language adopted by the Advisory Committee).

Committee Determination: Restyled Rule 614 approved as issued for public comment, with change to subdivision (a), as blacklined, previously approved, and with changes from "question" to "examine" throughout the Rule. The Rule as finally approved is blacklined from the public comment version as follows:

Rule 614. Court's Calling or ~~Questioning~~ Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's ~~suggestion~~ request. Each party is entitled to cross-examine the witness.

(b) ~~Questioning~~ Examining. The court may ~~question~~ examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or ~~questioning~~ examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

Committee Discussion

"a person whose presence a party shows to be essential": A public comment suggested that the words "a party shows to be" is superfluous and that the phrase should just be "a person whose presence is essential." The Style Subcommittee implemented this change, but the Advisory Committee voted unanimously that this was a substantive change. It shifted the focus from the party, whose burden it is (under the current rule) to show the witness is necessary, to the court. It implies that the court must make a sua sponte determination and refuse to exclude a person whose presence is essential even if a party never makes an argument on the subject. Committee members noted that the other grounds for exception against exclusion are in essence self-authenticating, whereas the exception in (c) is dependent on a factual condition --- it makes sense to impose on the party the burden of showing that the factual condition is met.

The Committee voted unanimously to restore "a party shows to be" to the Restyled Rule. It also voted unanimously that the change suggested in public comment was substantive.

(In a subsequent telephone conference the Style Subcommittee approved the reinsertion of "a party shows to be").

Committee Determination: Restyled Rule 615 approved as issued for public comment.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Determination: Restyled Rule 701 approved as issued for public comment.

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Committee Determination: Restyled Rule 702 approved as issued for public comment.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Determination: Restyled Rule 703 approved as issued for public comment.

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a) In General** — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Determination: Restyled Rule 704 approved as issued for public comment.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Committee Determination: Rule 705 approved as issued for public comment.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert in writing of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	**(c) Compensation.** The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows: **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Committee Discussion:

1. Deletion of "witness/witnesses" in subdivision (a): A public comment suggested broadly that the word "witness" should be deleted whenever combined with "expert" because the expert would by definition have to be a witness. But that broad statement is inaccurate. The Committee determined that deleting the word "witness" in Restyled Rule 706 would be a substantive change because it could lead to an interpretation that Rule 706 governs all court-appointed experts, when in fact it applies only to the appointment by the court of expert *witnesses.*

The Style Subcommittee agreed with the assessment that taking the word "witness" completely out of Rule 706(a) would be a substantive change. But it decided to delete that word from the second sentence of Rule 706(a), because the context will have been made clear by keeping the word in the first sentence. The Advisory Committee unanimously approved the deletion of the word "witness" from the second sentence.

2. Rule 706(c), change by Style Subcommittee: The Style Subcommittee decided to change "The expert is entitled to whatever reasonable compensation the court allows" to "The expert is entitled to a reasonable compensation, as set by the court." After a short discussion, the Advisory Committee determined that the change was not substantive and approved it unanimously.

Committee Determination: Restyled Rule 706 approved as issued for public comment, with deletion of "witness" in second sentence of subdivision (a), a change to the opening sentence of subdivision (c), and a previously approved change to the caption of subdivision (d).

ARTICLE VIII. HEARSAY **Rule 801. Definitions**	ARTICLE VIII. HEARSAY **Rule 801 — Definitions That Apply to This Article; Exclusions from Hearsay**
The following definitions apply under this article: **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means: **(1)** a person's oral or written assertion; or **(2)** a person's nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a prior statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about the prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one that the party appeared to adopt or accept as true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Discussion:

1. Rule 801(a), intent requirement for implied assertions: The existing rule is unclear on whether an intent to communicate an assertion is a requirement when it is made orally or in writing, but the assertion is implied rather than express. The classic example is a letter written to a testator about the writer's travel plans, offered to prove that the testator is competent. The communication of competence is implied, not express. Under the common law, implied assertions, when offered for the truth of the matter impliedly asserted, were hearsay. In contrast, most (though not all) federal courts have held that in order to be hearsay, the declarant must *intend* to communicate the implied assertion.

The Restyled Rule 801(a) as issued for public comment provides that the intent requirement is only applicable to conduct, and not to oral or written assertions. That is a substantive change in most federal courts. After extensive discussion, the Committee voted unanimously that the Restyled Rule 801(a) makes a substantive change. The Committee then discussed a remedy. Committee members concluded that the best solution was the one that would hew closest to the text of the original rule.

Committee members unanimously proposed the following change to Restyled Rule 801(a) (blacklined from the Rule as issued for public comment):

> **(a) Statement.** "Statement" means~~:~~
>
> ~~**(1) a person's**~~ an oral or written assertion~~;~~ or
>
> ~~**(2) a person's**~~ nonverbal conduct of a person, if ~~the person intended it~~ it is intended by the person as an assertion.

The clean version reads as follows:

> "Statement" means an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.

Professor Kimble suggested a slightly different version:

> "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

The Committee noted that Professor Kimble's version was also acceptable as a substantive matter, but it expressed a preference for the above version, because it is closest to the original.

In a telephone conference after the meeting, the Style Subcommittee adopted Professor Kimble's proposal. As the Advisory Committee agreed that the choice between the two options was one of style, Professor Kimble's proposed language will be recommended to the Standing Committee.

*2. **Rule 801(c), "prior" statement:*** The restyled definition of hearsay describes it as "a *prior* statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant." A public comment argued that the addition of the word "prior" constituted a substantive change, because a witness could make a statement *after* testifying at a trial that, when offered for truth, would be hearsay under existing law. The Committee agreed with this assessment, and voted unanimously to delete the word "prior" from the definition, on the ground that it constituted a substantive change. The Style Subcommittee reviewed and approved this change.

*3. **Rule 801(c), "truth of the matter asserted by the declarant"**:* Several public comments argued that the phrase "by the declarant" was incorrect --- a substantive change --- because the declarant may

have made a number of statements. The question is not whether the declarant is telling the truth in general, but whether the statement is true. In response to these comments, Professor Kimble and the Reporter proposed a revision, defining hearsay as an out-of-court statement

> "that a party offers in evidence to prove the truth of the matter asserted ~~by the declarant~~ in the statement."

After discussion, the Committee voted unanimously in favor of this change. The change was also approved by the Style Subcommittee.

4. Rule 801(c), Style Subcommittee restructuring: The Style Subcommittee suggested that the hearsay definition be broken up into subdivisions in order to make the several requirements easier to understand. Including the substantive changes discussed above, the Style Subcommittee's approved version looks like this:

> **"Hearsay means a statement that:**
>
> **(1) the declarant does not make while testifying at the current trial or hearing; and**
>
> **(2) a party offers in evidence to prove the truth of the matter asserted in the statement."**

The Advisory Committee unanimously approved the Style Subcommittee's changes to Rule 801(c).

5. Rule 801(d)(1), use of the word "prior": Professor Kimble suggested that because the word "prior" was deleted from the definition of hearsay in Rule 801(c), it should also be deleted from Rule 801(d)(1). But the Committee unanimously rejected this suggestion. Unlike hearsay itself, which could be uttered after a witness testifies, Rule 801(d)(1) can only apply to statements made prior to the witness's testimony. Deleting "prior" would be confusing in these circumstances. Given the difficulty of mastering the hearsay rule, the Committee believed it made no sense to delete words that help to describe the rule's application.

Professor Kimble noted that if the word "prior" is kept, a minor change was necessary to Rule 801(d)(1) in light of the fact that "prior" was deleted from Rule 801(c). Now there is no syntactic connection between the subdivisions, and so the following stylistic change was necessary:

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about ~~the~~ a prior statement, and the statement: . . .

The Committee unanimously approved this technical change. The Style Subcommittee approved it as well.

6. Rule 801(d)(1)(B), suggested style change: A Committee member suggested a slight style change to Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements:

. . . the statement:

. . .

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated ~~it~~ that testimony or acted from a recent improper influence or motive in so testifying; or

After discussion, the Committee voted unanimously to recommend the style change for the consideration of the Style Subcommittee.

(In a telephone conference after the meeting, the Style Subcommittee rejected the suggested change to Rule 801(d)(1)(B). As the suggestion was a style change, that change will not be made).

7. Rule 801(d)(2)(A), caption: A public comment suggested that the caption to restyled Rule 801(d)(2) was underinclusive because it referred to "An Opposing Party's Statement" when the exemption also covers statements of a party's agent and statements of a coconspirator. In response to that comment, the Style Subcommittee approved the following change to the heading:

"An Opposing Party's Statement -- or One Attributable to the Party".

After discussion, the Advisory Committee concluded that the change to the heading was substantive because it misdescribed the statements covered by the Rule. A Committee member contended that co-conspirator statements, for example, are not "attributable" to the party. The Committee determined that the heading as originally restyled was in fact an accurate statement of the statements covered by this subdivision. The Committee voted unanimously to restore the caption to the version issued for public comment.

(In a telephone conference after the meeting, the Style Subcommittee agreed with the decision to restore the heading to the version released for public comment --- deleting "or One Attributable to the Party").

8. Rule 801(d)(2)(B) – "manifested": At the Fall 2009 meeting, the Committee determined that the Restyled Rule 801(d)(2)(B) made a substantive change because it could signal that adoption of a statement could be found on a lesser showing than under current law. The problem for restyling is that the current rule requires the party to have "manifested" an adoption or belief in the truth of the statement, but courts have found silence in certain circumstances to be an adoption. So there is a disconnect between the case law and the language of the rule, and any attempt to change the text to less vigorous language --- such as "appeared" in the restyled version --- risks further dilution of the standards for adoption. At the previous meeting, the Committee unanimously determined that the word "manifested" must be retained in the restyling.

For the Committee meeting, Professor Kimble drafted two versions of Rule 801(d)(2)(B) that used "manifested":

"is one the party manifested that it adopted or believed to be true;"

"is one that the party manifested an adoption of or a belief in its truth;"

Before the meeting, the Style Subcommittee had approved the first alternative.

After discussion at the meeting, the Advisory Committee concluded unanimously that both options were substantively correct. The Committee preferred the latter alternative, however, because it was closer to the original rule.

(In a telephone conference after the meeting, the Style Subcommittee adhered to its decision to use the language: "is one the party manifested that it adopted or believed to be true;". As the decision between the two alternatives is a question of style, the language approved by the Style Subcommittee will be recommended to the Standing Committee).

9. Rule 801(d)(2)(E), co-conspirator: Professor Kimble consulted Bryan Garner --- who wrote the book on style --- and Bryan stated that the proper usage was "coconspirator." The Style Committee therefore decided to take the hyphen out of "co-conspirator" and the Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 801 approved with changes from the rule as issued for public comment as set forth above.

Rule 802. Hearsay Rule	Rule 802 — The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Determination: Rule 802 approved as issued for public comment.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803 — Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress ~~of~~ of excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**(6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; ~~and~~ **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification~~.~~; and **(E)** ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; ~~and~~ **(B)** a record was regularly kept for a matter of that kind~~.~~ ; and **(C)** ~~But this exception does not apply if~~ neither the possible source of the information ~~or~~ nor other circumstances indicate a lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	(8) ***Public Records.*** A record of a public office setting out: **(A)** the office's activities; **(B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	(9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: **(A)** the record does not exist; or **(B)** a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.	(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.	(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	(13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	(15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	(17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	(19) ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	(20) ***Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	(21) ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	(22) ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the judgment was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	(23) ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24) [Other exceptions.]** [Transferred to Rule 807]

Committee Discussion:

*1. **Rule 803(2) — stress of excitement:*** The Restyled Rule 803(2) changed the language to "stress or excitement" but at the Fall 2009 meeting the Committee voted unanimously to return to "the stress of excitement" --- because that language was derived from earlier codifications and had been construed in hundreds of cases. At the Spring 2010 meeting, Professor Kimble suggested that the phrase might be changed to "the stress of *the* excitement" but the Committee once again determined that the language was well-ensconced and should not be changed. Professor Kimble dropped the suggestion.

2. Rule 803(6) --- clerical change: The Magistrate Judges' Association pointed out a typo in Rule 803(6)'s cross-reference to the certification provisions of Rule 902. The reference in the Restyled Rules is to "Rule 902(b)(11) or (12)" --- which tied to a previous draft in which Rule 902 had lettered subdivisions. But those lettered subdivisions were dropped in the Restyled Rule as issued for public comment. The Style Committee therefore deleted the "(b)" and the Advisory Committee unanimously agreed with this change.

3. Rule 803(8), "statement" and "trustworthiness clause" --- The definition of "record" in Rule 101 was intended to streamline the records-based rules --- especially Rules 803(6)-(8), so that the related words "memorandum", "data compilation" etc. need not be repeated. But a public comment noted that Rules 803(8), 803(10) and 901(b)(7) also cover a *statement*. And "statement" is not part of the definition of "record." This meant that the restyling drops the word "statement" from those rules. The Committee determined that dropping the word "statement" effected a substantive change because some statements covered by these rules are not in records --- such as a statement of a public official at a press conference.

In addition, at the Fall 2009 meeting, the Committee resolved to find a way to include the trustworthiness clause of Rule 803(8) as a lettered subdivision, to avoid the use of a hanging paragraph.

In response to these two concerns, Professor Kimble drafted and the Style Subcommittee approved the following version of Restyled Rule 803(8), blacklined from the rule as issued for public comment:

(8) ***Public Records.*** A record or statement of a public office ~~setting out~~ if:

(A) it sets out:

(i) the office's activities;

~~**(B)**~~ **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

~~**(C)**~~ **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation~~.~~ and

(B) ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor other circumstances indicate a lack of trustworthiness.

Clean version:

A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

After discussion, the Committee unanimously approved the changes to Restyled Rule 803(8).

4. Rule 803(10), addition of statement, and consideration of "even though": Restyled Rule 803(10)(B) as issued for public comment covers the absence of a public record to prove that "a matter did not occur or exist, *even though* a public office regularly kept a record for a matter of that kind." Before the meeting, Judge Hinkle suggested that the words "even though" did not connect well with the introductory language of the Rule. In addition, as with Rule 803(8) and as raised in public comment, the definition of "record" does not cover a statement, and so the word "statement" had to be reintroduced into the Restyled Rule.

In response to these concerns, the Style Subcommittee approved changes to Rule 803(10) as it was issued for public comment. The blacklined version is as follows:

"**(10) Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, ~~even though~~ if a public office regularly kept a record or statement for a matter of that kind."

The Advisory Committee unanimously approved these changes to Restyled Rule 803(10).

5. Rule 803(22), caption, " Judgment of a Previous Conviction": A public comment suggested that the word "Previous" in the caption was superfluous because the conviction would have to be "previous" to be admissible in the case. The Style Subcommittee agreed with this suggestion and deleted the word.

In discussion, Advisory Committee members were unanimously in favor of returning the word "Previous" to the caption. One of the goals of the restyling project is to make headings more, not less, helpful. Use of "Previous" helps the reader, especially a novice, to know that the rule is not talking about the possible conviction in the existing case. It thus sets the context of the rule for the reader. There is a difference between superfluity and emphasis. Committee members also noted that use of the word "Previous" would probably make it easier to search for the applicable rule.

The Committee voted unanimously to request the Style Committee to retain the word "Previous" in the caption to Rule 803(22).

(In a telephone conference after the meeting, the Style Subcommittee agreed to return "Previous" to the caption of Rule 803(22)).

6. Rule 803(22)(B), "judgment for a crime": A public comment suggested that the term "judgment for a crime" in Rule 803(22)(B) should be changed to "*conviction* for a crime," meaning that the subdivision would be changed as follows:

> **(B)** the ~~judgment~~ conviction was for a crime punishable by death or by imprisonment for more than a year;

The Style Subcommittee agreed with the public comment and made the change. The Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 803 approved, with changes to the rule as issued for public comment in Rules 803(2), (6), (8), (10) and (22).

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804 — Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability in order to prevent the declarant from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1)** ***Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

	(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4) Statement of Personal or Family History.** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
(5) [Other exceptions.] [Transferred to Rule 807] **(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(5)** ***Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.*** A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability in order to prevent the declarant from attending or testifying. **[Other exceptions.]** [Transferred to Rule 807]

Committee Discussion:

1. Rule 804(a)(1), "having a privilege": A public comment noted that characterizing the unavailability condition as the declarant "having a privilege" is narrower than the existing rule, in which a declarant is exempted "on the ground of privilege." The public comment observed that a declarant might be exempted on ground of privilege even though the declarant is not the holder of the privilege --- i.e., does not "have" the privilege. For example, an attorney would be unavailable to testify to the client's confidential communication, but the attorney doesn't "have" the privilege, the client does.

The Advisory Committee accordingly determined that Restyled Rule 804(a)(1), as issued for public comment, effected a substantive change. After discussion, the Committee unanimously approved an amendment. The language of the proposed amendment was subsequently reviewed and revised slightly by the Style Subcommittee. Blacklined from the public comment version, the amendment reads as follows:

> **(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
>
> **(1)** is exempted ~~by a court ruling on the ground of having a privilege to not testify~~ from testifying about the subject matter of the declarant's statement <u>because the court rules that a privilege applies</u>;

2. Rule 804(a), hanging paragraph, "unavailability <u>as a witness</u>":

Professor Kimble suggested the following change to the last (hanging) paragraph of Rule 804(a):

> But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability <u>as a witness</u> in order to prevent the declarant from attending or testifying.

The Advisory Committee found it unnecessary as a matter of substance. Professor Kimble wished to include it to parallel the language of Rule 804(b)(6) (see discussion below), even though that is unnecessary as a substantive matter because the two provisions cover different situations and are construed differently. The Style Subcommittee reviewed Professor Kimble's suggestion after the meeting and approved it, so "as a witness" will be included in Rule 804(a) as recommended to the Standing Committee.

3. Rule 804(b)(5), attending or testifying: The Restyled Rule as issued for public comment would allow a finding of forfeiture if a party wrongfully prevented the declarant from "attending or testifying." The Reporter expressed concern that "attending or testifying" --- when used in the disjunctive in Rule 804(b)(5) --- could result in a substantive change, because a party could be found to have forfeited a hearsay objection simply by preventing a declarant from *attending* the trial (e.g., by threatening him not to appear) when the declarant might still be able to testify (without attending).

The Committee unanimously agreed that "attending or testifying" was a substantive change. After discussion, the Committee determined that the best solution would be to continue to use the term of art used in the original rule --- "unavailability as a witness." That term covered all the possible forms of unavailability --- including asserted failure of memory --- that could give rise to a finding of forfeiture. The Committee unanimously approved the following change to Rule 804(b)(5) as issued for public comment:

> ***Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.*** A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, ~~with the intent to do so~~ and did so intending that result.

(After the meeting, Judge Hinkle found another glitch in the Restyled Rule --- the reference to "the" party should be "a" party, as it is in the caption. The Style Subcommittee approved the Advisory Committee's change together with the change from "the" to "a").

4. Rule 804(b)(5)/(6), placement: In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:

> ***(5) [Transferred to Rule 807.]***

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted and what is now Rule 804(b)(6) be renumbered to (b)(5) to fill the gap.

But many Committee members argued that making that change would 1) deprive the reader important knowledge about the history of the rules; 2) disrupt electronic searches; and 3) lead to search

results for "Rule 804(b)(5)" that would cover two separate hearsay exceptions. The Committee noted that while subdivisions have been renumbered in the restyling, no rule has been renumbered --- and the hearsay exceptions, while technically subdivisions, are as a matter of practice more like freestanding rules.

The Advisory Committee unanimously resolved to request the Style Subcommittee to restore the original numbering to Rule 804(b)(6), and to return the historical reference to Rule 804(b)(5). The Committee was very concerned that renumbering Rule 804(b)(6) would lead to confusion and perhaps to a failure by some parties to make proper objections and arguments in court. Members noted that Evidence Rules are often applied on the fly, and the Committee believed that it is important to have constancy in their numbering. So while the renumbering may be a question of style, the change could have real-world negative consequences.

(In a telephone conference after the meeting, the Style Subcommittee agreed to move the forfeiture exception back to Rule 804(b)(6), and to preserve the historical reference in Rule 804(b)(5).)

Committee Determination: Restyled Rule 804(b) approved, with changes to the rule as issued for public comment in Rules 804(a)(1), and 804(b)(5), and (with Style Subcommittee approval) Rule 804)(b)(5) renumbered as Rule 804(b)(6).

Rule 805. Hearsay Within Hearsay	Rule 805 — Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Determination: Rule 805 approved as issued for public comment.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806 — Attacking and Supporting the Declarant's Credibility
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Determination: Rule 806 approved as issued for public comment.

Rule 807. Residual Exception	Rule 807 — Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Determination: Rule 807 approved as issued for public comment.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901. Requirement of Authentication or Identification**	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901 — Authenticating or Identifying Evidence**
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	(a) **In General.** To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	(2) ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	(5) ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	(6) ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	(7) ***Evidence About Public Records.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	(10) ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Discussion:

1. Rule 901(b)(7), "statement": Restyled Rule 901(b)(7), an authentication provision for public records, raises the same problem as previously discussed with Rule 803(8), the hearsay exception for public records. The definition of "record" in Rule 101 includes all the references in current Rule 901(b)(7) except "statement." The Committee unanimously determined that "statement" must be added to the Restyled Rule 901(b)(7).

2. Rule 901(b)(7), "lawfully recorded or filed": The current Rule provides a ground for authenticity for public records "authorized by law to be recorded or filed and in fact recorded or filed in a public office." The language of the Rule was restyled to "lawfully recorded or filed in a public office." The Committee determined that this was a substantive change: the restyled language focuses on the *act* of recording and requires it to be lawful. The existing language focuses on whether recording is authorized. There could be a situation in which a document was legally authorized to be recorded yet there might be a dispute over whether the recording was actually lawful. Where that dispute arises, proof of the document itself may be necessary, and the current rule would provide for authentication but the restyled rule would not.

To account for the deletion of "statement" and the substantive change concerning lawful recording, the Committee unanimously approved the following changes to Restyled Rule 901(b)(7) (blacklined from the rule as issued for public comment):

(7) ***Evidence About Public Records.*** Evidence that:

(A) a document was recorded or filed in a public office, as authorized by law ~~record or statement is from the public office where items of this kind are kept~~; or

(B) a purported public record or statement is from the office where items of this kind are kept ~~document was lawfully recorded or filed in a public office~~.

(In a telephone conference after the meeting, the Style Subcommittee approved the changes to Rule 901(b)(7).

Committee Determination: Restyled Rule 901 approved, with changes to the Rule as issued for public comment in Rule 901(b)(7).

Rule 902. Self-authentication	Rule 902 — Evidence That Is Self-Authenticating
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears: **(A)** a signature purporting to be an execution or attestation; and **(B)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.	**(2)** ***Domestic Public Documents That Are Signed But Not Sealed.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.	(3) ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	(4) ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was lawfully recorded or filed in a public office — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	**(6)** ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

Rule 902(7)-(11)

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	**(7)** ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.	**(8)** ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	**(9)** ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	**(10)** ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Discussion:

1. Rule 902(4), lawfully recorded: As with Rule 901(b)(7), the Restyled Rule 902(4) was found to have made a substantive change by using "lawfully" recorded in place of "authorized by law." The Committee unanimously approved the following change to Rule 902(4):

> **(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was ~~lawfully~~ recorded or filed in a public office, as authorized by law — if the copy is certified as correct by:
>
> **(A)** the custodian or another person authorized to make the certification; or
>
> **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(In a telephone conference after the meeting, the Style Subcommittee approved the change to Restyled Rule 904).

2. Rule 902(11), "modified as follows": The Magistrate Judges' Association raised a concern about the use of the term "modified as follows" in Restyled Rule 902(11) as it was issued for public comment. Rule 902(11) is a certification provision for business records. It does not "modify" the admissibility requirements of Rule 803(6). After discussion, the Committee determined that the use of the term "modified" was substantively incorrect. The Committee unanimously approved the following change to Rule 902(11):

> **(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), ~~modified as follows: the conditions referred to in 803(6)(D) must be~~ as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(In a telephone conference after the meeting, the Style Subcommittee approved the change to restyled Rule 902(11)).

Committee Determination: Restyled Rule 902 approved, with changes to the Rule as issued for public comment in Rules 902(4) and (11).

Rule 903. Subscribing Witness' Testimony Unnecessary	Rule 903 — Subscribing Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Determination: Restyled Rule 903 approved as issued for public comment.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS **Rule 1001. Definitions**	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS **Rule 1001 — Definitions That Apply to This Article**
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	In this article~~, the following definitions apply~~: (a) ~~**Writing.**~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form. (b) ~~**Recording.**~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. (c) ~~**Photograph.**~~ "Photograph" means a photographic image or its equivalent stored in any form. (d) ~~**Original.**~~ An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. (e) ~~**Duplicate.**~~ "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Determination: Restyled Rule 1001 approved as issued for public comment, with minor style changes that were approved at the Fall 2009 meeting.

Rule 1002. Requirement of Original	Rule 1002 — Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Determination: Rule 1002 approved as issued for public comment.

Rule 1003. Admissibility of Duplicates	Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Determination: Restyled Rule 1003 approved as issued for public comment.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004 — Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or **(d)** the writing, recording, or photograph is not closely related to a controlling issue.

Committee Determination: Restyled Rule 1004 approved as issued for public comment.

Rule 1005. Public Records	Rule 1005 — Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Determination: Restyled Rule 1005 approved as issued for public comment.

Rule 1006. Summaries	Rule 1006 — Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Committee Determination: Rule 1006 approved as issued for public comment.

Rule 1007. Testimony or Written Admission of Party	Rule 1007 — Testimony or Admission of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written admission of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Discussion:

Admission of a party: Both the heading and the text of Restyled Rule 1007 refer to an "Admission of a Party." This is a reference to Rule 801(d)(2). The Reporter noted, however, that Restyled Rule 801(d)(2) no longer refers to "admissions" --- rather they are now called "statements" of a party. The Committee unanimously approved the change to the heading and as follows:

Rule 1007 --- Testimony or ~~Admission~~ Statement of a Party to Prove Content

> The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written ~~admission~~ statement of the party against whom the evidence is offered. The proponent need not account for the original.

This change was also approved by the Style Subcommittee.

Committee Determination: Rule 1007 approved as issued for public comment, with the substitution of "statement" for "admission" in the heading and text.

Rule 1008. Functions of Court and Jury	Rule 1008 — Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

Committee Determination: Rule 1008 approved as issued for public comment.

XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	XI. MISCELLANEOUS RULES **Rule 1101 — Applicability of the Rules**
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.	**(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; • contempt proceedings, except those in which the court may act summarily; and • cases and proceedings under 11 U.S.C.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.	**(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Committee Discussion:

Bankruptcy Cases: At the Fall 2009 meeting the Committee added bankruptcy cases to the list of cases to which the Evidence Rules are applicable, in subdivision (b). This was out of concern that the reference to 11 U.S.C. in the existing rule did not cover all the bankruptcy cases in which the Evidence Rules apply. At the Spring 2010 meeting, the liaison from the Bankruptcy Rules Committee observed that because bankruptcy cases are now specifically mentioned, the reference to 11 U.S.C. has become superfluous. The Committee therefore voted unanimously to delete the bullet point for 11 U.S.C.

Committee Determination: Rule 1101 approved as issued for public comment, with technical changes approved at Fall 2009 and Spring 2010 meetings.

Rule 1102. Amendments	Rule 1102 — Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Discussion:

Provision concerning supersession: The Civil Rules restyling project included an amendment to Rule 86, providing that if any restyling amendment conflicts with another law, "priority in time for the purpose of 28 U.S.C.§2072(b) is not affected" by the amendment. The Evidence Rules Committee discussed whether a similar provision should be added to Rule 1102.

The Committee relied heavily on an excellent memorandum from Professor Cooper, Reporter to the Civil Rules Committee, prepared during the Civil Rules restyling project. In that memo, Professor Cooper noted that it was very unlikely (though not impossible) for a court to find that a style amendment would supersede a pre-existing statute. But even if a court would so find, the Committee determined that it was essentially impossible for an Evidence Rule to supersede any prior legislation. This is because the Evidence Rules are written to accommodate statutory law whenever enacted. For example, Rule 402 provides that evidence is relevant unless a statute provides otherwise; Rule 501 likewise defers to statute; Rule 802, the rule against hearsay, defers to statute; the authenticity rules are illustrative only and do not at all conflict with a statute that would govern authenticity. So if the rules themselves do not take priority over statutes --- no matter when enacted --- there is no reason to draft against the already remote possibility that a court would find that an Evidence Rule could become "last in time" by a style amendment.

The Committee determined that in the context of the Evidence Rules, a supersession provision could do more harm than good. It might lead a reader to think that there is a possible problem when in fact there is not. A reader might think, for example, that Rule 402 doesn't mean what it says when it defers to statutes. The Committee also noted that Rule 1101(e) as restyled has further lessened the need for a supersession clause because it states that a statute "may provide for admitting or excluding evidence independently from these rules." Including a separate supersession provision could cause the reader to think that the amended Rule 1101(e) does not mean what it says.

After this discussion, the Committee unanimously rejected any amendment to the Restyled Rules that would add a supersession provision.

Committee Determination: Rule 1102 approved as issued for public comment.

Rule 1103. Title	Rule 1103 — Title
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Determination: Rule 1103 approved as issued for public comment.

III. Committee Notes to the Restyled Evidence Rules

The Committee approved the following Committee Notes to the Restyled Rules of Evidence: 1) a Note to Rule 101 that described the goals and methodology of the restyling project; 2) a template for each of the amended rules, indicating that the amendments are stylistic only; and 3) additional language for particular rules to explain questions about a rule that might be raised by the bench or bar.

A. Rule 101 Note

The Committee approved the following Note to Rule 101:

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence 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. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth 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 apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. 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 (1969) 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 http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich B.J. 46 (Sept. 2009); 88 Mich B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many of the changes in the restyled Evidence 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. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. *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. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

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 rule does not change their substantive meaning. See, e.g., Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of its discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. *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. [Rule 804(b)(6) has been renumbered to Rule 804(b)(5) so that the numbering within the rule is continuous.]

5. *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. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, the amendment could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase" — one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

B. Template for Basic Note

The Committee approved the following basic Committee Note for all the Restyled Rules, except Rule 502:

The language of Rule ___ has been amended, and definitions have been added, as part of the general restyling of the Evidence 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. There is no intent to change any result in any ruling on evidence admissibility.

C. Additional Notes for Specific Rules

In preparing the restyled Evidence Rules for public comment, the Committee operated under the presumption that the basic template was a sufficient Committee Note for each of the Rules. Because no substantive change was intended, the Committee determined that it would ordinarily be enough to say just that.

The Committee recognized, however, that changes to certain rules were relatively extensive, and this might raise questions about possible inadvertent substantive consequences. The Committee therefore developed a working principle for providing additional comment in a Committee Note to a specific rule. The working principle was:

An extra, short statement may be added to Rules where a change has been made that might cause a reasonable reader to wonder about the Committee's intent or meaning.

Under that working principle, the Committee amended the basic template for the Committee Notes to the following Rules

1. Rule 101(b)(6) — Evidence stored in electronic form

Rule 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." A public comment suggested that it would be useful for the Committee Note to provide a cross-reference to Civil Rule 34. The Committee concluded that a cross-referencing Note would assist the reader in determining the meaning of the term "electronically stored information." The Committee therefore approved the following addition to the basic Note:

> The reference to electronically stored information is intended to track the language of Fed.R.Civ.P. 34.

2. Rules 407, 408 and 411.

Explanation:

These rules had always been rules of exclusion. They had never provided a ground of admissibility. The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. In the public comment period, the ABA Litigation Section suggested that the change to these rules is substantive (though the Committee had voted and found the changes to be stylistic only). The Committee therefore determined that an explanatory Note would be useful to clarify the limited effect of the amendment.

Addition to the Committee Note:

> Rule ___ previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

3. Rule 502

Explanation:

Rule 502 was only recently enacted, and in the run-up to its acceptance by Congress, the Committee expended great effort to make sure that the style changes already made in the Rule would be preserved. The Committee therefore determined that it would be imprudent to restyle the Rule *again* during the restyling project. The only changes made to Rule 502 were changes in capitalization. So the template Committee Note, which refers to the fact that a rule has been restyled, would not accurately describe the Committee's work on Rule 502. The Committee therefore approved the following Note to Rule 502:

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

4. Rule 608(b)

Explanation:

Rule 608 allows specific acts to be inquired into "on cross-examination." But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language "on cross-examination" on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. The Committee therefore approved the following addition to the basic Committee Note to Rule 608:

The Committee is aware that the Rule's limitation of bad act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

5. Rules 701, 703, 704 and 705.

Explanation:

These restyled rules cut out all references to an "inference." The Committee determined that the change was stylistic only, but as the term "inference" is often used by lawyers — especially with respect to experts — it might be anticipated that some could think that the change is more important than intended. The Committee therefore approved the following addition to the basic Committee Notes to Rules 701, 703, 704 and 705:

The Committee deleted all reference to an "inference" on the ground that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

6. Rule 801(d)(2).

Explanation: The restyling drops the term "admission" in favor of "statement of a party-opponent. That proposal has been well-received. But lawyers and judges often refer to Rule 801(d)(2) as the hearsay exception for "admissions" — so the Committee thought that an additional explanation of this change was appropriate. The Committee approved the following language to be added to the basic Committee Note to Rule 801(d)(2):

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

7. Rule 804(b)(3).

Explanation:

One amendment in the restyled package to the rules is clearly a substantive change to the current rule — Rule 804(b)(3) extends the corroborating circumstances requirement to declarations against penal interest offered by the prosecution.

But this substantive change was not made in the restyling project. By the time restyling takes effect, the restyled-and-substantively-changed Rule 804(b)(3) will already have been in effect for a year. In order to avoid confusion, the Committee decided to provide an explanation in the Committee Note to Rule 804(b)(3).

The amendment to Rule 804(b)(3) provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 and scheduled to be enacted before the restyled rules — explicitly extends the corroborating circumstances requirement to statements offered by the government.

IV. Closing Matters

Judge Hinkle, the Committee, and Judge Rosenthal all expressed deep gratitude to Professor Kimble for his outstanding and incredibly dedicated efforts in the restyling project.

Judge Hinkle noted with regret that Justice Hurwitz and Bill Taylor were going off the Committee. Both were outstanding members and will be sorely missed. The Reporter expressed his gratitude to Justice Hurwitz for his stellar work on Rule 502.

Finally, Judge Hinkle noted that this was his last meeting as Committee Chair. Committee members and the Reporter expressed their deep gratitude for Judge Hinkle's fine work and outstanding leadership as Chair. Without his guidance and commitment, the restyling could never have been done.

The meeting was adjourned on April 23, 2010

Respectfully submitted
Daniel J. Capra
Reporter

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7C

Restyling Amendments to the Federal Rules of Evidence

Summary of Public Comments

Professor Elliot B. Glicksman, (09-EV-001), provides the following suggestion for restyling Rule 606(a):

> A juror may not testify before the jury on which they sit. If they do the court must give opposing counsel an opportunity to object.

The Federal Rules of Evidence Committee of the American College of Trial Lawyers, (09-EV-002), commends the Advisory Committee for its excellent work and provides extensive comments and suggestions for restyling Rules 101-706. The Committee agrees with most of the restyling changes posted for public comment. Among the Committee's suggestions: 1) delete the last sentence to Rule 406; 2) add the word "subsequent" before "measures" in Rule 407; 3) clarify the scope of Rule 410(a)(3); 4) clarify that evidence of misconduct under Rule 414 and 415 can be admitted even if the misconduct occurred after the act charged; 5) change the reference to "having a character for truthfulness" in Rule 608(a); 6) change the location of the reference to the Jencks Act in Rule 612; and 7) combine the opening sentences of restyled Rule 613(a);

The Committee also suggests several substantive changes to Rule 410 for future consideration by the Advisory Committee, including "clarifying what a guilty plea means" and clarifying whether the rule covers both guilty pleas withdrawn as a matter of right and guilty pleas withdrawn by the court.

Finally, the Committee raises a concern about the use of bullet points, contending that they are "uncitable and unsearchable and, if one is dealing with page limits in briefs, add several lines to any quotation of the rule."

Ken McKinney, Esq. (09-EV-003), states that the restyled rules as issued for public comment "are useful and accomplish the purpose of the Conference in clarifying and simplifying the rules from a stylistic standpoint."

Alan Fredregill, Esq. (09-EV-004), contends that it is a "mistake" to remove the word "shall" from the Evidence Rules. He states that "shall" is a word that is widely used in legislation.

Maurice J. Baumgarten, Esq., (09-EV-005), suggests changes to Rules 1002 and 1004 designed to clarify that the Best Evidence Rule applies only when a document is offered to prove

its contents.

Thomas E. McCutchen, Esq. (09-EV-006), "would like to see fewer amendments and changes made less often" because "[r]elearning the wheel every year is a negative."

Hon. Robert E. Jones, (09-EV-007), expresses approval of the updated language in Rule 801(d)(2)(D) — from "servant" to "employee."

Clifford A. Rieders, Esq. (09-EV-008), expresses concern that the definition of "record" in restyled Rule 101 "could have a limiting effect on admissible evidence by leaving out other possible written documents that are not a memorandum, report or data compilation."

Professor Jeffrey Bellin, (09-EV-010), expresses concern that the restyling of Rule 609(a) would aggravate "the federal courts' longstanding misinterpretation of Rule 609" that he "chronicled" in an article. Among other things, he suggests a return to the word "shall."

The Federal Magistrate Judges' Association, (09-EV-011), "doubts the value" of restyling the Rules of Evidence. The Magistrate Judges argue that the "definitions and phrasing" of the Evidence Rules "have become part of the lexicon of the trial courts and trial bar." The Magistrate Judges also question the use of "but" and "and" to begin a sentence. The Magistrate Judges oppose the restyled Rule 801(c) as released for public comment. They suggest deleting the word "prior" and deleting the phrase "to the declarant" in the restyled version, so that the amendment will adhere more closely to the existing rule. The Magistrate Judges also suggest clerical changes to Rules 803(6) and 902(11) and (12).

Professor Roger C. Park, (09-EV-012), commends the Advisory Committee for its work and states that the restyling "will make it easier for students to learn the Federal Rules of Evidence." Professor Park compliments the Committee "for taking the misleading word 'admission' out of Rule 801 (d)(2) and for changing Rule 609(a) to present its categories more clearly." Professor Park is "amazed at how successful the Committee has been in avoiding substantive changes." He makes the following suggestions for change to the rules as issued for public comment: 1) reinsert the examples in Rule 103(c); 2) add language to Rule 104(b) to clarify that the court can rule on conditional relevance at a later point in the trial; and 3) restore to Rule 401 the language "than it would be without the evidence."

Professor Richard D. Friedman, (09-EV-013), provides suggestions for change to the

restyled rules as issued for public comment, including: 1) restore the reference to Rule 104(b) in Rule 104(a); 2) change "one" purpose to "a" purpose in Rule 105; 3) change "behavior toward the defendant" to "behavior with the defendant" in Rule 412(b)(1)(B); 4) use an indefinite article before "statement" in Rule 801(b); 5) delete the word "prior" and change "declarant" to "statement" in Rule 801(c); 6) change the title of Rule 801(d)(2) to add a reference to statements by agents. Professor Friedman also includes a comment from Joshua Camson, which suggests, among other things, retaining "in conformity therewith" in Rule 404 on the ground that it is a "sacred phrase."

The Litigation Section of the American Bar Association (09-EV-014), commends the Advisory Committee on its "excellent and careful work" and notes that the "overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public." The Section provides a number of suggestions for change to the restyled rules as issued for public comment, including: 1) in Rule 101, include a reference to the Civil Rules in the definition for electronically stored information; 2) in Rule 102, change "end" to "ends"; 3) clarify Rule 104(b)'s reference to a conditional fact; 4) change the bullet points used in various rules to numbered or lettered subdivisions; 4) add "character" before "trait" in Rule 404; 5) restore "is relevant" — as opposed to "may be admitted" — in Rule 406; 6) restore "this rule does not require exclusion" — as opposed to "the court may admit"— in Rules 407 and 411, on the ground that the restyling should not change a rule of exclusion to a rule of admission; 7) delete "other" from Rule 501; 8) in Rule 604, specify that a translator must satisfy the qualification standards for expert testimony; 9) in Rule 608, change the "awkward" phrase "having a character for truthfulness"; 10) restore "in the exercise of discretion" in Rule 611(b); 11) break Rule 612(b) into two subdivisions; 12) use "examining" rather than "questioning" in Rule 613; 13) restore the word "inference" where it currently exists in Article 7 — on the ground that "opinion" is "not synonymous" with "inference"; 14) retain the word "manifested" in Rule 801(d)(2)(B), because it conveys "a much more active role on the part of the 'party' than the word 'appeared,' which focuses entirely on the observer rather than the 'party.'"

The State Bar of California Committee on Federal Courts, (09-EV-015), believes that "there should be a general rule (comparable to Federal Rule of Civil Procedure 86), expressly stating that the 2010 revisions are stylistic only." The Committee also notes that the restyling has created new subdivisions in some rules, "which could make legal research confusing." The Committee also suggests that use of the phrase "lawfully recorded or *lawfully* filed" in Rules 901(b)(7)(B), 902(4) and 1005.

Professor John Scott, (09-EV-016), is a "huge fan" of the restyled rules, and believes that the restyled Rule 801(c) in particular is a substantial improvement over the original because it clarifies the existing language "truth of the matter asserted." Professor Scott would add "on cross examination *of the character witness*" to Rule 405(a) because the current rule is not explicit about who can be cross-examined in the context covered by the Rule.

Professor Katherine T. Schaffzin, (09-EV-017), states that the proposed restyling "represents a tremendous improvement to the current Rules." Her suggestions include: 1) in Rule 609(b), change "prejudicial effect" to "unfair prejudice"; and 2) in Rule 801(c), change "to prove the truth of the matter asserted" to "to prove the truth of the declarant's statement."

James J. Duane, (09-EV-018), states that the Advisory Committee "must be commended for an excellent job in their work" on the restyled rules because "[i]n many important respects, the proposed revisions represent a significant improvement in the clarity, precision and elegance with which the original rules were drafted, most of them decades ago." Nonetheless, he proposes more than 50 changes to the rules as issued for public comment, some of which were approved by the Advisory Committee.

The National Association of Criminal Defense Lawyers (09-EV-019), proposed a number of changes, including: 1) retain "than it would be without the evidence" in Rule 401; 2) clarify that the notice requirement of Rule 404(b) must be met or the evidence proffered by the government will be excluded; 3) change back "if disputed" to "if controverted" in Rule 407; 4) delete the words "if disputed" in restyled Rule 411, as there is no "in dispute" requirement in the existing rule; 5) delete the word "person" in Rule 801(a) — on the ground that it could be read to exclude statements of entities from the hearsay rule; 6) define "record" to include "statements" in Rule 101 — on the ground that "statements" are covered in Rules 803(6) and (8) and 901(b)(7), and therefore should be covered by the definition of "record."

TAB

7D

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Director

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Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 24, 2010

MEMORANDUM TO EVIDENCE RULES COMMITTEE

SUBJECT: Professor Kimble's Articles on Style Project

Professor Kimble has submitted the attached articles appearing in the Michigan Law Journal on the restylization of the Federal Rules of Evidence.

John K. Rabiej

Attachments

A Drafting Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

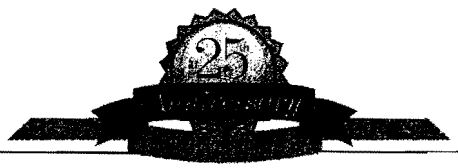
There's a new milestone on the long road to better legal writing. On June 1, the Standing Committee on Rules of Practice and Procedure approved for publication the "restyled" Federal Rules of Evidence. As drafting consultant, I began redrafting the rules in mid-2006, and in April the Advisory Committee on Evidence Rules approved the last set for transmittal to the Standing Committee. In August, the rules will be published in print and online at www.uscourts.gov/rules.

The goal has been to make the rules clearer, more consistent, and more readable—all without changing their meaning. No small assignment, and as you can imagine, the Advisory Committee scrutinized every word, looking for possible substantive change. The careful, systematic, three-year process is summarized by Judge Robert Hinkle, Chair of the Advisory Committee, in a report that's available at www.uscourts.gov/rules/Agenda%20Books/Standing/ST2009-06.pdf, pages 480–84.

Of course, the work is not done. No doubt the public comments will produce any number of changes. And the final version must then be approved by the Standing Committee (again), the Judicial Conference of the United States, the Supreme Court, and Congress. The track record, though, is good: this is the fourth set of federal rules to be restyled. The Rules of Appellate Procedure took effect in 1998, the Rules of Criminal Procedure in 2002, and the Rules of Civil Procedure in 2007.

During the comment period for the civil rules, I wrote two Plain Language columns (December 2004 and January 2005) showing side-by-side examples of several old and new rules. This time, I'll do something a little different. I'll look in detail at one rule and try to describe some of its drafting deficiencies. Then I'll offer the proposed new rule and, as I did with the two earlier columns, ask you to be the judge.

Nobody would claim that the restyled rules are perfect; on a project like this, you can always find pieces that could have been—and perhaps still will be—improved. Naturally, though, I do think that the new rules are far better. But see what you think. And then try your hand at the contest that follows.



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Current Rule 609(a)–(b)
Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of[1] attacking the character for truthfulness of a witness,[2]

(1)[3] evidence that a witness other than an accused has been convicted of a crime shall[4] be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of[5] one year[6] under the law under which the witness was convicted,[7] and evidence that an accused has been convicted of such[8] a crime[9] shall be admitted if the court determines that[10] the probative value of admitting this evidence outweighs its prejudicial effect to the accused;[11] and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily[12] can be determined that[13] establishing the elements of the crime required proof or admission[14] of an act of dishonesty[15] or false statement by the witness.[16]

(b) Time Limit.[17] Evidence of a conviction under this rule[18] is not admissible if a period of[19] more than[20] ten years has elapsed since the date of[21] the conviction or of the release of the witness[22] from the confinement imposed for that conviction,[23] whichever is the later date, unless[24] the court determines, in the interests of justice, that[25] the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.[26] However,[27] evidence of a conviction more than 10[28] years old as calculated herein,[29] is not admissible unless[30] the proponent gives to the adverse party sufficient advance[31] written notice of intent to use such evidence[32] to provide the adverse party with a fair opportunity to contest the use of such evidence.[33]

Drafting Deficiencies

1. *For the purpose of* is a multiword preposition. Make it *To attack.*
2. An unnecessary prepositional phrase. Make it *a witness's character.*
3. Two structural points. (1) Without digging, it's hard to tell what the point of distinction is between this first paragraph and the second one; the restyled rule makes that clear at the beginning of each paragraph. (2) This dense first paragraph contains two possibilities that should be broken down.
4. *Shall* has become inherently ambiguous (among other disadvantages). The restyled rules use *must* for required actions.
5. A stuffy way of saying *for more than.*
6. Note the miscue: *in excess of one year* modifies *imprisonment* but not *death.* To avoid the miscue, insert *by* before *imprisonment.*
7. Arguably, it's obvious what law we're talking about. But the restyled rule at least shortens this clumsy phrasing to *in the convicting jurisdiction.*
8. A lot hangs on the word *such.* It avoids repetition, but it would be easy to blow past.
9. Note the repetition of *evidence that... has been convicted of... a crime* from the first part of this paragraph.
10. There's no such *the court determines that* in, for instance, Rule 403. The restyled rule omits it.
11. An unnecessary prepositional phrase. Of course we're talking about the effect on the accused. Strike *to the accused.*
12. The adverb should normally split the verb phrase. Whether to put it after the first or second of two auxiliary verbs can be tricky, but I'd say *readily* belongs after *be.*
13. Here, the *can be determined that* language needs to stay in order to keep the idea of "readily." But why is it passive?
14. Prefer the *-ing* forms—*proving* and *admitting*—to the nouns with *of.*
15. Another unnecessary prepositional phrase. Make it *a dishonest act.*
16. The language beginning with *proof* is a syntactic muddle. We're talking about the witness's admitting something, but not the witness's proving something.
17. Not an informative heading. The restyled heading makes it immediately clear when this part applies.
18. Of course we're talking about a conviction under this rule. Strike *under this rule.*
19. Strike *a period of.*
20. Note the inconsistency with *in excess of* in (a)(1).
21. Strike *the date of.*
22. Make it *the witness's conviction or release.*
23. To this point, the sentence uses nine prepositional phrases. The restyled rule uses three.
24. Note the double negative: *is not admissible... unless.* Make it *is admissible only if.*
25. Again, strike *the court determines... that,* along with *in the interests of justice.* The latter is a needless intensifier anyway.
26. This is a 72-word sentence.
27. Start sentences with *But,* not *However.* What's more, this sentence actually contains a second condition to using the evidence. The rule should be structured to show that the evidence is allowed only if two conditions are met.
28. The previous sentence spells out *ten.*
29. Strike *as calculated herein.* Also, the comma needs a paired comma after *old.*
30. Another double negative.
31. Isn't notice always in advance? At any rate, here it certainly has to be.
32. Try a pronoun—*it*—instead of *such evidence.*
33. Try another pronoun—*its*—as in *its use.*

Now for the proposed new rule. Most of the changes are explained by my comments on the current rule. I'll just make three salient points. First, the current rule contains 262 words; the new one contains 204, or 22 percent fewer. Second, the new rule is structured in a way that reflects the content much more clearly. Third, the new rule improves the formatting with progressive indents for the subparts and hanging indents (aligned on the left) within each subpart.

Restyled Rule 609(a)–(b)
Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and

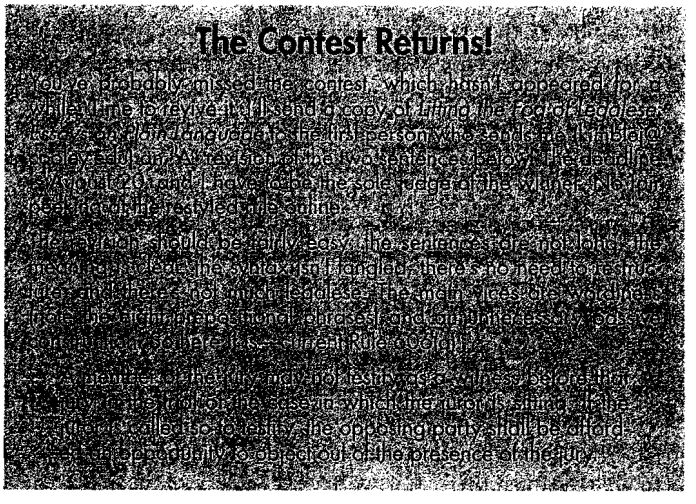
(B) must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.



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Another Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

In the introductory essay to his book *Garner on Language and Writing*, Bryan Garner offers a sobering indictment: "a supermajority of lawyers—even law professors—grossly overestimate their writing skills, and underestimate the importance of those skills." That's the view of the preeminent authority on the subject. And what he says goes double for the category of legal writing that we call drafting—statutes, rules, contracts, wills, and the like.

So why has most legal drafting been so bad for so long? I posed that same question in the October 2007 Plain Language column and offered five reasons: (1) law schools have by and large failed to teach drafting; (2) most lawyers don't fill the void through self-education, but rather tend to just copy the lumbering old forms; (3) young lawyers may have to "learn" drafting at the hands of older lawyers who never learned the skill themselves but who think their expertise in a particular field makes them adept drafters; (4) lawyers typically believe they should draft for judges rather than front-end users like clients, the public, and administrators; and (5) transactional lawyers seem more indifferent to the skill of drafting than litigators are to the skill of analytical and persuasive writing.

Let me add another reason, a cousin to #2: with rare exceptions, the apparent models that law students and lawyers have to work with are poorly drafted. Think of the Uniform Commercial Code, the United States Code, the Code of Federal Regulations, the Federal Rules of Civil Procedure until late 2007, most state statutes and regulations and court rules, most model jury instructions, municipal ordinances by the tens of thousands—the entire bunch. So pervasive is the old style of drafting that, unless we've somehow seen the light, we can't help but regard it as perfectly normal and good, and we can't help but internalize it.

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But a remarkable thing happened in the early 1990s: the Standing Committee on (Federal) Rules of Practice and Procedure saw the light. The Committee recognized that the federal court rules were in a bad way, and it undertook the daunting task of "restyling" them set by set. It created a Style Subcommittee, which enlisted the help of a drafting consultant (first Bryan Garner, then me). The consultant prepared the drafts; they were meticulously reviewed by the Style Subcommittee and by the Advisory Committee for each set of rules; they were approved by the Supreme Court; and we now have new Federal Rules of Appellate Procedure (1998), Criminal Procedure (2002), and Civil Procedure (2007), and proposed new Federal Rules of Evidence (available for public comment at www.uscourts.gov/rules).

I think it's fair to say that the appellate, criminal, and civil restylings have been remarkably successful. Everyone seems to agree that the new rules are much clearer and more consistent, and since they took effect, only a few corrections have been needed—out of three complete rewrites. Still, during the public-comment periods, we heard from some quarters that "mere" restyling was not worth the effort or that restyling was a solution in search of a problem or that some other such objection loomed large. Never mind that the old rules were riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumps of unbroken text, uninformative headings, unwieldy sentences, verbosity, repetition, abstractitis, unnecessary cross-references, multiple negatives, inflated diction, and legalese. (For dozens of examples, see the August–December 2007 columns.) Never mind that the old rules were a professional embarrassment. Never mind that those who would dismiss the restylings as unneeded must (as most lawyers do) have little regard for good drafting—or ease of reading. Never mind that they'd be willing to consign us to the old models forever.

So now the evidence rules have been restyled. Last month, I offered an example—a current rule with detailed comments, followed by the restyled rule. I'll do the same this month. Try to put yourself in the place of a law student reading the current rule for the first time. And remember that just about all the evidence rules—certainly those of any length—can be given the same treatment.

The restyled version, besides fixing 30-odd drafting deficiencies, uses 41 fewer words, breaks the rule down into subdivisions, and converts four long sentences to six that are shorter by almost half.

Current Rule 612
Writing Used to Refresh Memory[1]

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code,[2] if a witness uses a writing to refresh memory for the purpose of[3] testifying, either—[4]

(1) while testifying, or

(2) before testifying, if the court in its discretion[5] determines[6] it[7] is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon,[8] and to introduce in evidence those portions[9] which[10] relate to the testimony of the witness.[11] If it is claimed[12] that the writing contains matters[13] not related to the subject matter of the testimony[14] the court shall[15] examine the writing in camera, excise[16] any portions not so related,[17] and order delivery of[18] the remainder[19] to the party entitled thereto.[20] Any portion withheld[21] over objections[22] shall be preserved and made available to the appellate court in the event of an appeal.[23] If a writing is not produced or delivered pursuant to[24] order[25] under this rule,[26] the court shall[27] make any order justice requires,[28] except that in criminal cases when the prosecution elects not to[29] comply, the order shall be one striking the testimony or, if the court in its discretion[30] determines that the interests of justice so require, declaring a mistrial.[31]

Drafting Deficiencies

1. Whose memory? Also, just glance at the rule. How discouraging is it to see such a stretch of unbroken text?
2. Wordy phrasing with a clunky citation. Note the three prepositional phrases. The restyled rule uses one.
3. *For the purpose of* is a multiword preposition. It should usually be replaced with *to*. Here it isn't needed at all. The purpose is clear from what follows.
4. Why use a dash, rather than a colon, to introduce a vertical list? What's more, the list appears midsentence—not the best practice. Some drafting experts allow it, but our guidelines for federal rules require that lists be placed at the end of the sentence. See Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* 3.3(B) (Admin. Office U.S. Courts 1996).
5. Strike *in its discretion*. It's as useless as can be.
6. Add *that* after *determines*. Most verbs need *that* to smoothly introduce a following clause.
7. A classic. What does *it* refer to? What's the antecedent? Actually, the reference is forward, but not to any identifiable noun. *It* refers loosely to what a party is entitled to.
8. Legalese.
9. As a rule, draft in the singular to avoid ambiguity. What if the adverse party wants to introduce just one portion? Sure, the plural probably covers that here, but other contexts might not be as clear. And by convention the singular includes the plural.
10. Use *that* when the relative pronoun introduces a restrictive clause, one that's essential to the basic meaning.
11. An unnecessary prepositional phrase. Make it *the witness's testimony*.
12. Why is this passive? Quick—who is claiming?
13. Is one matter enough? See note 9.
14. A lot of words for *unrelated matter*. We know that *unrelated* means unrelated to the testimony. Also, put a comma after *testimony*, which ends the long subordinate clause. Punctuation 101.
15. Make it *must*. Likewise in the next use (after *objections*) and the last use (after *the order*). And good riddance to the inherently ambiguous *shall*.
16. How about *delete*?
17. How about *unrelated portion*?
18. Even the passive voice—*be delivered*—is preferable to the nouner, the noun *delivery* with *of*. Better a verb than an abstract noun. See the February 2007 column.
19. How about *rest*?
20. Legalese.
21. Withheld by whom? See the miscue? Withheld by the judge or by whoever produces the writing? Using the same term as in the previous sentence—*excise*[*d*] or *delete*[*d*]—would make the meaning immediately clear. Consistency is the cardinal rule of drafting.
22. Is one objection enough?
23. A lot of words for *must be preserved for the record*.
24. Legalese.
25. Another miscue: *pursuant to order* modifies *delivered*, but not *produced*. Make it *is not produced or is not delivered as ordered*.
26. Strike *under this rule* as entirely obvious.
27. Should this be *may*? That's the kind of trouble *shall* causes.
28. Insert a period and start a new sentence with *But*. That breaks up a 60-word sentence.
29. How about *does not*?
30. Again, strike *in its discretion*.
31. Everything beginning with *the order* is indirect and rather clumsy. It should simply say that "the court must do X or Y."

Restyled Rule 612
Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Last Month's Contest

Last month, I invited you to revise current Rule 606(a):

> A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

The winner is Drew Slager, an associate with Mancini, Schreuder, Kline & Conrad. His revision, slightly edited:

> A juror may not testify at trial before the jury on which he or she sits. If a party calls a juror to testify, the opposing party may object out of the jury's presence. [Note: you won't find *he or she* in the restyled rules, but it has its place in some drafting—used sparingly.]

Compare that version with the restyled version published for comment:

> A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

Now I wonder: do we really need *as a witness*? And could we just say that "an adverse party may object outside the jury's presence," without the bit about the court's giving an opportunity? We'll see.

A New Contest

Once again, I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an "A" revision of the single sentence below. I'm deliberately picking short examples to encourage participation. The deadline is September 24.

The sentence is from current Rule 608(b):

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

A little hazy, right? The main subject and verb—*giving* and *operate*—are abstract, and *when examined* does not connect well with what it modifies. So here's a hint: start with a strong verb—*waive*—and then find a concrete subject. Besides clearing the haze, you should be able to cut almost half the words. No fair peeking online at the restyled version.

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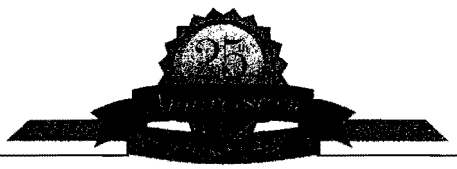
Still Another Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

In August, after a three-year project, the completely "restyled" Federal Rules of Evidence were published for comment. They are available at www.uscourts.gov/rules. The project's goal was to redraft the rules in a modern, plain-language style—making them clearer, more consistent, and more readable—without changing their substantive meaning. An even broader goal has been to make the drafting style consistent throughout all the federal rules. Remember that three other sets of rules—Appellate, Criminal, and Civil Procedure—have already been redrafted. In fact, the work began more than 15 years ago.

Now, this is the third column I've written on the restyled evidence rules. In August and September, I provided a little background on the restyling process, addressed the occasional complaint that the effort is not worth the trouble, and considered why our profession has made such a hash of legal drafting for so long. Then I set out a current evidence rule, noted the drafting deficiencies, and offered the restyled rule for comparison. I'll do it again this month—and again ask you to judge the results.

This month's example is shorter, so I won't be able to identify as many deficiencies. I noted 33 in August's example and 31 in September's; this month, only 18, although they include a serious ambiguity. See whether you can spot it.



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Current Rule 806
Attacking and Supporting Credibility of Declarant[1]

When a hearsay statement, or a statement defined[2] in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant[3] may be attacked, and if attacked may be supported,[4] by any evidence which[5] would be admissible for those purposes if declarant[6] had testified as a witness. Evidence of a statement or conduct by the declarant[7] at any time, inconsistent[8] with the declarant's hearsay statement,[9] is[10] not subject to any requirement[11] that the declarant may[12] have been afforded[13] an opportunity to deny or explain.[14] If the party against whom a hearsay statement[15] has been admitted[16] calls the declarant as a witness, the party is entitled to[17] examine the declarant on the statement as if under[18] cross-examination.

Drafting Deficiencies

1. An unnecessary prepositional phrase. Make it *the Declarant's Credibility.*
2. There's no definition in Rule 801(d)(2)(C), (D), or (E).
3. Again, make it *the declarant's credibility.*
4. A lot of words for *and then supported.*
5. Use *that,* not *which,* when the relative pronoun introduces a so-called restrictive clause, one that doesn't simply provide supplemental information but rather is essential to convey the basic meaning. Typically, *which* is correct only if you can insert a comma before it, setting off the clause.
6. Why is it *the declarant* everywhere else? This may seem like a small point, but consistency is the first rule of drafting, and the drafter who makes small missteps is headed for larger ones.
7. Another unnecessary prepositional phrase. Make it *the declarant's statement or conduct.*
8. *At any time, inconsistent* is rather clumsy, and the punctuation doesn't save it. *Inconsistent* belongs with *statement or conduct.* We know that *inconsistent* means inconsistent with the statement admitted in evidence, so the *with*-phrase after *inconsistent* can go. And the paired commas after *time* and *statement* aren't standard; they were probably inserted as a makeshift fix for the disruption caused by *at any time.*
9. A critical ambiguity crops up here. The previous sentence talks about two statements: (1) a hearsay statement and (2) a statement described in Rule 801(d)(2). But the 801(d)(2) statement is, by the very terms of 801(d), "not hearsay." So when this second sentence of 806 refers to a "hearsay statement," it seems to be referring only to the first "statement" in the previous sentence—a hearsay statement—and not an 801(d)(2) statement. Was that limitation intended?

10. Another thing that makes this sentence unwieldy: the verb, *is*, is too far from the subject, *evidence*.
11. Why is this nonrequirement stated so indirectly? Why not *the court may admit evidence of... even if...*? The restyled rule does it a little differently, but along the same lines.
12. Strike *may*. This whole verb phrase needs reworking.
13. How about *given*?
14. Deny or explain what? Readers are brought up short. Apparently, the drafters didn't want to use the pronoun *it*, sensing that the antecedent would be unclear, or to add *the inconsistent statement or conduct*. Trapped with no way out.
15. The ambiguity deepens. By again using *hearsay statement*, the sentence seems to invoke only the first "statement" in the first sentence. See note 9.
16. No need to use the present perfect tense. Make it *was admitted*.
17. Replace *is entitled to* with *may*.
18. Wouldn't *on* be more idiomatic—*as if on cross-examination*?

Note some of the more obvious improvements in the restyled rule below. It uses dashes, rather than commas, for the longish midsentence alternative in the first sentence. It smooths out the second sentence and states the meaning more directly. (The parallel structure of *regardless of when... or whether* helps considerably.) It's a little tighter overall. And most importantly, it fixes the ambiguity described in notes 9 and 15. The sentences are longer on average than I'd like (33 words), but the other restyled rules do better.

Restyled Rule 806
Attacking and Supporting the Declarant's Credibility

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Last Month's Contest

Last month, I invited you to revise the sentence below from current Rule 608(b). I suggested that you start with a strong verb—*waive*—and then find a concrete subject.

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

The winner is Kenneth Treece, a staff attorney with Miller, Canfield, Paddock & Stone, who submitted this:

> A witness does not waive the privilege against self-incrimination by testifying to matters limited to character for truthfulness.

Compare that version with the restyled version:

> A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

A New Contest

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimble@cooley.edu) an "A" revision of current Rule 610, set out below. The deadline is October 26.

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Big hint: try using *to attack or support* in your version. And I hope you'll go after the unnecessary prepositional phrases and multiword prepositions. Can you believe how many there are in a single 34-word sentence?

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One Last Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

This is the fourth and final article in my series on drafting examples from the restyled Federal Rules of Evidence (published for comment at www.uscourts.gov/rules). I have tried to illustrate the improvement by pulling out a few current rules, briefly describing their deficiencies, and showing you the restyled rules for comparison. Thus, I noted 33 deficiencies in Rule 609(a)–(b), 31 in Rule 612, and 18 in Rule 806, and below I'll note 28 in Rule 404(a). Perhaps that's enough to make the case.

Before looking at 404(a), I'd like to do something different—and possibly surprising. I'd like to acknowledge some drafting flaws in the restyled rules. As I said in the first of these articles, nobody would claim that the restyled rules are perfect; you can always go back and find ways to improve on the improvements. Of course, any large-scale project like this will involve countless decisions and many compromises. And on some matters, the Advisory Committee on Evidence Rules had to decide whether to follow the best drafting practices in the face of other considerations.

So what could have been fixed in an ideal world, if we had been starting from scratch? We might have changed the structure of various restyled rules in several ways.

For one thing, the numbering in Rules 803 and 902 is unlike the numbering in the other restyled rules: you'll see that, as in the two current rules, 803 and 902 follow the rule number with another number—803(6), for instance. To achieve consistency, that could have been 803(a)(6) or (b)(6), although creating the new (a) or (b) might have required a little artfulness.

For another thing, those same two rules, along with 801(d), 804(b), and 901(b), use a hybrid format. Technically, they are set up as items in a list, but they look like subparts with headings. (Compare, for instance, Rule 807: it has two subparts, two subdivisions, each with a heading, and then a list without headings in subdivision (a). That's the norm in the restyled rules—the items in a list do not carry headings.) But the anomaly may be justifiable because the "lists" in those five rules are so long and complicated.

Another formatting anomaly: Rule 502 has a freestanding, undesignated, uncitable piece at the beginning, before the first subdivision. It should have been subdivision (a), but the Advisory Committee had reason to not adjust the version passed by Congress.

Finally, in Rule 801(d)(2), Rule 803(5), (6), (7), (8), (18), and (22), and Rule 804(a), you'll find so-called dangling text—a sentence that follows an enumerated vertical list. Although some drafting experts find this practice unobjectionable and even useful, the guidelines for drafting federal rules discourage it. Perhaps some of these danglers can still be fixed.

So much for structural imperfections—which hardly diminish the great leap forward taken by the restyled rules. And no doubt the public comments will lead to a number of further improvements in wording. Meanwhile, let's take up our last example.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Contact Prof. Kimble at kimblej@cooley.edu. For a list of previous articles, go to www.michbar.org/generalinfo/plainenglish/columns.cfm. 2009 is a notable year for the column.

Current Rule 404(a)
Character Evidence Not Admissible to Prove Conduct;[1] Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a[2] trait of character[3] is not admissible for the purpose of[4] proving action in conformity therewith[5] on a particular occasion, except:

(1) Character of accused.[6] In a criminal case, evidence of a pertinent trait of character[7] offered[8] by an accused,[9] or by the prosecution to rebut the same,[10] or if evidence of a trait of character[11] of the alleged victim of the crime[12] is offered[13] by an accused and admitted under Rule 404(a)(2),[14] evidence of the same trait of character[15] of the accused offered by the prosecution;[16]

(2) Character of alleged victim.[17] In a criminal case,[18] and subject to the limitations imposed by[19] Rule 412, evidence of a pertinent trait of character[20] of the alleged victim of the crime offered by an accused,[21] or by the prosecution to rebut the same,[22] or evidence of a character trait of peacefulness of the alleged victim[23] offered[24] by the prosecution in a homicide case to rebut evidence that the alleged[25] victim was the first aggressor;

(3) Character of witness.[26] Evidence of the character of a witness,[27] as provided in Rules 607, 608, and 609.[28]

Drafting Deficiencies

1. This title does more than just describe what the rule is about; it announces that the rule will generally prohibit character evidence to prove conduct. That's not necessarily bad, just inconsistent with other titles.
2. Technically, the *a* makes this read *Evidence of a person's... a trait of character.* No good. Drop the second *a.*
3. An unnecessary prepositional phrase. Make it *character trait.* More substantively, what is the practical difference between "character" and "character trait"? Could a witness simply testify that someone is a bad man, without more? The restyled rule keeps both ideas, but should it?
4. *For the purpose of* is a multiword preposition. Make it *to prove.*
5. Legalese.
6. An unnecessary prepositional phrase? *Accused's Character* is probably not very speakable. But far more often than not, a possessive is better than an *of*-phrase.
7. Again, make it *character trait.* Also, recall that (a) refers to both "character" and "trait of character." Why both items there, but only the latter here?
8. A passive-voice verb, and none of the exceptions to preferring the active voice seem to apply here. To make it active—*the defendant may offer*—we need to restructure paragraphs (1), (2), and (3) into complete sentences.
9. Converting to the active voice eliminates *by an accused.* Another prepositional phrase bites the dust.
10. Legalese.
11. Once again, make it *character trait.* Also, paragraphs (1) and (2) use *trait of character* four times, then *character trait* the fifth time. But after saying *character trait* once, why not shorten to *trait* in all the later uses? We understand that that means "character trait."
12. Make it *alleged crime victim.* And note the four *of*-phrases in the 15 words beginning with *or* and ending with *crime.* Quite a feat.
13. Passive voice.
14. An unnecessary cross-reference that better organization would cure. The organization is seriously flawed. Here's why. Paragraph (1) purports to be about the accused's character, but in the middle we get a long condition having to do with a crime victim's character. That's what paragraph (2) is about—the victim's character. Hence the repetition in (2) of *evidence of a... trait of character of the alleged victim of the crime offered by an accused.* The restyled rule fixes the back-and-forth by creating three discrete categories in (2)(A), (B), and (C): the defendant's offering the defendant's own trait, and the prosecutor's responding; the defendant's offering the victim's trait, and the prosecutor's responding; and the prosecutor's offering the victim's trait of peacefulness in special circumstances.
15. See note 11.
16. For the record, paragraph (1) uses 15 prepositional phrases. The comparable, repetition-free parts of the restyled rule—believe it or not—use 3.
17. Don't change this heading to a possessive unless you also change the heading for paragraph (1). Parallelism rules.
18. *In a criminal case* also appears at the beginning of paragraph (1). The restyled rule uses the phrase once—a sign of better organization.
19. Change *imposed by* to *in.*
20. See note 11.
21. As pointed out in note 14, almost all the words beginning with *evidence* are repeated from paragraph (1). So we get another passive-voice verb and another blast of prepositional phrases.
22. Legalese.
23. Make it *the alleged victim's trait of peacefulness.*
24. Passive voice. The *be*-verb is implied: *evidence... [that is] offered.*
25. No need to repeat *alleged.*
26. See note 17.
27. One more time—make it *a witness's character.*
28. This paragraph, like (1) and (2), doesn't read well with the introductory language in (a): *Evidence of a person's... trait of character is not admissible... except:... Evidence of the character of a witness, as provided in Rules 607, 608, and 609.* The three paragraphs are technically items in a list (using the hybrid format mentioned earlier), but the list is ill-formed.

The restyled rule improves on the current rule in three basic ways. First, it restructures the rule. We now have certain exceptions in a criminal case and exceptions for a witness. And the exceptions in a criminal case are broken down into three categories. Second, those categories are set out in a list that reads smoothly with the introductory language and uses strong parallel constructions. Third, the restyled rule dispenses with the slew of passive-voice verbs and prepositional phrases that bedevil the current rule.

Restyled Rule 404(a)
Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Last Month's Contest

Last month, I invited you to revise current Rule 610. I suggested that you use *to attack or support* in your version, and that you go after the unnecessary prepositional phrases and multiword prepositions. There are eight prepositional phrases—or six if you take the two multiword prepositions (*for the purpose of* and *by reason of*) as units. Rule 610:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

The winner is Robert Harvey, former vice president and general counsel for DTE Energy Technologies, Inc. His revision (with one slight edit) is identical to the restyled rule:

> Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

The entries this month raised two good questions. Do we need *Evidence of*? And do we need *or opinions*? Just goes to show that revision could last forever, although projects must eventually end.

I received one entry that deserves an honorable mention.

> Dear Professor Kimble,
>
> As a project for my 8th-grade English class, I decided that we would rewrite the rule of evidence for your October contest. We discussed what we understood the rule to mean and then rewrote it as plainly as possible. Besides advocating clear writing, I am trying to get my class to see that what they learn in English class is useful in the outside world. Thank you for your contest and for your consideration.
>
> Rule 610: A witness's religious beliefs cannot be used to challenge or support his or her credibility.
>
> Yours truly,
> Barbara Shafer (P34786) and
> the Dearborn Guardian Lutheran 8th grade

A New Contest

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an A+ revision of current Rule 609(d) on juvenile adjudications. The deadline is November 24.

> (d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

This one's a little tougher than the previous three. Try your hand at it!

Joseph Kimble has taught legal writing for 25 years at Thomas M. Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language, *the editor in chief of* The Scribes Journal of Legal Writing, *the past president of the international organization Clarity, a founding director of the Center for Plain Language, and the drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and the Federal Rules of Evidence.*

TAB

8-9

Report on Sealing Cases
Prepared by the Sealed Cases Subcommittee for the Judicial Conference Committee on Rules of Practice and Procedure

I. Introduction

The federal courts have a longstanding and pervasive commitment to public access to court records. This commitment flows partly from the First Amendment right of access to court proceedings and from a common law right of access. At the same time, there is a longstanding and established recognition that it is sometimes necessary to restrict public access to certain court records. Federal court cases and filings may contain highly sensitive information that must be kept confidential for reasons ranging from protecting individuals' privacy to safeguarding national security, maintaining the integrity of ongoing law enforcement investigations, keeping witnesses, victims, or cooperating defendants safe, and to protecting the commercial value of trade secrets or proprietary data. Most commonly, the restriction relates to specific court filings or parts of filings in a case to which the public otherwise has access. But there are also circumstances in which an entire case is appropriately sealed from public access.

A variety of statutes and rules require or authorize the sealing of certain types of cases in the federal courts. For example, False Claims Act complaints are required by law to be sealed until the federal government decides whether to participate. A federal rule requires grand-jury matters to be sealed. Indictments and criminal complaints against defendants not in custody generally must be sealed so the defendants do not flee. Established case law also recognizes that sealing an entire case may be justified without a statutory or rule requirement. Because sealing an entire case is such a significant restriction on public access and shields the information needed to question or challenge the sealing, however, courts have recognized the importance of ensuring that such sealing orders are only entered when the proper showing has been made.

Electronic filing has made the presumptive right of public access to documents filed in the federal courts a practical reality by making court filings remotely accessible online. The federal courts' shift to electronic filing and the broad public access to court files has produced many benefits for litigants and the public. But electronic filing has also increased the risks resulting from mistaken

public filing of materials that should not be publicly accessible. Even if publicly accessible for only a short time, a mistaken public filing of such materials could result in very serious harm. As a consequence, electronic filing has increased the need for vigilance about prompt and accurate sealing of cases that should be sealed, without reducing the importance of preserving the general public right of access.

In 2006, Chief Judge Flaum, on behalf of the Seventh Circuit Judicial Council, raised questions about the handling of sealed cases that led to Judicial Conference action concerning the report CM/ECF would provide regarding sealed cases. Thereafter, Chief Judge Easterbrook indicated that this change did not fully address the concern raised by the Seventh Circuit Judicial Council because that concern was also about the frequency of sealing entire cases, and the criteria for such sealing. Against this backdrop, the Judicial Conference Executive Committee asked the Rules Committees, in consultation with any other appropriate JCUS committee, to examine the sealing of entire cases in the federal courts and to address Judge Easterbrook's recommendation that standards be developed to regulate such sealing orders. The Executive Committee authorized the Standing Committee on Rules of Practice and Procedure to establish this inter-committee Sealed Cases Subcommittee to perform this work. The Sealed Case Subcommittee consists of a judge from each of the six Rules Committees and a judge from the Court Administration and Case Management Committee, as well as a representative of the Department of Justice and an experienced court clerk. It also includes participation by all the Rules Committees' reporters.

The Sealed Cases Subcommittee worked with the Federal Judicial Center to research sealed cases in the federal courts. The FJC identified every matter filed in the federal courts during 2006 that was still sealed at the time of the FJC's study. For every sealed case filed in a Court of Appeals or having a CV (civil case) or CR (criminal case) docket number in a federal district court, the FJC determined the subject matter and examined the ground for sealing.

The FJC research shows that the number of sealed cases is a very small fraction of the total number of federal cases. The research also shows that the great majority of those sealed cases are

sealed because a statute or rule requires it or for another valid reason. But the FJC research also shows that some sealing orders that were proper when entered remain in place after the reason for sealing has expired, and that a small proportion of sealed cases were sealed on grounds that raised questions.

The Sealed Cases Subcommittee concluded that there is no need for new or amended Rules of Civil, Criminal, Bankruptcy, or Appellate Procedure to regulate the sealing of entire cases in the federal courts. Instead, this report recommends steps to be considered by the appropriate JCUS committees to ensure that entire cases are sealed only when consistent with the proper, and established, criteria.

The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing. That policy statement would recognize that an entire case is properly sealed only when consistent with the following criteria:

1. Sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;

2. A judicial officer makes or promptly reviews the decision to seal a case; and

3. The seal is lifted when the reason for sealing has ended.

The recommended steps to promote compliance with these criteria include the following:

1. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;

2. judicial and clerks' office education to ensure that both judges and clerks are aware that sealing an entire case must be a judicial decision, and that if a clerk or designee has sealed a case temporarily a judge will promptly review and decide whether the seal should continue;

3. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

4. judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

5. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

6. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

7. consideration by CACM or other appropriate committees of local administrative measures that courts could adopt to improve the handling of requests for sealing.

II. The Basis for the Findings and Recommendations

A. The Grounds for Sealing Entire Cases

The Subcommittee's work began by recognizing the grounds recognized as requiring or authorizing a court to seal an entire case. The most frequent is a command in a statute or a rule that certain matters be sealed. See memorandum dated Dec. 10, 2007, from Andrea Thomson entitled Statutes Requiring or Permitting Sealing, submitted with this report. Some of the most common are set out below.

> False Claims Act: 31 U.S.C. §3730(b)(2) directs that a complaint filed by a private person under the False Claims Act remain under seal and not be served on the defendant for at least 60 days to enable the Government to decide whether to

intervene. §3730(b)(3) permits the Government to move to extend the time the case remains under seal to enable it to complete its investigation, a request made necessary fairly frequently if the Government's investigation cannot be completed within the time specified in the statute.

Grand Jury Matters: Fed R. Crim. P. 6(e)(6) directs that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."

Indictments: Fed. R. Crim. P. 6(e)(4) authorizes a magistrate judge to "direct that the indictment be kept secret until the defendant is in custody" and directs the clerk to seal the indictment when the magistrate judge so orders.

Juvenile Delinquency Matters: 18 U.S.C. §5038(c) says: "During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the government, and others entitled under this section to receive juvenile records." §5038(a) very narrowly authorizes certain disclosures about such a proceeding, and otherwise provides that "information about the juvenile record may not be released."

Other statutes and rules authorize sealing of court records for specified reasons, often national security concerns.

In addition to statutes and rules authorizing or requiring sealing, the Supreme Court has recognized that the courts have authority to seal court records to deal with a variety of situations in which those records might "become a vehicle for improper purposes." See Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99 (1978). When justified by extraordinary circumstances and in the absence of less restrictive feasible and effective alternatives, sealing may extend to the entire case.

B. The Subcommittee's Work

The Sealed Cases Subcommittee limited its focus to fully sealed cases, the concern raised by the JCUS. The Subcommittee requested and obtained the assistance of the Federal Judicial Center in performing needed research. The FJC Report, Sealed Cases in Federal Courts (FJC, Oct. 23, 2009), provides a comprehensive picture of actual case-sealing practices in the federal courts during an entire calendar year (2006). A copy of the FJC Report is submitted with this report.

The FJC researchers used CM/ECF data to identify every matter filed in every district during calendar year 2006 and to determine how many were actually sealed. District courts are not consistent in labeling matters as civil – CV – or criminal – CR – cases, rather than as magistrate judge – MJ — or miscellaneous – MC – matters. For example, although most districts classified search warrant applications as MJ or MC, some included them in CR cases. Most districts, however, used the CV and CR designation to identify what are generally considered "cases," and used MJ or MC to designate more discrete matters that are not generally thought of as "cases." The diversity of practice affected the frequency of sealed "cases" in various districts. In order to be comprehensive, the FJC research took an expansive approach to what should be considered a "case," including any matter that was assigned a number.

Sealed civil cases (CV): Among 245,326 civil cases filed in the federal courts in 2006, there were 576 sealed cases, representing 0.2% of all civil filings (2 out of every 1,000 cases). 23 of 94 districts had no sealed civil 2006 cases. This is a very small number, particularly given the high percentage sealed because a statute or rule so required. Nearly a third of these sealed civil filings were qui tam actions, subject to a statutory sealing command. Another third are regarded as "cases" only because they were filed in a district that designated them "CV," but in other districts these matters would be designated "MJ" or "MC" and would not be recognized as a "case." Thus, two-thirds of the sealed CV cases were either required to be filed under seal by statute or would not be viewed as "cases" in most districts.

Of the remaining sealed civil cases, the largest categories were: habeas corpus petitions and other prisoner petitions involving juveniles or cooperating defendants whose lives might be in jeopardy if information about them was publicly available; other cases involving minors; and cases sealed to prevent litigants from filing pleadings or other documents in those cases because the filing was supposed to be in another, unsealed, case.

Sealed criminal cases (CR): Of 66,458 criminal cases filed in the federal courts in 2006, 1,077 (1.6%) were sealed. 13 of 94 districts had no sealed 2006 criminal cases. Some 226 sealed

"cases" were applications for various types of warrants. In most districts, such applications were not classified as criminal ("CR") cases. Disregarding these warrant applications leaves 851 sealed criminal cases; of those 705 (nearly 83%) were sealed for one of three reasons. A primary reason was to seal the indictment until the defendant was apprehended. Fed. R. Crim. P. 6(e)(4) authorizes a magistrate judge to "direct that the indictment be kept secret until the defendant is in custody" and directs the clerk to seal the indictment when the magistrate judge so orders. A second common reason was to protect a juvenile defendant's identity, again based on statutory directives; 18 U.S.C. §5038 directs that juveniles' identities be protected in juvenile delinquency proceedings, and 18 U.S.C. §3607(c) provides for expunging the record of defendants under 21 years of age who are subject to disposition under §3607(a). A third common reason was that sealing the case keeps secret details of a cooperating defendant's cooperation with the government. The appropriate handling of plea agreements with cooperating defendants is the subject of specific study by other JCUS committees and is not specifically addressed in this report. Additional sealed CR cases involved such reasons as sealing to protect victims (including juvenile victims), to protect trade secrets, and to protect information concerning the defendant's psychiatric examination.

Sealed magistrate judge matters (MJ): The FJC researchers used sampling to determine what kinds of MJ matters were sealed. That sampling showed that 83% were warrant applications, 10% were sealed criminal complaints, and 6% were grand jury and CJA matters. Only 1% of MJ matters sealed were outside these categories. No "cases" were among the sealed MJ matters, and the reasonableness of the initial sealing of the great majority of those matters is apparent.

Sealed miscellaneous matters (MC): The FJC researchers used sampling to examine the types of MC matters that were sealed. That sampling indicated that 58% were warrant applications, 30% were grand jury and CJA matters, 3% were requests from foreign governments for assistance with cases in their courts, 1% were forfeitures and seizures in which sealing may be needed to avoid tipping off the person from whom the seizure is to occur, and 8% are other matters. The "other matters" ranged from files opened for marriages performed in a territorial court to attorney discipline

situations to arbitration matters. As with MJ matters, there is no indication that these are "cases" in a conventional sense or that there was inappropriate sealing used.

Sealed appeals: Of 64,475 appeals to the courts of appeals from district court cases filed in 2006, there were 82 sealed appeals (slightly over 0.1%). Five of thirteen courts of appeals had no sealed 2006 appeals. Of the 82 sealed appellate files, 13 were resolved by published opinions and 27 were resolved by unpublished but public opinions, for a total of nearly half resolved by public opinions. 36 others were resolved without opinions, and three of the 81 sealed appeals were still pending when the FJC study was completed. Two appeals were resolved by sealed opinions or orders, and one was dismissed for lack of prosecution. Usually the sealing of the appellate file originated in the district court; if the district court sealed the case the appellate court did so as well. Of the sealed appellate matters, 18 were grand jury matters (22%), another 18 were juvenile prosecutions (22%), and 17 were criminal appeals involving cooperating defendants (21%).

Bankruptcy courts: For 2006 filings, the bankruptcy courts had almost no sealed cases. 651,488 bankruptcy court cases were filed in 2006. Among these, one court had expunged five cases and another court had expunged one case upon determining that the cases were fraudulently filed by somebody falsely claiming to be the debtor.

III. Analysis

1. The federal courts seal a very small number of cases. The number of actual sealed cases is extremely small. Most of these are sealed because a specific statute or rule so requires. The largest category of sealed civil cases is under the False Claims Act, a statute that directs that cases be sealed until the Government decides whether to intervene. Many criminal cases are sealed under the federal rule directing that grand jury matters be sealed. The great majority of other sealed cases were sealed for reasons that were clear and appropriate.

2. The legal criteria for sealing an entire case are established. Sealing an entire case is justified when required by statute or rule or on a showing of extraordinary circumstances. No new statutes or national rules are needed to establish the criteria for sealing entire cases. A variety of

statutes and rules already address sealing cases. Some command sealing for certain types of matters. Others call for judicial discretion to determine whether to seal. This statutory and rule-based authority, coupled with the authority the Supreme Court has recognized to avoid use of court records "for improper purposes," has led to the development of case law setting the criteria for proper sealing. Case law establishes that sealing can be important to protect interests that range from national security to personal safety, privacy to property rights, and for effective law enforcement, but that sealing -- even for a particular filing within a case -- is an exception to the presumption of public accessibility. Sealing an entire case requires a stronger showing of need and closer judicial scrutiny than the episodic sealing of a particular filing within a case. When it is not commanded by statute or rule, such sealing requires a showing of extraordinary circumstances and the absence of a feasible, effective, narrower alternative, such as redacting information or sealing specific documents within a case.

3. Sealing an entire case should be a last resort, to be used only if other less restrictive measures are infeasible or ineffective. Under legal principles expounded in each circuit, sealing an entire case requires a more compelling and articulated reason and implicates closer judicial scrutiny than the episodic sealing of a particular paper within a case. Sealing an entire case should be used only on a showing not only of compelling circumstances, but also the absence of feasible and effective alternatives. These alternatives include expunging or redacting information (for example, using initials or another shorthand rather than a name, a place, or a proprietary formula), or adopting other customized means to accommodate the legitimate concern that caused a party to request sealing.

4. Decisions to seal are judicial decisions that should be made or promptly reviewed by a judicial officer. Of necessity, initial decisions to seal cases must in some instances be made by the clerk's offices. Given electronic access, mistaken failure to seal for even a short period could have very harmful consequences, so intake personnel in clerk's offices must have some authority to file under seal those matters appearing to come within statutory or rule mandates for sealing. But the

decision to seal must be a judicial determination. A judge must promptly review a case that is initially sealed by a clerk's office employee and decide whether it should remain sealed.

5. There have been instances of questionable sealing. The FJC study showed that some cases that were properly sealed were kept sealed for too long a period; in a few cases, the sealing was too extensive; and, in even fewer cases, the sealing was for a questionable purpose.

a. Sealing for too long. The FJC study discovered that cases that had properly been sealed at the outset were sometimes still sealed although the original justification had passed. For example, complaints under the False Claims Act must be sealed until the Government decides whether to intervene. But there were several instances in which a False Claims Act case remained sealed after that decision had been made or the court refused to grant further extensions of time for the Government's investigation. An indictment might needlessly remain sealed even after it was voluntarily dismissed by the government before the defendant appeared. Because of the variety of reasons for sealing, across-the-board rules on the duration of sealing are not feasible. And it may not be necessary to unseal a given matter if all the filings can now be found in a separately filed unsealed case. An example is a sealed miscellaneous file containing a complaint or indictment against a person not in custody; once the defendant is apprehended and a criminal file is opened, the complaint will be publicly available in the criminal file and it is not necessary to unseal the miscellaneous file.

b. Sealing too much. The FJC study also revealed a few sealed cases in which the purpose of the sealing apparently could have been accomplished by less restrictive methods. Occasionally the privacy of juveniles was protected by sealing the entire case when it may have been adequate to replace the juvenile's name by initials. Or a civil case involving intellectual property may be sealed when confidentiality could be protected by sealing some documents and redacting others.

c. Sealing for an questionable purpose. The FJC study found a few cases in which the purpose of the sealing appeared inappropriate or erroneous. In some instances, the assigned

judge was not aware the case had been or continued to be sealed. In a very few cases, it appeared that sealing resulted from the parties' request or to protect against unwanted publicity. The law is clear that sealing an entire case for such reasons is not justified. The Subcommittee did not, of course, have complete information about these sealed cases. As the Supreme Court has recognized, it is sometimes proper to seal judicial records to protect against their use "for improper purposes," and it is accordingly impossible to be certain about the propriety of any specific sealing decision without full knowledge of the particulars.

IV. Subcommittee Recommendations

1. The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing of entire cases. That policy statement could recognize that an entire case is properly sealed only when consistent with specified criteria, such as the following:

a. sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;

b. a judicial officer makes or promptly reviews the decision to seal a case; and

c. the seal is lifted when the reason for sealing has ended.

2. The Subcommittee recommends that CACM and other appropriate Judicial Conference Committees consider the following additional steps to improve sealing practices:

a. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;

b. judicial and clerks' office education to ensure that both judges and clerks are aware that sealing an entire case must be a judicial decision and if a clerk or designee has sealed a case temporarily, a judge will promptly review and decide whether the seal should continue;

c. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

d. judicial education to ensure that judges are aware of the need to limit the duration of initially appropriate sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

e. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

f. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

g. consideration by CACM or other appropriate committees of administrative measures that could be adopted to improve the handling of requests for sealing by, for example, ensuring (particularly when the initial decision must be made by the clerk's office) that such requests are supported by legally adequate grounds, and that initial sealing by personnel of the clerk's office is promptly reviewed by a judicial officer.

V. Conclusion

Public access to court records is universally recognized as essential to maintaining public knowledge about, and confidence in, the federal judiciary. Although certain persons and subjects are entitled in unusual circumstances to a carefully constrained protection from injurious and unjustified exposure to public scrutiny, the public should accurately perceive that, except for sealing done in those carefully circumscribed instances and for only so long as necessary, the records of the judiciary

are open to public inspection both by in-person inspection and by remote electronic inspection. The FJC Report, based on a study of unprecedented thoroughness, has shown that the actual number of sealed cases in federal courts is extremely small, and that the great majority of those cases were sealed pursuant to a statute or rule or for some evident reason. Although the FJC study has also identified a very small number of instances of sealing for what appear to be weak reasons or by mistake, no legislation or rule changes are needed to deal with these rare problems. Instead, the administrative measures outlined above appear the best way to ensure that even this very small number of apparent mistakes is minimized, although no system can entirely eliminate mistakes.

TAB

10A

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: May 27, 2010

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 29 and 30, 2010, in New Orleans, Louisiana. Among the matters before the Committee were the proposed amendments and new rules that were published for public comment in August 2009. More than 150 written comments were submitted in response to the publication. The Committee held a hearing in New York City on February 5, 2010. Fifteen witnesses testified on the proposed amendments to two rules and on one proposed new rule. The Committee also conducted a telephonic hearing with one witness on December 22, 2009.

Through a series of telephonic subcommittee meetings and at its New Orleans meeting, the Committee carefully considered all of the comments and testimony it had received and, as is discussed below, it is recommending changes to several of the published rules in response. The Committee also studied a number of new proposals for amendments to the Bankruptcy Rules and Forms.

The Committee took action on the following matters, which it presents to the Standing Committee with the indicated recommendations:

(a) approval for transmission to the Judicial Conference of published amendments to Rules 2003, 2019, 3001, 4004, 6003, Official Forms 22A, 22B, and 22C, and new Rules 1004.2 and 3002.1;

(b) approval for transmission to the Judicial Conference without publication of amendments to Official Forms 20A and 20B; and

(c) approval for publication for comment of amendments to Rules 3001, 7054, and 7056, and Official Forms 10 and 25A, and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2).

After a discussion of the action items listed above, this report presents information on the following topics: the Committee's continued work on a possible revision of the bankruptcy appellate rules, the status of the Forms Modernization Project, and changes in the Committee's membership.

II. Action Items

A. Items for Final Approval

1. Amendments and New Rules Published for Comment in August 2009. **The Advisory Committee recommends that the proposed amendments and new rules that are summarized below be approved and forwarded to the Judicial Conference.** The texts of the amended rules and forms and of the new rules are set out in Appendix A.

Rule 1004.2 is new. Subdivision (a) requires that the entity filing a chapter 15 petition identify in the petition the country in which the debtor has the center of its main interests ("COMI"). It also requires that the filer list each country in which a case involving the debtor is pending. Subdivision (b) sets a deadline for challenging the statement of the debtor's COMI. In response to comments received after initial publication of the proposed rule in August 2008, the Committee changed the deadline in subdivision (b) for filing a motion challenging the COMI designation from "60 days after the notice of the petition has been given" to "no later than seven days before the date set for the hearing on the petition."

No comments were submitted on the proposed rule in response to the August 2009 publication. Only stylistic changes were made after that publication. The Committee voted unanimously to approve it.

Rule 2003 is amended in subdivision (e) to require the presiding official at a meeting of creditors to file a statement specifying the date and time to which the meeting is adjourned. This requirement will ensure that the record clearly reflects whether the meeting of creditors was concluded or adjourned to another day.

Nine comments were submitted about this proposed amendment. Eight of the comments expressed support for the amended rule as proposed. These comments were submitted by six individual members of the consumer bar, by Bankruptcy Judge Marvin Isgur of the Southern District of Texas, and by David Shaev on behalf of the National Association of Consumer Bankruptcy Attorneys.

The ninth comment was submitted by Deborah A. Butler, Associate Chief Counsel of the IRS, on behalf of the Office of Chief Counsel. She recommended revising the proposed amendment to require the official presiding at the meeting of creditors to specify whether the meeting is being held open pursuant to § 1308(b) to allow a taxpayer additional time to file a tax return, or adjourned for some other purpose. Only if the trustee declared that the meeting was being "held open" under § 1308(b) would the debtor be protected from dismissal or conversion under § 1307(e) for the failure to file a tax return within the time specified by § 1308.

The Committee, by a 9 to 4 vote, approved the amendment to Rule 2003(e) as published, with a clarifying change to the Committee Note. It concluded that holding open a meeting is equivalent to adjourning it to a specific date and that a chapter 13 case should not be subject to conversion or dismissal merely because of the language the trustee uses in adjourning a meeting of creditors.

Rule 2019 is amended to expand the scope of the rule's coverage and the content of its disclosure requirements. As amended, the rule requires disclosures in chapter 9 and chapter 11 cases by committees, groups, or entities that consist of or represent more than one creditor or equity security holder. The type of financial information that must be disclosed is expanded to extend to all "disclosable economic interests," a term that is broadly defined in subsection (a) to include, not just claims or interests, but all economic rights and interests that could affect the legal and strategic positions that a stakeholder takes in a case. Stylistic and organizational changes are made throughout the rule, resulting in new subdivisions (c), (d), and (e).

Publication of the proposed amendments to this rule attracted much attention. Seven witnesses presented testimony concerning the Rule 2019 amendments at the Committee's hearing in New York on February 5, 2010, and 14 individuals or organizations submitted written comments on the amendments. The major topics addressed by the testimony and comments are discussed below.

Price and date of acquisition information. Most of the opposition to the published amendments focused on proposed Rule 2019(c)(2)(B) and (C) and (c)(3)(B) and (C). As published, these provisions would have required the disclosure of the date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. These disclosure obligations would have applied to each covered entity, indenture trustee, member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official committee).

The objectors to these provisions raised a consistent set of concerns:

- The price paid for a claim or interest is generally irrelevant to any issue in a chapter 11 case.
- If this information should ever be relevant, it could be obtained through discovery or pursuant to the court's inherent authority to order its disclosure.
- Pricing information is highly guarded by distressed debt purchasers. Requiring its disclosure will allow competing firms to determine the disclosing party's trading strategy.
- Parties in interest engage in the strategic use of the authority to compel the disclosure of this confidential information.
- The existence of this requirement, proposed to be made explicitly applicable to *ad hoc* committees, will discourage the formation of such groups and will decrease the purchasing of distressed debt.
- The disclosure of the date of purchase enables other parties to determine the purchase price. Thus the required disclosure in all cases of the date of purchase will result in the acquisition price being revealed, whether or not the court directs its disclosure.

Bankruptcy Judge Robert Gerber of the Southern District of New York testified in favor of the published amendments, including the provisions for disclosure of date and price of acquisition. He indicated, however, that a more general disclosure of the time of acquisition and a required showing of relevance of price might be sufficient to serve the rule's purposes.

Disclosure regarding clients who do not actively participate in the case. The National Bankruptcy Conference ("NBC") commented that an entity, such as a law firm, should not be made subject to the rule when it represents more than one client with respect to a chapter 11 case but it does not appear in court to seek or oppose the granting of relief on behalf of more than one of those clients. NBC argued that if a client remains passive in the case, there is no reason to require the public disclosure of its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

Exclusions from the rule. Several comments asserted that administrative agents under credit agreements should not be required to disclose information regarding each of the lenders in its syndicated credit facility; others argued further that such agents should be exempted altogether from the rule's coverage. It was argued that these entities are not agents in the traditional sense of that term since the lenders are free to take positions adverse to the agent. Furthermore, it was contended, the lenders themselves are often not acting in concert with each other and so should not be covered by the rule just because there happens to be an administrative agent under the credit agreement.

Somewhat similarly, the argument was made that indenture trustees should not be required to make disclosures regarding every bondholder under the applicable indenture merely because the bonds were issued under an indenture. Another comment stated that the rule should be revised to make clear that it does not cover class action representatives.

Supplemental statements. Several comments addressed the proposed requirement in subdivision (d) that supplemental verified statements be filed monthly, setting forth any material changes in the facts disclosed in a previously filed statement. The comments expressed concern that the requirement would be overly burdensome on the parties and the court. Some commentators sought clarification that a supplemental statement would not have to be filed if no changes had occurred. One comment suggested that verified statements be supplemented only when the group, committee, or entity that filed the original statement was seeking to participate in matters before the court. That change, it was argued, would relieve parties no longer active in the case from the continuing obligation to file supplemental statements.

The enforcement provision of subdivision (e). The published draft of amended Rule 2019 proposed mostly organizational and stylistic changes to the existing provisions of Rule 2019(b), which authorize sanctions for the failure to comply with the rule's requirements. Under the revised rule, those provisions are set forth in subdivision (e). Although this part of the rule did not attract attention at the New York hearing, two sets of written comments criticized the breadth of proposed subdivision (e). Like the existing rule, the proposed subdivision would have authorized the court to determine and impose sanctions for violations of applicable law other than Rule 2019. It would also continue to specify certain materials that the court could examine in making its determination.

Both the comment submitted by the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") and the comment submitted by the Insolvency Law Committee of the Business Law Section of the California State Bar questioned the authority of bankruptcy courts to determine "whether there has been any failure to comply with any other applicable law regulating the activities and personnel of any entity, group, committee, or indenture trustee" and "whether there has been any impropriety in connection with any solicitation." LSTA and SIFMA also argued that the materials that the court can examine in making a determination under this subdivision should be left to the Federal Rules of Evidence.

Disclosure by entities that are seeking or opposing relief. As published, Rule 2019(b) would have authorized the court, on motion of a party in interest or on its own motion, to require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief. This part of the rule would apply to individual entities that do not represent others. While disclosure by such entities would not be routinely required, the provision would authorize the court to order disclosure when knowledge of a party's economic stake in the debtor would assist the court in evaluating the party's arguments.

Two commentators expressed concerns about this part of the proposed rule. The Clearing House Association argued that the addition of the provision was inconsistent with the original purpose of the rule – protection of represented parties; that the information could be obtained by means of discovery or Rule 2004 if relevant; and that the provision would lead to abusive litigation by parties seeking merely to harass opponents. Bankruptcy Judge Michael Lynn of the Northern District of Texas also expressed concern about the likely tactical use of this provision. He suggested

that an order for such disclosure by an entity that is not representing others should issue only on the court's own motion, or on motion by the U.S. trustee, the case trustee, or an examiner.

Repeal of Rule 2019 or adoption of an alternative to its verified statement requirement. The Committee's consideration of Rule 2019 was prompted by a suggestion of two trade associations that the rule be repealed. After publication of the proposed amendments, however, those organizations no longer advocated repeal. The only commentator who supported repeal of Rule 2019 was attorney Thomas Lauria. In both his testimony and his written comments, he argued that the rule chills participation by *ad hoc* committees in chapter 11 cases, that it is used improperly for tactical purposes by parties, and that its valid purpose can be fulfilled by the use of discovery. Another attorney, Martin Bienenstock, suggested that parties be allowed to satisfy Rule 2019 by filing three certifications rather than the verified statement required by the rule. The certifications would require a party to state the amount of its pre- and postpetition claims against the debtor and whether it held economic interests in the debtor or in an affiliate of the debtor that would increase in value if the debtor's estate decreased in value.

The overwhelming majority of commentators supported a clarified and reinvigorated Rule 2019, even if they opposed specific aspects of the proposed amendments. They favored providing greater transparency in the chapter 11 reorganization process and permitting creditors and equity security holders to have access to information about possible conflicts of interest of those purporting to represent them.

The Committee's careful consideration of all the views expressed in the testimony and comments led it to make several changes to the published rule. In addition to stylistic changes, the Committee unanimously recommends that revised Rule 2019 be approved with the following changes made after publication, all of which are responsive to suggestions made in the comments and testimony and narrow in some respects the provisions of the published rule:

- the addition of a definition of "represent" or "represents" in subdivision (a)(2) that limits the meaning of the terms to taking a position before the court or soliciting votes on a plan, thereby removing entities that are only passively involved in a case from coverage under the rule;
- the addition of a provision in subdivision (b)(1) providing that the covered groups, committees, and entities are those that represent or consist of multiple creditors or equity security holders that act in concert to advance their common interests and are not composed entirely of affiliates or insiders of one another;
- the elimination of the provision in subdivision (b) of the published amendments that authorized the court to require disclosure by an entity that does not represent anyone else;
- the addition of subdivision (b)(2), which excludes certain entities from the rule's disclosure requirements unless the court orders otherwise;
- the elimination from subdivision (c) of the authorization for the court to order the disclosure of the amount paid for a disclosable economic interest;

- with respect to disclosure of the date of acquisition of a disclosable economic interest, the limitation of the requirement in subdivision (c) to the quarter and year of acquisition and the restriction of its application to an unofficial group or committee that claims to represent any entity other than its members;
- revision of subdivision (d) to require the filing of supplemental statements only when a covered entity, group, or committee is taking a position before the court or solicits votes on a plan, and any fact disclosed in its most recently filed statement has changed materially;
- revision of subdivision (e) to limit the scope of this sanctions provision to failures to comply with the provisions of Rule 2019 and to eliminate the enumeration of materials the court may examine in making a determination of noncompliance; and
- the addition of a sentence to the Committee Note stating that the rule does not affect the right to obtain information by means of discovery or as ordered by the court under authority outside the rule.

Rule 3001 is amended to prescribe in greater detail the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the possible consequences of failing to provide the required information. As published, existing subdivision (c) was redesignated as (c)(1), and it included a new provision applicable to a claim based on an open-end or revolving consumer credit agreement. The new clause would have required the proof of claim to be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. Based on the testimony and comments that were submitted, the Committee voted to withdraw that proposed provision. In its place, the Committee recommends approval for publication of a new subdivision (c)(3), which is discussed below in section II B of this report.

New subdivision (c)(2) requires additional information to be filed with a proof of claim in a case in which the debtor is an individual. This additional information includes an itemization of interest, fees, expenses, and other charges incurred prior to the petition and included in a claim; a statement of the amount necessary to cure any prepetition default on a claim secured by a security interest in the debtor's property; and, for a claim secured by a security interest in the debtor's principal residence, an escrow account statement as of the petition date if an escrow account has been established. Subdivision (c)(2) also authorizes the imposition of sanctions on a creditor who fails to provide the information required by this subdivision.

The Committee received numerous comments and testimony favoring and opposing the published version of Rule 3001(c)(2) – both as applied to credit card and other unsecured claims and as applied to home mortgage claims. They are summarized below.

Requirement in subparagraph (A) for itemized statement of interest, fees, expenses, or charges. Most of the comments concerning this provision related to unsecured claims, particularly those based on credit card debt. Despite the current and longstanding requirement of the proof of claim form that an "itemized statement of interest or charges" be attached if the "claim includes interest or other charges in addition to the principal amount of claim," commentators opposing this

proposed rule provision asserted that it is often impossible to break out the components of credit card debt because, depending upon the terms of the applicable credit agreement, unpaid interest and fees may be folded into the principal balance. They further contended that in most bankruptcy cases the debtor has no need for this information. While they acknowledged that mortgage lenders may have a history of including inflated or unnecessary fees and charges in their claims, they argued that this problem does not generally exist with respect to unsecured credit card claims.

Two comments addressed this requirement as it applies to mortgage claims. Attorney John Cannizzaro suggested that this provision should require more detail. He proposed that the following sentence be added to subparagraph (A): "The itemized statement shall include evidence of the expenditure, the identity of the entity to whom the payment was made and the reason for the expenditure." The other comment was submitted by Judge Marvin Isgur, and it is discussed below in connection with subparagraph (B).

Requirement in subparagraph (B) for a statement of the amount necessary to cure any default as of the date of the petition. Three comments addressed this requirement. The written comment submitted on behalf of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association raised two objections to this requirement. First, it noted that in the case of a judgment lien, the cure amount would be the entire indebtedness. Second, it questioned the need for the inclusion of this requirement in the rule since the proof of claim form already requires this information to be provided.

Another comment on this subparagraph was submitted by Bankruptcy Judge Marvin Isgur of the Southern District of Texas in his written comments. While supporting the purpose behind this provision and subparagraph (A), Judge Isgur questioned the effectiveness of the two provisions in addressing the problems that he has encountered with home mortgage proofs of claim. He said that a full loan history, which provides more detailed information about the assessment of fees, expenses, charges, and the application of payments, is needed. Judge Isgur expressed particular concern that, without the submission of a full loan history, it may not be evident when payments were actually made by the debtor (as opposed to the months for which payments were applied by the mortgagee). He advocated the use of a form similar to the local form that has been adopted by his district.

The National Association of Consumer Bankruptcy Attorneys also urged that a complete loan history be required. It stated that "[w]ithout such documents, a trustee cannot know how much of the amount claimed is for penalties, such as late charges and overbalance fees, that are classified differently in bankruptcy."

Requirement in subparagraph (C) for an escrow account statement. Three comments specifically addressed this provision. First, the written comment of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association noted that an escrow statement is already required to be provided by local rules in many jurisdictions. The comment expressed the need for a uniform national form to provide this information and suggested that the proposal be withdrawn until such a form is developed.

Second, chapter 13 trustee Debra Miller, on behalf of the National Association of Chapter Thirteen Trustees' Mortgage Liaison Committee, raised concerns about this provision. She explained that some smaller servicers lack the capacity to run an escrow analysis as of a particular date (such as the date of the filing of the petition).

Finally, Judge Isgur, in both his testimony on December 22, 2009, and his written comments, raised a concern about subparagraph (C). He stated that the requirement of an escrow account statement prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law might conflict with the Fifth Circuit's decision in Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (2008). He described that decision as holding that the prepetition arrearage includes all amounts that the home mortgage lender could have demanded be paid into an escrow account prior to the petition date. He was concerned that an escrow account statement prepared according to applicable nonbankruptcy law would result in a smaller prepetition escrow arrearage, which could be cured over the life of the plan, and would lead to a larger postpetition escrow adjustment, which would have to be paid as part of the debtor's ongoing mortgage payments.

Sanctions under subparagraph (D). This is the part of proposed Rule 3001(c)(2) that attracted the most attention and opposition. Several of the comments submitted by persons other than members of the consumer bankruptcy bar raised concerns about this provision. The overall theme of these comments was that the proposed sanctions are overly harsh, are inconsistent with the Code, exceed the authority under the Rules Enabling Act, and are attempting to address a problem that has not been shown to exist. The sanctions in proposed Rule 3001(c)(2)(D) can be imposed on all types of claimants in cases of individual debtors, and the comments generally did not distinguish between the impact of the provision on inadequately documented home mortgage proofs of claim and on unsecured or other types of secured claims.

The most detailed critique of this provision was submitted by Professor Bernadette Bollas Genetin of the University of Akron School of Law. She argued that the provision sweeps too broadly and that by requiring the attachment of additional supporting documentation in every case, even when there is no demonstrated need for the information, the proposed amendments to Rule 3001(c), including its sanction provision, would abridge creditors' substantive rights in violation of the Rules Enabling Act. Viewing the sanction in subparagraph (D) as being tantamount to claim disallowance, she contended that it is inconsistent with § 502 of the Code, as well as disproportionate to the violation in most cases.

Representatives Lamar Smith (ranking minority member of the House Judiciary Committee) and James Langevin of Rhode Island also expressed concerns about the sanctions, focusing primarily on the impact of the rule on unsecured creditors. Both Congressmen questioned whether there was evidence of a significant problem of unsupported claims being filed in consumer cases, and Rep. Smith noted the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. He further questioned the authority to provide for the disallowance of claims for failure to comply with the requirements of a rule, as opposed to the grounds for disallowance listed in § 502(b) of the Code.

Likewise, attorney Patti H. Bass contended that subparagraph (D) in effect provides a new basis for the disallowance of a claim, one that is not authorized by the Code. She argued that the provision is therefore in conflict with the Supreme Court's decision in Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co., 549 U.S. 443 (2007), which holds that the grounds for disallowance are limited to the ones statutorily specified. She further submitted that the sanction provision would create an incentive for debtors to refrain from scheduling debts that they know they owe if they believe that the creditor lacks all of the documentation that would be required under the rule. The debtor would just object to the creditor's insufficiently supported proof of claim, and the creditor would be prevented by the sanction provision from presenting its proof of the validity of the claim in response to the objection.

The comment of John McMickle on behalf of the Housing Policy Council, Financial Services Roundtable, American Bankers Association, and the Mortgage Bankers Association argued that the sanction provision "runs afoul of the Rules Enabling Act by 'modifying' and 'diminishing' a mortgage servicer's statutory right to rely on a presumption of validity for timely-filed proofs of claim." The comment made by Philip Corwin on behalf of several of the same organizations was similar.

Finally, the Insolvency Law Committee of the Business Law Section of the California State Bar commented that the proposed sanctions are too harsh. This group suggested that instead of precluding the creditor from using any omitted information to prove its claim, an insufficiently supported proof of claim should be temporarily disallowed and the claimant should be given an opportunity to provide the missing documentation.

On the other side of the issue, numerous comments filed by consumer bankruptcy lawyers and trustees strongly supported the proposed amendments. They recounted their frustrating experiences in dealing with bare proofs of claim filed by bulk purchasers of credit card debt. They said that claims often failed to comply with existing documentation requirements and that it was impossible to determine how the claim amounts were calculated. Furthermore, they argued, when additional information was sought, claimants frequently failed to respond until an objection was filed, at which point they either withdrew their claims or belatedly provided information that should have been attached to the proof of claim.

Consumer lawyers also expressed frustration with the failure of mortgage claimants to comply with the existing rule requirements and noted their gratitude for the Committee's efforts to address the problems. Representatives John Conyers, Jr., (chair of the House Judiciary Committee) and Steve Cohen (chair of the Subcommittee on Commercial and Administrative Law) submitted a comment that expressed the need for "more enforcement tools" to "polic[e] creditor abuses in consumer bankruptcy cases." They noted testimony given at a congressional hearing that asserted that the filing of false proofs of claim in bankruptcy cases had led families to lose their homes.

Debtors' lawyers explained the disincentives to challenging inadequately documented claims. Debtor's counsel often receives no additional compensation for the effort, and any money freed up

from payment to the creditor whose claim is challenged goes to other unsecured creditors. In some cases, they said, the cost of objecting would exceed the payment that would be made to the creditor. Nevertheless, some lawyers or trustees said that, when they had pursued challenges to claims filed by bulk purchasers of credit card claims, they had discovered claims that were time-barred, filed against the wrong debtor, or excessive in amount.

Supporters of the amendments applauded the proposal to provide sanctions for the failure of claimants to comply with the rules. They noted the burdens the Bankruptcy Code and Rules place on debtors seeking bankruptcy relief and expressed the view that bulk purchasers should not be free to ignore rule requirements based on assertions that compliance would be unduly burdensome. Some members of the consumer bar advocated strengthening the proposed requirements and sanctions.

The Committee carefully considered all of the comments and testimony regarding Rule 3001(c)(2), and it engaged in extensive discussion of the sanction provision. Following its deliberations, the Committee voted to recommend final approval of the provision, with the following changes made to the published draft of subdivision (c)(2):

- Subparagraph (C) was revised to refer to the official form that is being proposed as a required attachment for a proof of claim filed by a creditor with a security interest in the debtor's principal residence. The Committee is recommending that form (Official Form 10 (Attachment A)) for publication for comment in August 2010.
- In subparagraph (D), the sanction provision was revised to eliminate the phrase "shall be precluded," and to provide that the court "may, after notice and hearing, take either or both" of the listed actions.
- The term "security interest" was added to the discussion in the Committee Note of subdivision (c)(2)(B) to underscore that the requirement of a statement of the amount required to cure a prepetition default applies only to consensual liens, and not to judgment liens.
- The discussion in the Committee Note of subparagraph (D) was expanded. As revised, it states that grounds for disallowance of a claim are governed by § 502(b) of the Code and that inadequate documentation of a proof of claim, by itself, is not a basis for disallowance. The Committee Note now also points out that the court retains discretion to allow an amendment to a proof of claim under appropriate circumstances and to impose a sanction different from or in addition to the preclusion of the introduction of evidence.
- Stylistic changes were made to the provision.

Rule 3002.1 is new. It assists in the implementation of § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. As published, subdivision (a) required the holder of a claim secured by a security interest in the debtor's principal residence to provide at least 30 days' notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Subdivision (b) prescribed the procedure for giving that notice. Subdivision (c) required

the holder of a home mortgage claim to give an itemized notice of any postpetition fees, expenses, or charges within 180 days after they are incurred, and it allowed the debtor or trustee to challenge those additional charges within a year after notice is given.

Subdivisions (d)-(f) established a procedure for determining whether the debtor has cured any default and is otherwise current on the debtor's mortgage payments at the close of a chapter 13 case. Subdivision (g) specified sanctions that could be imposed if the holder of a claim secured by the debtor's principal residence failed to provide any of the information required by this rule.

The Committee received approximately 100 written comments on the published rule, and three witnesses testified concerning it. About three-fourths of the comments were submitted by members of the consumer bankruptcy bar in support of the rule. Several of those commentators described the difficulty they have encountered with the misapplication of payments during the pendency of a chapter 13 case and the lack of information about postpetition mortgage payment changes and the assessment of charges. Attorney Annabelle Patterson, for example, stated that she has had clients successfully emerge from chapter 13, believing that they were current on their mortgage payments, only to be immediately confronted with a notice of delinquency.

None of the comments or testimony opposed the rule in its entirety, but some suggested the need for revision of certain of its provisions. The most significant of these comments are briefly summarized below by category.

Timing of notice of payment changes. Three comments raised questions about the proposed requirement of published subdivision (a) that a mortgagee file a notice of payment change "no later than 30 days before a payment at the new amount is due." They expressed concerns about how this provision would apply to loan payments that adjust frequently. One comment suggested that to be consistent with the Truth in Lending Act's notice requirement for adjustable rate mortgages, the notice required by the rule should be given "at least 25, but no more than 120, calendar days prior to the due date of the new payment amount."

Filing of notice of payment changes. The comments reflected a division of opinion within the court system about the requirement that the notice of payment change be filed as a supplement to the proof of claim (i.e. on the claims register), rather than on the case docket. A comment submitted on behalf of the Bankruptcy Judges Advisory Group supported the rule's provision for the filing of the notice as a supplement to the proof of claim, which filing can be made by a creditor without the assistance of a lawyer. Another comment, however, indicated that a majority of bankruptcy clerks prefer that payment change notices be filed on the case docket.

Timing of notice of fees, expenses, and charges and of motion for court determination of validity. Three comments expressed concern about the requirements of subdivision (c) of the published rule that the mortgagee serve a notice of fees, expenses, and charges "no later than 180 days after the date when the fees, expenses, or charges are incurred" or that the debtor or trustee file a motion "no later than one year after service of the notice" to obtain a court determination of the

validity of the fees, expenses, and charges. Testifying at the New York hearing, attorney Philip Corwin stated that compliance with the 180-day requirement may not be feasible in a significant number of cases. His later-submitted written comments did not elaborate on this assertion. The comment submitted by John McMickle on behalf of the Housing Policy Council and other groups suggested without explanation that the 180-day provision be changed to one year and that the provision for filing a motion to seek a judicial determination be changed from one year to 90 days. Finally, Bankruptcy Judge Howard R. Tallman of the District of Colorado stated that the 180-day notice requirement could result in unnecessary supplementation in chapter 13 cases that are never successfully completed. He also noted that both debtors' and creditors' lawyers in his district expressed concern about the costly prospect of annual litigation over potentially small amounts of fees and charges.

Procedure for determining the status of the debtor's payments at the end of the case. Several comments raised issues about the procedure provided in subdivisions (d) - (f) of the published rule regarding the debtor's successful cure of any default and completion of all payments due after the petition. One concern related to the timing of the notice provision. Marie-Ann Greenberg, a standing trustee in the District of New Jersey, pointed out that mortgage defaults, especially when the amounts are relatively small, are sometimes cured early in the case. In such cases the procedure specified in subdivisions (d) - (f) would not result in a determination upon the conclusion of the case that the debtor was current on all payments. Two other comments expressed similar concerns.

Another issue was raised by Bankruptcy Judge Marvin Isgur of the Southern District of Texas in his written comments. He suggested that, in place of the proposed procedure, the rule should authorize a motion at the end of the case for a determination that the debtor is current on all ongoing mortgage payments and has paid all arrearages. The court's ruling on this motion would have a preclusive effect on both parties. Thus if the mortgage were determined to be current at the end of the case, the mortgagee would be precluded from declaring a default and initiating foreclosure proceedings in state court once the bankruptcy case was closed.

Appropriateness of the rule in all districts. Several comments suggested that proposed Rule 3002.1 is designed for or is appropriate only in so-called "conduit" districts – those in which the chapter 13 trustee disburses all mortgage payments – as opposed to districts in which the debtor makes ongoing mortgage payments directly to the mortgagee. These comments were based on the provisions of the rule that require notices to be filed on the claims register and service to be made on the trustee (as well as on the debtor and debtor's counsel).

The Committee made several changes to the published Rule 3002.1 in response to the comments and testimony it received:

- As a result of an organizational revision of the rule, the subdivision designations were changed.
- The timing of the notice of payment change, now addressed by subdivision (b), was changed from 30 to 21 days before payment must be made in the new amount.

- The triggering event for the filing of the notice of final cure payment, now addressed by subdivision (f), was changed to the debtor's completion of all payments required under the plan. The subdivision now requires the notice to inform the holder of the mortgage claim of its obligation to file and serve a response under subdivision (g).
- The provision governing the consequences of the failure to provide information as required by the rule, now subdivision (i), was revised in the same manner as the sanction provision of Rule 3001(c)(2)(D).
- A sentence was added to the first paragraph of the Committee Note that clarifies that the rule applies in all districts, regardless of whether ongoing mortgage payments are made directly by the debtor or by the chapter 13 trustee.
- Stylistic changes were made throughout the rule and Committee Note.

With these changes made to the preliminary draft of Rule 3002.1, the Committee unanimously recommends that it be given final approval.

Rule 4004 is amended to permit a party under limited circumstances to seek an extension of time to object to a debtor's discharge after the time for objecting has expired. In some cases the discharge is not entered immediately after the objection deadline passes. That situation creates the possibility during the resulting gap period – between the expiration of the time for objecting and the entry of a discharge – that a party may discover information that would have provided a basis for objecting had it been known in time to object. Even when the discharge is later entered, revocation of the discharge under § 727(d) may not be available based the information acquired in the gap period, because some grounds for revocation require the complaining party to have learned of the debtor's misconduct *after* the entry of the discharge. Subdivision (b) of the Rule is amended to allow a party in that circumstance to file a motion for extension of time to object to the debtor's discharge even though the objection period under subdivision (a) has already expired.

Three comments were submitted on the proposed amendment. The Insolvency Law Committee of the Business Law Section of the State Bar of California ("ILC") supported the proposed changes. In particular, it approved the proposed rule's reference to § 727(d) as a whole, rather than to any specific paragraph within that subsection. The broader reference, ILC said, allows an extension of time to be sought whenever the debtor commits an act during the gap period that provides a basis for both denial and revocation of the discharge, even if the ground for revocation does not require lack of knowledge of the debtor's misconduct prior to the discharge. The ILC noted approvingly that the amended rule would allow a creditor or trustee to seek an extension of time to object to discharge upon learning of the misconduct, rather than having to wait until the discharge was granted to seek its revocation. It suggested that the Committee Note be amended to clarify the rule's applicability in that situation.

Bankruptcy Judge Wesley Steen of the Southern District of Texas suggested that the proposed amendment does not go far enough. He expressed concern that it fails to address the situation in which a debtor during the gap period engages in conduct of a type that would provide

a basis for denial of the discharge under § 727(a) but that is not a ground for revocation of the discharge under § 727(d). In a recent opinion that he attached to his comment, *In re* Shankman, 2009 WL 2855731 (Bankr. S.D. Tex. Sept. 1, 2009), Judge Steen found that Rule 4004 is invalid because it imposes a deadline that prevents parties from objecting to discharge based on misconduct by the debtor that occurs during the gap period. The proposed amendment, he said, does not fully address this problem because it is limited to conduct that would provide a basis for discharge revocation, and § 727(a) and (d) are not coextensive.

Bankruptcy Judge Marvin Isgur, also of the Southern District of Texas, concurred in Judge Steen's comment. While stating that the proposed amendment "is an excellent change to this Rule," Judge Isgur suggested that the language of the amendment be broadened to address the concerns raised in the *Shankman* opinion.

The Committee voted unanimously to approve the rule amendment as published, with only stylistic changes to the rule itself and a clarifying change to the Committee Note. The Committee decided that the purpose of the amendment is to arrive at the same result as would occur if the discharge were entered promptly after the expiration of the Rule 4004(a) deadline and thus no gap existed. In that situation, § 727(d) would determine whether acts committed or discovered after the discharge would provide a basis for revocation, and not all acts that might have resulted in denial of the discharge would qualify as grounds for revocation. A sentence was added to the Committee Note to clarify that the amended rule authorizes an extension of time to object to discharge whenever a debtor commits an act during the gap period that provides a basis for both denial and revocation of the discharge.

Rule 6003 is amended to clarify that the 21-day waiting period before a court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying in the order that it is effective as of an earlier date.

No comments were submitted on the proposed rule in response to the August 2009 publication, and only stylistic changes to the Committee Note were made after publication. The Committee voted unanimously to approve it.

Official Forms 22A, 22B, and 22C are amended in several respects. Form 22A is amended on lines 19A, 19B, 20A, and 20B to delete references to "household" and "household size" and to replace them with "number of persons" or "family size." These amendments implement more accurately the provisions of § 707(b)(2)(A)(ii)(I) of the Bankruptcy Code that allow means test deductions to be taken from current monthly income based on IRS National and Local Standards. Similar changes are made to Form 22C on lines 24A, 24B, 25A, and 25B.

Form 22A is also amended to add an instruction to line 8 to clarify that only one joint filer should report regular payments by another person for household expenses. Reporting of this figure by both spouses results in an erroneous double-counting of this source of income. Forms 22B and 22C are similarly amended on line 7 of each form.

Finally, the introductory instruction to Part I of Form 22A is amended to reflect the Bankruptcy Code's ambiguities regarding application of means test exemptions in joint cases in which only one debtor is exempt. The amended instructions give debtors the choice of filing separate forms if they believe they are required to do so by § 707(b)(2)(C) of the Bankruptcy Code. The amendment therefore follows the Committee's general policy regarding the means test forms – allowing courts to resolve ambiguities rather than determining the outcome in forms.

The only comment that was submitted in response to the publication of these proposed amendments expressed support for them. The commentator, attorney William J. Neild, also suggested the need for an additional change to Form 22A. That suggestion will be considered by the Committee at its fall 2010 meeting.

No changes were made to the forms after publication, and the Committee voted unanimously to recommend their approval

2. *Amendments for Which Final Approval is Sought Without Publication.* **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference.** Because the proposed amendments are conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended forms are set out in Appendix A.

Official Forms 20A and 20B are amended to change their captions in two respects. First, the forms instruct the filer to list all names used by the debtor in the last eight, rather than six, years. This change conforms to a 2005 amendment of § 727(a)(8) of the Bankruptcy Code that extended the period between chapter 7 discharges from six to eight years. Second, the filer is instructed to redact not only the debtor's social security number, but also the debtor's individual taxpayer identification number. The latter change conforms to Rule 9037.

The Committee voted unanimously to recommend approval of these amendments without publication.

B. Items for Publication in August 2010

The Advisory Committee recommends that the proposed amendments and new forms that are summarized below be published for public comment. The texts of the amended rules and official forms and the new official forms are set out in Appendix B.

Rule 3001 is amended to provide, in new subdivision (c)(3), requirements for the documentation of claims based on an open-end or revolving consumer credit agreement. Subdivision (c)(1) requires the attachment to a proof of claim of the writing, if any, on which a claim or an interest in property is based. That provision is amended to create an exception for claims governed by paragraph (3) of the subdivision. New paragraph (3) requires for an open-end or revolving consumer credit claim that a statement be filed with the proof of claim that provides the

information specified in that provision. This information may be needed by the debtor to associate the claim with a known account, since claims of this type – primarily for credit card debts – are frequently sold one or more times before ending up in the hands of the claim filer, which may be an entity unknown to the debtor. The required information will also provide a basis for assessing the timeliness of the claim.

As published in August 2009, a proposed amendment to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor prior to the commencement of the bankruptcy case. Representatives of bulk purchasers of credit card debt objected on several grounds to this requirement. Their arguments included the assertion that the statement will often not be available when the proof of claim is filed. They said that under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, they asserted, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement.

The proposal for the attachment of the last account statement for credit card claims arose from a concern that the requirement for the attachment of the writing on which a claim is based is frequently not complied with by holders of credit card debt. When little supporting information is provided with a proof of claim, the burden is placed on a debtor or trustee to seek, through informal means or by discovery, information that Rule 3001(c) or Form 10 requires the claimant to provide in support of its claim. The Committee concluded, however, that the rule should not require the attachment of information that is frequently unavailable or impracticable to obtain. Likewise, it concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on the provision of that information in a more costly or difficult manner.

The Committee therefore voted to withdraw the proposal for the attachment of the last account statement and in its place to recommend for publication new subdivision (c)(3). That provision requires a statement of the following information, to the extent applicable: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit and loss. In addition to this information, which must be routinely provided, a party in interest may obtain the writing on which an open-end or revolving consumer credit claim is based by making a request in writing for that documentation from the holder of the claim.

Rule 7054 is amended in subdivision (b) to provide more time for a party to respond to a prevailing party's bill of costs and to increase the time for seeking review of the clerk's taxing of costs. The existing rule provides for the taxing of costs on one day's notice. That time period is extended to 14 days in order to provide a more realistic opportunity for a party to prepare a response. The five-day period for seeking court review is changed to seven days to conform to the convention

used throughout the rules of specifying time periods of fewer than 30 days as multiples of seven. These changes bring the rule into conformity with Civil Rule 54(d).

Rule 7056 is amended to alter the incorporated Civil Rule 56's default deadline for filing a motion for summary judgment. Rule 7056 makes Civil Rule 56 applicable in bankruptcy adversary proceedings. As of December 1, 2009, Civil Rule 56(c) provides that, unless a local rule or court order otherwise provides, the deadline for filing a motion for summary judgment is 30 days after the close of discovery. Because of the swift pace of some bankruptcy proceedings and contested matters (to which Rule 7056 applies by virtue of Rule 9014(c)), a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted.

Official Form 10, the proof of claim form, is amended in several respects:

(1) Additional information is sought concerning the interest rate specified for secured claims. The filer of the claim must indicate whether the rate is fixed or variable, and the form clarifies that the rate in question is the one applicable when the bankruptcy case was filed.

(2) Part 7 of the form and related instructions are revised to clarify that, consistent with Rule 3001(c), a filer must attach redacted copies of documents that support a claim or provide evidence of the perfection of a lien; the attachment of only a summary of those documents is not sufficient. The need for the redaction of documents is highlighted.

(3) In order to emphasize the duty imposed on a party filing a proof of claim, the signature box of the form now includes a declaration that the information provided is true and correct to the best of the filer's knowledge, information, and reasonable belief. The related instruction also reminds the filer that the signature constitutes a certification that the claim meets the requirements of Rule 9011(b). An individual filing a claim must indicate the capacity in which he or she is doing so, and check boxes are added to the signature block for that purpose.

(4) A new space is provided for indicating a uniform claim identifier. The use of this 24-character identifier is optional for the claim filer and is intended to facilitate the making of chapter 13 disbursements by means of electronic fund transfers.

(5) Stylistic and formatting changes are made throughout the form.

Official Form 10 (Attachment A) is new. It is a required proof of claim attachment for home mortgage claims that implements Rule 3001(c)(2). The form provides a uniform format for setting forth the following components of the amount of a mortgage claim: principal, interest, fees, expenses, and charges owed as of the petition date. It also requires the filer to state the amount necessary to cure any prepetition default, break out the components of that amount, and attach an escrow account statement if the mortgage installment payment includes an escrow deposit.

Official Form 10 (Supplement 1) is new. It implements Rule 3002.1(b). The filer of a claim secured by a security interest in the debtor's principal residence must use this form during the course of a chapter 13 case to provide notice of changes in the ongoing installment payment amount. This notice will allow a debtor to properly maintain mortgage payments while in bankruptcy as permitted by § 1322(b)(5) of the Bankruptcy Code.

Official Form 10 (Supplement 2) is new. It implements Rule 3002.1(c) by providing a uniform format for the filer of a claim secured by a security interest in the debtor's principal residence to provide notice of fees, expenses, and charges that are incurred during the course of a chapter 13 case.

Form 25A, a model plan of reorganization for small businesses, is amended to change the effective date provision. On December 1, 2009, the concurrent periods for filing a notice of appeal and for the automatic stay of an order of confirmation were changed from 10 to 14 days. The effective date of the plan is therefore changed to the first business day following the expiration of those 14 days, unless the stay remains in effect on that date. In the latter case, the effective date is the first business day after the stay expires or is terminated, so long as the confirmation order has not been vacated.

III. Information Items

The draft minutes of the April 29-30, 2010, Committee meeting are attached as Appendix C.

A. Revision of the Bankruptcy Appellate Rules

The Advisory Committee is proceeding with its consideration of a comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules). At its spring meeting, the Committee endorsed the following goals for the revision:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure (FRAP).
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.
- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.
- Modernize the Part VIII rules to take advantage of existing technology – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

With the benefit of valuable input from users of the existing Part VIII rules obtained at special meetings held in March and September 2009, the Advisory Committee will begin its consideration of a draft of a revised Part VIII at its fall 2010 meeting. The Committee hopes to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules so that the committees can together consider the proposed revisions.

B. Forms Modernization Project

The Forms Subcommittee of the Advisory Committee continues its multi-year Forms Modernization Project, which was initiated to develop recommendations for making the bankruptcy forms more user-friendly and less error-prone and taking better advantage of modern information technology.

With the help of an expert in forms redesign, the project has made significant progress in reformatting and rephrasing the questions in an initial filing package of forms to be used by individual debtors in bankruptcy. At its January 2010 meeting, the project approved initial drafts of a revised petition for individuals, property schedules, the debtor's social-security statement, and the debtor's statement about a rented residence subject to a judgment of possession. Project subgroups are in the process of revising other forms to be used by individuals in an initial filing package, and will move on to forms for businesses when the package for individuals is complete.

The Forms Modernization Project continues to solicit feedback from users of the forms (bankruptcy judges, attorneys, court and clerk's office employees, the Executive Office for United States Trustees, and academics) both through electronic surveys and other questionnaires, and through its presentations at the clerks' operations forum and the FJC's National Workshop for Bankruptcy Judges and Conference for Chief Bankruptcy Judges.

The project also continues to work with the NextGen CM/ECF Project to promote functional requirements it believes should be included in the future version of CM/ECF. Those functional requirements include the ability to store information in data form and retrieve the data in user-specified reports. Significant numbers of judicial users have identified court needs for such capabilities. The requirements also include capacity to control users' access to data, to ensure that CM/ECF will continue to operate in conformity with Judicial Conference privacy and access policies.

C. New Committee Members

Circuit Judge Sandra Segal Ikuta of the Ninth Circuit and Bankruptcy Judge Arthur I. Harris of the Northern District of Ohio are the newest members of the Advisory Committee. Judge Ikuta, Judge Harris, and District Judge Karen K. Caldwell of the Eastern District of Kentucky (who was appointed in late 2009) replaced Circuit Judge R. Guy Cole, Jr., of the Sixth Circuit, Bankruptcy Judge Jeffery P. Hopkins of the Southern District of Ohio and District Judge Richard A. Schell of the Eastern District of Texas, respectively.

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1004.2. Petition in Chapter 15 Cases**

(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.

(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

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

** In addition to the adoption of Rule 1004.2, Official Form 1 would be amended to include a line on the form where the foreign representative indicates the country of the debtor's center of main interests. The Official Form would also be amended to include a line or lines on which the filer would set out the countries in which cases are pending.

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.

COMMITTEE NOTE

This rule is new. Subdivision (a) directs any entity that files a petition for recognition of a foreign proceeding under chapter 15 of the Code to state in the petition the center of the debtor's main interests. The petition must also list each country in which a foreign proceeding involving the debtor is pending. This information will assist the court and parties in interest in determining whether the foreign proceeding is a foreign main or nonmain proceeding.

Subdivision (b) sets a deadline of seven days prior to the hearing on the petition for recognition for filing a motion challenging the statement in the petition regarding the country in which the debtor's center of main interests is located.

Changes Made After Publication

The rule was first published for comment in August 2008. After publication, the deadline in subdivision (b) for challenging the designation of the center of the debtor's main interests was changed from "60 days after the notice of the petition has been given" to "no later than seven days before the date set for the hearing on the petition."

The rule as revised was published in August 2009. Minor stylistic changes were made to the rule's language and the Committee Note following that publication.

Summary of Public Comment

In response to the August 2008 publication of the rule, three

comments were submitted.

08-BK-002. Una O'Boyle. The deadline for challenging the center of the debtor's main interests is too long and could delay the hearing on the petition.

08-BK-004. Ellie M. Bertwell. The proposed rule does not clearly indicate the date that triggers the commencement of the 60-day notice period, since the event that constitutes "giving" notice is unspecified. The deadline could also extend beyond the date of the hearing on the petition.

08-BK-006. Hon. Samuel L. Bufford (Bankr. C.D. Cal.). The service list should be expanded.

No comments were submitted on proposed Rule 1004.2 after its republication in August 2009.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(e) ADJOURNMENT. The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time ~~without further written notice~~. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to require the presiding official to file a statement after the adjournment of a meeting of creditors or equity security holders designating the period of the adjournment. The presiding official is the United States trustee or the United States trustee's designee. This requirement will provide notice to parties in interest not present at the initial

meeting of the date and time to which the meeting has been continued. An adjourned meeting is "held open" as permitted by § 1308(b)(1) of the Code. The filing of this statement will also discourage premature motions to dismiss or convert the case under § 1307(e).

Changes Made After Publication

No changes were made to the language of the rule following publication. The Committee Note was revised to state more explicitly that adjournment of a meeting of creditors to a specific date constitutes holding it open for purposes of § 1308(b) of the Bankruptcy Code.

Summary of Public Comment

09-BK-004. Hon. Marvin Isgur (Bankr. S.D. Tex.). The proposed change will be very helpful, and I fully support the change as written.

09-BK-016. David B. Shaev (National Association of Consumer Bankruptcy Attorneys). NACBA supports the proposed amendment. It will prevent chapter 13 trustees from holding creditors' meetings open indefinitely to avoid the deadline for filing objections to exemptions. This practice has become abusive and should be limited.

09-BK-139. Deborah A. Butler, Assoc. Chief Counsel (Internal Revenue Service). The proposed amendments should be revised to require the presiding official to specify whether the meeting of the creditors is being held open pursuant to section 1308(b) to allow a taxpayer additional time to file a tax return, or adjourned for some other purpose.

Comments by individual members of the consumer bankruptcy bar, endorsing the proposed amendment:

09-BK-057. Pamela Simmons-Beasley
09-BK-075. Charles Farrell
09-BK-087. Jim Green
09-BK-100. Mark Cornell
09-BK-118. John Francis Murphy
09-BK-121. Stephen M. Goldberg

~~Rule 2019. Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases~~

~~(a) DATA REQUIRED. In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when~~

~~acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.~~

~~(b) FAILURE TO COMPLY; EFFECT. On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or~~

~~received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.~~

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) DEFINITIONS. In this rule the following terms have the meanings indicated:

(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.

(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.

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(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.

(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:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative; or

(D) a governmental unit that is not a person.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(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

(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;

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:

(A) name and address;

(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

(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 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;

(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:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the

date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(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.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(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.

(2) If the court finds such a failure to comply, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity,

group, or committee; or

(C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

The content of subdivision (a) is new. It sets forth two definitions. The first is the definition of the term "disclosable economic interest," which is used in subdivisions (c)(2) and (c)(3). The definition of the term is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps.

The second definition is of "represent" or "represents." The definition provides that representation requires active participation in the case or in a proceeding on behalf of another entity – either by taking a position on a matter before the court or by soliciting votes on the confirmation of a plan. Thus, for example, an attorney who is retained and consulted by a creditor or equity security holder to monitor the case, but who does not advocate any position before the court or engage in solicitation activities on behalf of that client, does not represent the creditor or equity security holder for purposes of this rule.

Subdivision (b)(1) specifies who is covered by the rule's disclosure requirements. In addition to an entity, group, or committee that *represents* more than one creditor or equity security holder, the amendment extends the rule's coverage to groups or committees that *consist of* more than one creditor or equity security holder. The rule no longer excludes official committees, except as specifically indicated. The rule applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of one another), even if the group does not call itself a committee.

Subdivision (b)(2) excludes certain entities from the rule's coverage. Even though these entities may represent multiple creditors or equity security holders, they do so under formal legal arrangements of trust or contract law that preclude them from acting on the basis of conflicting economic interests. For example, an indenture trustee's responsibilities are defined by the indenture, and individual interests of bondholders would not affect the trustee's representation.

Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the formation of a committee or group, other than an official committee, and the employment of an entity.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The quarter and year in which each disclosable economic interest was acquired by each member of a committee or group (other than an official committee) that claims to represent others must also be specifically provided, except for a disclosable economic interest acquired more than a year before the filing of the petition. Although the rule no longer requires the disclosure of the precise date of acquisition or the amount paid for disclosable economic interests, nothing in this rule precludes either the discovery of that information or its disclosure when ordered by the court pursuant to authority outside this rule.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, or committee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under subdivision (c)(2)(A) and (B). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d) requires the filing of a supplemental statement at the time an entity, group, or committee takes a position before the court or solicits votes on a plan if there has been a material change in any of the information contained in its last filed statement. The supplemental verified statement must set forth the material changes that have occurred regarding the information required to be disclosed by subdivision (c) of this rule.

Subdivision (e) addresses the court's authority to determine whether there has been a violation of this rule and to impose a sanction for any violation. It no longer addresses the court's authority to determine violations of other applicable laws regulating the activities and personnel of an entity, group, or committee.

Changes Made After Publication

Subdivision (a). A definition of "represent" or "represents" was added, and the subdivision was divided into paragraphs (1) and (2).

Subdivision (b). The provision authorizing the court to require disclosure by an entity that seeks or opposes the granting of relief was deleted.

In the paragraph now designated as (1), language was added providing that groups, committees, and entities are covered by the rule only if they consist of or represent 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." The phrase "and, unless the court directs otherwise, every indenture trustee," was deleted.

Subdivision (b)(2) was added to specify entities that are not required to file a verified statement merely because they act in one of the designated capacities.

Subdivision (c). The authorization in subdivision (c)(2)(B) and (c)(3)(B) for the court to require the disclosure of the amount paid for a disclosable economic interest was deleted.

The requirement in subdivision (c)(2)(C) and (c)(3)(C) for disclosure of the acquisition date of each disclosable economic interest was modified. The requirement was made applicable only to members of an unofficial

group or committee that claims to represent any entity in addition to the members of the group or committee, and the date that must be disclosed was limited to the quarter and year of acquisition.

Subdivision (d). The requirement of monthly supplementation of a verified statement was modified to require supplementation whenever a covered group, committee, or entity takes a position before the court or solicits votes on the confirmation of a plan and there has been a material change in any fact disclosed in its most recently filed statement.

Subdivision (e). The provisions published as subdivision (e)(1)(B) and (C), which authorized the court to determine failures to comply with legal requirements other than those imposed by Rule 2019, were deleted.

Subdivision (e)(2), which enumerated the materials the court could examine in making a determination of noncompliance, was deleted.

Committee Note. In the discussion of the definition of "disclosable economic interest," the specific examples of "short positions, credit default swaps, and total return swaps" were added to illustrate the breadth of the definition. A sentence was added to the discussion of subdivision (c)(2) that states that the rule does not affect the right of a party to obtain information by means of discovery or as ordered by the court under any authority outside the rule.

Other changes. Stylistic and organizational changes were made throughout the rule and Committee Note to reduce the length and clarify the meaning of the published proposal.

Summary of Public Comment

09-BK-010 (testimony), **09-BK-152. Thomas E. Lauria.** Rule 2019 should be repealed. The rule chills creditor participation and may violate due process. Furthermore, it applies in a discriminatory fashion to distressed debt investors, who add value to a reorganization case, and it is used tactically by parties. Customized discovery should be used in place of Rule 2019 to identify conflicts.

09-BK-013 (testimony). **09-BK-028. Richards, Kibbe & Orbe LLP** (Jon Kibbe and Michael Friedman). We support the proposed amendments to the rule with the exception of the requirement of disclosure of the date of purchase of disclosable economic interests and, upon court order, the

purchase price. Disclosure of the date of purchase is tantamount to disclosure of the purchase price, which information is rarely relevant. Imposing this requirement will discourage the participation of *ad hoc* groups in chapter 11 cases.

09-BK-015 (testimony). **The Loan Syndications and Trading Association ("LSTA")** (Elliot Ganz) – LSTA and the Securities Industry and Financial Markets Association ("SIFMA") no longer advocate the repeal of Rule 2019. The organizations do oppose the amendments to the extent they "would compel public disclosure of an investor's most confidential and proprietary information: the date and price at which that investor purchased (and/or sold) its bankruptcy claims." Should a court question the bona fides of a party and desire the disclosure of pricing information, it would have inherent authority to require the party to reveal that information.

09-BK-026. LSTA and SIFMA. Pricing and purchase date disclosures should not be required. The following additional changes to the published proposal should be considered:

- The definition of "disclosable economic interest" should take account of the creation of ethical walls within an organization and should define "derivative" to eliminate the need for disclosure "when an entity's derivative positions have no material bearing on the entity's voice in the restructuring process."
- Agents and affiliated entities should not be subject to disclosure requirements under the rule that apply to entities representing multiple creditors or equity security holders.
- Under (c)(2) the verified statement should provide information as of the date the disclosing entity appeared in the case, rather than when the group or committee was formed or the entity was employed.
- Supplemental statements should be required only when the disclosing entity seeks to participate in matters before the court.
- Subdivision (e) should only refer to the court's authority to determine failure to comply with Rule 2019, not to other applicable law or improprieties in connection with a solicitation; (e)(2), which refers to the materials the court may examine in making its determination, should be deleted; and the provision regarding the court's authority to hold

invalid any authority, acceptance, rejection, or objection should be deleted.

09-BK-017. Hon. Kathryn Ferguson (Bankr. D.N.J.). Proposed Rule 2019(d), which requires supplemental statements to be filed "monthly, or as the court otherwise orders," should be revised. The term "monthly" is ambiguous, and the requirement is unduly burdensome and wasteful.

09-BK-018 (testimony). **Angelo, Gordon & Co., LP** (Forest Wolfe). Price information and trade data are extremely sensitive and should generally not have to be revealed. The term "group" should not apply to the situation in which various funds are represented by one investment advisor.

09-BK-019 (testimony). **Hon. Robert Gerber (Bankr. S.D.N.Y.).** I support the proposed amendments. The date of acquisition and price paid for a disclosable economic interest is sometimes relevant, but the rule could still be effective if it required only disclosure of the general period of time in which such an interest was acquired. If the rule were so revised, the Committee Note should state that the court retains authority to order the disclosure of date and price information upon a showing of relevancy or other cause. The definition of "disclosable economic interest" should expressly include short positions, credit default swaps, and total return swaps.

09-BK-020 (testimony). **Akin Gump Strauss Hauer & Feld LLP (Abid Qureshi).** Price and date information should not have to be disclosed. The price at which an interest was purchased is irrelevant, and these requirements will contribute to the strategic and abusive use of the rule. The Committee should make the rule as clear as possible so that compliance with it becomes routine and motion practice is reduced.

09-BK-024. National Bankruptcy Conference. The Conference supports the proposed rule but suggests that revisions or clarifications are needed to address three aspects of the rule:

- *Disclosure by law firms representing multiple holders of claims or interests.* Disclosure should not be required when two or more clients are not acting in concert to advance a common interest; when affiliated entities are jointly represented; or when the firm does not appear in court on behalf of a client to seek or oppose the granting of relief.
- *Application of the rule to indenture trustees and agent banks.* The rule should be revised to make it clear that indenture

trustees and agent banks are not required to make disclosures under the rule, except, with respect to agents, when they take positions in court.

- *Price and purchase date information.* The rule as proposed appears to authorize a court to require disclosure of price information without any showing of relevance, and even when the disclosure of price information is not required, that information can be determined from the required disclosure of the date of purchase. The rule's authorization for the disclosure of price information should be made applicable only to those who claim to act on behalf of or in the interest of creditors or equity security holders other than themselves.

09-BK-025, 09-BK-104. Martin Bienenstock. Parties covered by Rule 2019 should be allowed to make three certifications in lieu of the verified statement of disclosures. These certifications would address:

- the aggregate dollar amount of prepetition claims held against the debtor and the aggregate dollar amount of such postpetition claims;
- whether the party holds other disclosable economic interests that may increase in value if the debtor's estate declines in value; and
- whether the party holds claims or other disclosable economic interests in an affiliate of the debtor that may increase in value if the debtor's estate declines in value.

Alternatively, any pleading that asserts that a party holds claims against the estate must also disclose whether the party holds any economic interests that may increase in value if claims against any of the debtors' estates or their affiliates' estates decrease in value. Furthermore, the rule should apply to official committees. Finally, any comment in the Committee Note referring to the court's authority to order the disclosure of pricing and acquisition date information should make clear that current standards of materiality and relevance are not being altered, nor are new rights of discovery being created.

09-BK-036. Regiment Capital Advisors LP. We endorse LSTA's comments and oppose the disclosure of pricing and purchase date information.

09-BK-094. Hon. D. Michael Lynn (Bankr. N.D. Tex.). The definition of "disclosable economic interest" should turn on the value of the debtor or its

estate. Disclosure should not be required by members of official committees, and the parties that are permitted to move under subdivision (b) for disclosure by entities that are seeking or opposing relief should be limited. It is unclear whether the rule applies to collective bargaining agents and class action representatives. Subdivision (c)(3) risks being applied too broadly or too narrowly to unofficial committees. Members of official committees should not have to file supplemental statements because doing so might create holes in ethical walls. Making the rule applicable to official committees might intrude on the U.S. trustee's authority.

09-BK-114. Insolvency Law Committee of the Business Law Section of the California State Bar. Subdivision (e) should not authorize the court to determine violations of rules and laws other than Rule 2019. Although current Rule 2019 has similar provisions, these provisions, when read broadly, are constitutionally questionable. The disclosure requirements are overly burdensome, both with respect to the initial disclosures regarding each committee member and monthly supplements. It is not clear what constitutes a group, and the rule should apply to official committee members.

09-BK-116. The Clearing House Association LLC. The rule should clearly provide that it does not require disclosure by an administrative agent of the economic interests of syndicate lenders or its own holdings (merely because it is participating in the case as an agent). Delete the provision in subdivision (b) that authorizes the court to order disclosure by parties in interest that seek or oppose the granting of relief. The rule should not apply to official committees, and the economic interests that must be disclosed should be limited in several respects.

09-BK-127. Prof. Adam Levitin (Georgetown Law School). Do not require the disclosure of purchase price and purchase date information.

09-BK-131. Managed Funds Association. Do not require the disclosure of purchase price and purchase date information.

09-BK-133. State Bar of California Committee on Federal Courts. We endorse the views of the Insolvency Law Committee (09-BK-114). The rule should apply only to an entity, group, or committee that participates in the case as a representative of multiple creditors or equity security holders, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). Furthermore, the rule should not apply to separate creditors or equity

security holders that by way of shorthand are referred to by a collective name (such as "the Equipment Lessors").

09-BK-144. Commercial Finance Association. Clarify that the rule is not intended to apply to an agent for a group of lenders in a syndicated credit facility, to funds represented by the same investment manager, or to affiliated creditors.

Rule 3001. Proof of Claim

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(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate 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.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(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.

(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 petition shall be filed with the proof of claim.

(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.

(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:

(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

(ii) award other appropriate relief,

including reasonable expenses and attorney's fees caused by the failure.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1).

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by a security interest in the property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default.

If the claim is secured by a security interest in the debtor's principal residence, the proof of claim must be accompanied by the attachment prescribed by the appropriate Official Form. In that attachment, the holder of the claim must provide the information required by subparagraphs (A) and (B) of this paragraph (2). In addition, if an escrow account has been established in connection with the claim, an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed must be submitted in accordance with subparagraph (C). The statement must be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.

Paragraph (D) of subdivision (c)(2) sets forth sanctions that the court may impose on a creditor in an individual debtor case that fails to provide information required by subdivision (c). Failure to provide the required information does not itself constitute a ground for disallowance of a claim. See § 502(b) of the Code. But when an objection to the allowance of a claim is made or other litigation arises concerning the status or treatment of a claim, if the holder of that claim has not complied with the requirements of this subdivision, the court may preclude it from presenting as evidence any of the omitted information, unless the failure to comply with this subdivision was substantially justified or harmless. The court retains discretion to allow an amendment to a proof of claim under appropriate circumstances or to impose a sanction different from or in addition to the preclusion of the introduction of evidence.

Changes Made After Publication

Subdivision (c)(1). The requirement that the last account statement sent to the debtor be filed with the proof of claim was deleted.

Subdivision (c)(2). In subparagraph (C), a provision was added requiring the use of the appropriate Official Form for the attachment filed by a holder of a claim secured by a security interest in a debtor's principal residence.

In subdivision (c)(2)(D), the clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. In the discussion of subdivision (c)(2), the term "security interest" was added to the sentence that discusses the required filing of a statement of the amount necessary to cure a prepetition default.

The discussion of subdivision (c)(2)(D) was expanded to clarify that failure to provide required documentation, by itself, is not a ground for disallowance of a claim and that the court has several options in responding to a creditor's failure to provide information required by subdivision (c).

Other changes. Stylistic changes were made to the rule and the Committee Note.

Summary of Public Comment

Comments on Rule 3001(c)(1) (as published)

09-BK-002. Galaxy Asset Management. This provision is unnecessary and will create additional burdens upon the courts and trustees. Banks are only required to retain account statements for 25 months. It the debtor files more than 25 months after charge-off, the statement may no longer exist. If the intent is to validate a proof of claim, an affidavit should suffice.

09-BK-007 (testimony). **Creditors Interchange Receivables Management, LLC (Raymond P. Bell, Jr.).** The requirement to attach the last statement sent to a debtor will not reduce the number of objections. An additional attachment will increase the number of documents filed supporting the claim. There is no reason to impose special requirements on credit card (revolving credit) debt. If standards are going to be applied, then they should be applicable to all debts listed in the bankruptcy schedules, as well as making the penalty applicable to the accuracy of the bankruptcy schedules.

09-BK-011 (testimony). **Debt Buyers Association International (Barbara A. Sinsley).** There is no pressing need for the proposed amendments to this rule. They will discourage creditors from pursuing legitimate claims and impose a disproportionately greater chilling effect on debt buyers. The proposed changes will ultimately also result in the decline of the value of defaulted debt in the market, which in turn will ultimately reduce the availability of unsecured credit to consumers.

09-BK-014 (testimony). **National Capital Management, LLC (David M. Wiernusz).** The proposed amendments are not necessary because, aside from isolated anecdotal cases, there is no evidence that creditors or claim buyers routinely file overstated proofs of claim. The amendments may impermissibly abridge and modify a creditor's (or debt buyer's as successor) statutorily-grounded substantive right to have its claim deemed allowed so long as that claim does not offend any of the nine exceptions set forth in § 502(b).

09-BK-034. Rep. James R. Langevin. The proposed changes would impose additional burdens on unsecured creditors in consumer cases, potentially discouraging or impairing the ability of legitimate parties to participate in the bankruptcy process.

09-BK-135. Rep. Lamar Smith (ranking minority member, House Judiciary Committee). The proposed changes are likely to increase litigation and its attendant costs. Is there any evidence, beyond a few anecdotes, to indicate that there is a widespread problem of creditors who file unsupportable claims in consumer cases? The requirement for filing debtors' billing statements, thereby making them publicly available, will unnecessarily expose the private details of each consumer's activities.

09-BK-142. ACA International. Requiring the proof of claim to be supported with the last account statement sent to a consumer debtor prior to filing bankruptcy is at odds with federal laws governing the record retention policies of financial institutions to the extent that it would require a statement for an account older than two years. Further, amending the rule as proposed would have devastating impacts on the multi-billion dollar debt purchasing market.

09-BK-147. The Commercial Law League of America. CLLA does not believe there is a significant burden on individual debtors and on the bankruptcy system caused by the number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts. The proposed amendments unnecessarily reduce the intended flexibility of the current proof of claim process by eliminating a creditor's opportunity to provide further evidence of the legitimacy of its claim in the event that the claim is subsequently challenged by a debtor or trustee. The proposed amendments would also likely affect the speed, efficiency, and cost of the bankruptcy process. Debtors would have every incentive to object to claims based upon alleged violation of rigid technical rules. In addition, costs for creditors and debtors in bankruptcy would surely increase, particularly for those creditors who otherwise would file their proof claim without the assistance of legal counsel.

09-BK-072. B-Line LLC. The proposed rule is a solution looking for a problem. Fewer than 0.5% of B-Line's claims receive an objection based upon lack of documentation. Before purchasing a portfolio of consumer bankruptcy receivables, B-Line receives a computer file for each account contained in the portfolio. The computer file generally includes: (i) the originating creditor's account number for the debtor, (ii) the debtor's name, (iii) the debtor's address and contact information, (iv) the debtor's social security number, (v) the pre-petition balance on the account, (vi) the charge-off date, (vii) the account opening date, (viii) the name of the originating creditor, (ix) the last activity on the account, (x) the bankruptcy case number, (xi) the applicable bankruptcy chapter, and (xii) the bankruptcy petition date. B-Line relies upon the fact that the seller has

represented and warranted that the debt is due, owing, valid, and enforceable. In the course of litigating a claim objection, if the existence or amount of the underlying debt is disputed by the debtor, B-Line will request copies of the account documentation generated by the originating creditor.

09-BK-009 (testimony), **09-BK-141. Resurgent Capital Services (Carol J. Moore).** The proposed amendment would result in adding thousands of documents to court dockets to support 100% of claims filed, when the data indicate that only a small fraction of claims are questioned, and an even smaller number seem to need such support. The last prepetition account statement will often not include a great deal of substantive information about the account. For example, if the account was charged off before the petition was filed, the last statement may well contain only the balance and interest accrued since the previous statement. Because many creditors stop sending statements after an account is charged off, the last prepetition statement may antedate the filing by a considerable time. The last statement would not include payments made or interest accrued since the last statement was sent.

As an alternative to attaching the last prepetition statement, an "account summary" approach could be used. Under this approach, each claim would be accompanied by an Account Summary Form, which would include information necessary to identify and describe the account, such as the debtor name, redacted social security number and account number, account balance, and charge-off date.

09-BK-012 (testimony), **09-BK-149. Becket & Lee LLP (Alane A. Becket).** Attaching account statements to claims may lead to disclosure of personal, medical, or embarrassing information. If the proposed amendments are enacted, they should include a provision that compliance with the amendments satisfies the "writing" requirement of Rule 3001(c). The bankruptcy rules should be amended to include a provision that a debtor's listing of a debt on Schedule F is prima facie evidence of the existence of the obligation. To the extent that the debt is not disputed, such listing should also be prima facie evidence of the validity of the obligation.

09-BK-132. Creditors Bankruptcy Service. Rather than adding the proposed sentence to Rule 3001(c)(1), expressly provide that copies of electronic records identifying the debtor, the account, the last month's activity, and any interest, fees, or other charges are sufficient to establish a prima facie proof of the claim.

09-BK-134. AT & T, Inc. As drafted, this rule change might be construed to capture AT&T's claims, in addition to those of credit card companies. AT&T's consumer accounts may all involve to some extent the extension of consumer credit each month. Normally there are few, if any, disputes as to the amounts of AT&T's consumer claims. When there are disputes, the current rules work well. Either clarify that the amendment applies only to "credit card or other similar agreements that provide for the extension of credit and do not involve the provision of goods or services," or modify the proposed rule change so that the creditor can attach other types of documentation and not be compelled to attach the last account statement or be exposed to possible sanctions.

09-BK-140. Housing Policy Council, Financial Services Roundtable, American Bankers Association, Mortgage Bankers Association. Rule 3001(c)(1) should be modified to exempt claims based on home equity lines of credit loans from the requirement that the last account statement accompany the proof of claim.

09-BK-143. K&L Gates and eCast Settlement. Attaching the last account statement presents an unnecessary obstacle to filing an otherwise valid proof of claim. Open-end or revolving consumer credit holders, including holders of credit card debt, may not have retained copies of the statements mailed to the debtor. Electronic records maintained by holders of revolving consumer debt contain information sufficient to show the amounts owed by individual debtors and other information from which it is sufficient to determine whether to file a claim. It is typically not practical (or economical) to generate an account statement in the form last mailed to the debtor. The proposed amendment also presents significant privacy concerns for individual debtors. Production of an account statement in full could reveal every purchase made by a debtor during the period covered by the statement.

09-BK-145. HSBC Bank USA. Creditors generally do not image or otherwise copy the front and back of each account statement that is sent to the debtor. Instead, most creditors maintain the pertinent financial and other information electronically in their systems. The formatting is often different; the boilerplate language is generally not kept on the system. The system information does not look like the actual account statement sent to the debtor. If it is decided that more specific financial information must be provided, we suggest that the proof of claim form itself be modified to include the pertinent information that was included on the last account statement. Alternatively, creditors should be given the flexibility to attach

such information to the proof of claim in the form in which the information is kept.

09-BK-148. Bass and Associates, P.C. It would be difficult, impractical, or impossible for many creditors to comply with the last account statement requirement. If the aim of the rule change is to ensure that proofs of claim are supported by appropriate information, the rule should make clear that the creditor must attach evidence of its claim, and in the case of an open-end or revolving consumer credit account, indicate the status of the debtor's account on the day the petition was filed. That would allow a creditor to furnish this information in different forms.

09-BK-041. National Association of Chapter 13 Trustees. The trustee members of the NACTT are deeply concerned over the increasing deterioration of the quality of information provided in proofs of claim, particularly as consumer debt obligations become more complex and are freely transferred to third party debt buyers or are serviced by entities that are not the holders of the claims.

09-BK-159. Rep. John Conyers, Jr., chair, House Committee on the Judiciary, and Rep. Steve Cohen, chair, Subcommittee on Commercial and Administrative Law. In the last Congress, the Subcommittee on Commercial and Administrative Law held a hearing at which it received testimony about creditor abuses in consumer bankruptcy cases. Some courts have likewise expressed similar concerns about this problem, particularly with respect to bulk debt purchasers. The proposed amendment to Rule 3001(c)(1) – requiring the last account statement sent to the debtor prior to the filing of the bankruptcy petition to be filed with the proof of claim – appears to be a logical amplification of current Rule 3001. It will assist debtors and trustees in gauging whether such claims are untimely under an applicable statute of limitations.

09-BK-016 (testimony). **National Association of Consumer Bankruptcy Attorneys (David B. Shaev).** An unsecured claim that does not substantially comply with the rules should be disallowed.

09-BK-031. Loraine Troyer. Nonconforming unsecured claims should be disallowed.

09-BK-038. Lucien A. Morin. Creditors should be required to specify the date of the debtor's last payment or date of the debtor's last "actual" charge, as well as attaching the last open-end credit card statement.

09-BK-044. Mohammad Ahmed Faruqui. Require that a buyer of debt prove that it bought the debt from an original lender.

09-BK-046. Jonathan Leventhal. Require a claim to include a copy of the debtor's signature on the original card agreement.

09-BK-053. Shmuel Klein. Proofs of claim should include supporting documentation – a copy of the original agreement, a detailed explanation of how the claim was calculated, the date of the last payment by the debtor – and not simply the last account statement generated by the creditor. Furthermore, the creditor should provide copies of all assignments of the alleged debt to support its current ownership of the debt and its standing to file a claim against the debtor.

09-BK-054. Nancy B. Clark. Unsecured creditors file proofs of claims with little or no documentation attached. In many instances, it is difficult to decipher from the proof of claim who the original creditor was and the last time a payment was received. Debtors and their attorneys cannot be sure if the debt is legitimate, a claim is stale (under the statute of limitations), or a claim is a duplicate due to the selling of the account. The cost to the debtor and the benefit to the estate sometimes make it difficult for attorneys and their clients to file an objection to a claim.

09-BK-055. J. Thomas Black. With respect to unsecured claims being collected by debt buyers, it is often impossible to tell who the creditor is or was, if the debt is time-barred, and how the figure claimed was arrived at. While sometimes the amounts sought are small individually, there are many millions of dollars being collected through the bankruptcy system that are either not due or time barred. This reduces the money available to pay legitimate claimants.

09-BK-074. Sharon L. Smith. Some of my clients have received bills meant for people with similar names.

09-BK-076. Edward Shaw. Rule 3001 is necessary to prevent inaccurate proofs of claim that have been submitted by creditors who appear to mass produce documents without checking them against the actual account statements. It will also provide information that debtors need and is often very hard to get from creditors.

09-BK-078. Ken Rannick. We commonly see discrepancies between proofs of claims and the account statements. Obtaining reconciliations is

almost impossible, and it is certainly not cost effective for most debtors to do so.

09-BK-085. Richard Croak. After confirmation of a chapter 13 case, I am consistently confronted by claims filed by creditors who are not on the original schedules but are members of the debt buying industry. Few of these claims are consistent with the prior information provided to the three major credit reporting agencies by the original creditors. When the debt buyers are called regarding inaccuracies, they exhibit a cavalier attitude regarding their claims.

09-BK-086. David Linde. My experience has been that many claims filed in chapter 13 cases do not even come close to meeting the requirements provided by Rule 3001, such as attaching a copy of the underlying contract or statement. This situation has been made worse by the fact that now it is often a third-party debt collector that is filing the claim. In the majority of cases, those third-party debt collectors attach none of the required documents. All the debt collector attaches is a self-generated document listing the amount allegedly owed and a statement indicating that the documents required by Rule 3001 are no longer available.

09-BK-090. Tracy Wrisinger. Often proofs of claim are filed with limited information that does not match creditors/account numbers/balances provided by my clients or obtained through credit reports. Many times the debt buyers will withdraw if challenged. They should not file in the first place if the debt cannot be substantiated.

09-BK-098. Alan Ramos. Many creditors, particularly debt buyers, provide the debtor, the trustee, and the court with little or no documentation to support their claims. The cost of objecting to these claims, not to mention the court resources that must be devoted to claims objections, is prohibitive. This is a fact that I believe these creditors rely upon. The burden should be placed on the creditor to provide documentary support for their claims. This will reduce the necessity for the large majority of claims objections, which will allow more funds to be available for creditors and will free up court resources for more important issues.

09-BK-100. Mark Cornell. With the rise of an entire industry of debt buyers and claims purchasing, debtors and the bankruptcy trustee have a very difficult time matching the claims listed in the bankruptcy petition with the claims filed. In chapter 13 cases, I routinely review claims filed, and less than 20% of the claims are filed by the original creditors. Matching the claims filed with the claims scheduled is a daunting task. In reviewing

claims files, I have on occasion discovered claims that were more than ten years old, and sometimes even claims discharged in a prior bankruptcy in the distant past. These claims are always filed by purchasers of the debt. I note that the information that would be required to comply with the proposed amendment is no more than the information that the creditor would be required to provide to prevail in a state court collection action.

09-BK-111. G. Bruce Kuehne. In the case of open-end credit card lenders (and especially their assignees), there is almost never any substantiation for a filed proof of claim. This consistent practice imposes substantial burdens on the system. We usually have no way to know whether the account is valid, who the original lender was, the manner in which the debt is calculated, when the last transaction on the account occurred, etc. We then have the option of incurring the substantial expense of filing an objection to claim and showing up in court to simply say that we do not understand the proof of claim, or ignoring the lack of documentation and permitting the court to allow the claim. Since the system does not ordinarily allow debtors' counsel to be fairly compensated for such objections, this is a genuine dilemma for both us and the client.

09-BK-120. Gary Armstrong. When debtors prepare their bankruptcy schedules, the only information debtors and their attorneys have at hand regarding credit card debt is the most recent information from the purported creditor, such as a demand letter, a billing statement, or a report to a credit reporting agency. Debtors' attorneys rarely have documents available at the time of preparing the schedules to determine whether the balance asserted by the creditor is, in fact, the lawful balance owed on the debt. And, in the case of a debt collector or purported purchaser of the debt, we have no information by which we can confirm that the present claimant is the owner of the debt. Frequently claims are sold from one party to another with little information other than the identity of the purported debtor, a last payment date, a last balance amount, and an interest rate. That bare information is submitted to courts as if somehow it was competent evidence of liability for the debt and the actual amount of the debt owed. The only way that debtors and their counsel, and the courts, can evaluate the correctness of the claim is to obtain the documentation on which the claim is based.

Rather than requiring all unsecured creditors to provide a single statement that is of little help, all claimants should be required to provide a copy of the writing on which the claim is based. Failure to do so should remove the prima facie validity of the claim. In addition, the claimant, upon written request of any party in interest, should be required to provide to that party all of the following documents: the complete written agreement (to the

extent not already filed) documenting the claim; up to four years' worth of statements or similar records showing the charging of fees and interest on the account; and, if the claim is asserted by someone other than the original creditor, all agreements, assignments, or other writings that evidence the transfer of the debt or claim from the originating creditor to the claimant. The claim should be disallowed if the documentation is not provided within a reasonable time.

09-BK-121. Stephen M. Goldberg. Various parts of the unsecured debt industry have adopted a practice of changing the account numbers on debtor's accounts at various points in the collection process. This practice, coupled with the repeated sale and assignment of these debts, makes it nearly impossible for debtors to identify the claims of various creditors accurately.

09-BK-150. David S. Yen. I have had numerous cases in which my client cannot tell who the original creditor was from the proof of claim that was filed. In many cases, even after engaging in informal discovery, I was still unable to determine whether the there was a valid claim in the first place or whether my client had a valid defense to the claim. In such cases if I did file an objection to the claim, it was only after doing so that we obtained documents that proved that there was a defense to the claim. There are many occasions when we decide not to file an objection because even a completely successful objection will have no effect on how much my client has to pay to complete his or her chapter 13 plan. The lack of detail in the proof of claim is sometimes the reason that no objection is filed. Most courts have held that the creditor's failure to attach documents as called for by Rule 3001 is not sufficient to support an objection to a claim. In order to prevail on an objection to a poorly documented claim, I need to have an affidavit from the debtor stating why the claim is invalid. Often my client is unwilling to sign an affidavit that he or she does not owe a debt, precisely because there is so little information in the proof of claim that he or she cannot state with certainty that the debt is not owed.

The rule should go further and require that, where a signature or written application is required for there to be a legally enforceable contract, a copy of the document containing the signature must be attached to the proof of claim. If the signature was an electronic signature, the proof of claim should describe the date of the electronic signature and enough additional information to make a prima facie case that there was a valid electronic signature.

09-BK-155. Richard D. Shepard. Currently no practical mechanism exists to require secured creditors and debt buyers to attach documentation to proofs of claim establishing that the claimant either owns the debt obligation or has any contractual relationship of any kind with the actual creditor. This requires debtor's counsel to either ignore the issue of the claimant's apparent lack of standing, or else consume the debtor's resources and the court's time in efforts to resolve the standing issue through an objection to the claim or an adversary proceeding. This is highly inefficient since the necessary documentation, if it exists, is in the possession of, or accessible to, the claimant.

09-BK-080 – Seth Davidson; 09-BK-084 – Richard Nemeth; 09-BK-088 – Penny Souhrada; 09-BK-126 – Jonathan C. Becker. The proposed amendments should require that when an entity files a proof of claim, it must demonstrate that it in fact owns the claim. The entity should also be required to disclose whether the statute of limitations has run on the claim. Any contracts on which the claim is based should be required to be attached. In the case of unsecured claims, those that fail to comply with the rules should be disallowed.

09-BK-106. Jeanne Hovenden. Regarding the requirements in Rule 3001 for claims based on open-end credit agreements, such as credit cards, the creditor should be required to produce the original signed application for the credit line, not just a recent statement on the account. Debt buyers that file a claim should also be required to send in the original credit applications signed by the debtor, the assignments or purchase documents showing that they now own the debt, and all prior account numbers that were assigned to the account since origination. In the world of securitized debt, including debts that have already been discharged in a bankruptcy, being able to determine who the original creditor was and the chain of title through the land of debt-traders, gives the debtor a fighting chance of not paying the same debt multiple times.

I am about to file an adversary proceeding against a creditor and the creditor's counsel for garnishing a debtor after a discharge in a 13 case in which the creditor and counsel submitted a claim that was paid in the prior chapter 13 case. I can do it only because I can trace the debt. When the debt buyers discard the original creditor's account number and add a new one of their own, it is impossible for the debtor to know with any certainty what creditor they initially borrowed from. This is compounded when the debt buyers and collection agency change the "date opened" in the credit reports from the date the account was opened by the original creditor to the

date they bought the account or began reporting its collection status in the credit report.

09-BK-128. Mitchell P. Goldstein. Creditors should be required to file all assignments along with their claims to prove that they are the current owner of the claim. The rules need a clear statement that their provisions are in addition to any other remedy allowed by other laws and are not meant to override those remedies. Several courts have taken the position that bankruptcy laws pre-empt other federal laws like the Fair Debt Collection Practices Act. Each law exists for specific and different reasons. Both should be respected.

Comments on Rule 3001(c)(2)

09-BK-034. Rep. James R. Langevin. The provisions requiring creditors to itemize interest, expenses, or charges and imposing sanctions for failure to furnish the required information raise concerns.

09-BK-142. ACA International. The proposed amendments are out of step with the type of documentation routinely stored by financial institutions under federal laws. For example, debt purchasers charged with reporting discharged debt frequently are unable to separately itemize principal and interest. Moreover, existing requirements already create a clear obligation on any party filing a proof of claim to properly evidence the claim, and they contemplate the opportunity to reasonably dispute a claim that is not properly supported.

09-BK-008 (testimony). **B-Line LLC (Linh K. Tran).** The proposal conflicts with §§ 501-502 of the Bankruptcy Code in creating a new basis to object to or disallow a claim. It would violate due process to impose sanctions against a creditor who cannot comply with the itemization requirement due to the terms of the existing contract between the debtor and the creditor. Fed. R. Civ. P. 15 and case law permit liberal amendments in the interest of justice; the same should be true for proofs of claim. Instead of the current proposals, the rule should define the minimum threshold for "prima facie validity" under Rule 3001. The itemization requirement in Rule 3001(c)(2)(A) should be deleted. Credit card accounts cannot comply since, under the terms of many contracts, interest becomes principal. Remove the prohibition against amendments of claims and one-sided sanctions.

09-BK-009 (testimony), **09-BK-141. Resurgent Capital Services (Carol J. Moore).** The vast majority of credit card agreements provide that interest earned in a given month, if not paid, becomes part of the principal balance of the card. If the borrower doesn't pay the bill in full every month, a credit card account balance at any given time has become a summation of hundreds – possibly thousands – of purchases, payments, finance charges, and fees. Separating those would impose a tremendous burden on creditors and might not even be possible. The burden would be particularly difficult for account purchasers, as the "balance" purchased is generally a single number to which the new owner may add interest and, in some cases, other charges. Given that over 99% of claims are recognized as valid by the debtor, the sanction provision essentially imposes strict liability on creditors to comply with a burdensome requirement that provides limited benefits to the debtor, the court, and creditors.

09-BK-149. Becket & Lee LLP. There seems to be no purpose for the imposition of the itemization requirement on unsecured claims, since all components of the debt are general unsecured claims. The rule as now proposed provides an incentive for litigation. While the Committee seeks to clarify what documentation is required to accompany certain proofs of claim, it has not specified that the "writing" requirement of Rule 3001 is satisfied if the new requirements are met. This omission leaves the door open to the continued use of Rule 3001 as a means to object to claims based on the lack of a "writing."

09-BK-132. Creditors Bankruptcy Service. In effect, this rule amendment resolves through the rulemaking process (by prohibiting evidence on the issue) the substantive issue of whether § 502 is exclusive. This proposed rule will have a profound chilling on creditors, particularly when the vast majority of unsecured claims in individual bankruptcy are relatively small and the intervention of attorneys is not economically justified. Subdivision (c)(2)(D) should be deleted.

09-BK-143. K&L Gates and eCast Settlement. Because of the nature of credit card claims, any itemization of that portion of the principal balance that originally represented unpaid interest could require a review of the entire payment history for a particular account. Depending upon the terms of the applicable credit agreement, unpaid interest and fees may be added to the outstanding principal balance. Proposed Rule 3001(c)(2)(D) provides that if any information required by subsection (c) is not provided with the proof of claim, the creditor will be precluded from presenting the information in any form in a subsequent contested matter or adversary proceeding. The proposed rule goes far beyond that necessary to prevent

creditor misconduct. The fact that the proposed rule would allow the admission of omitted information in an alternate form if the court found the original omission to be "substantially justified" or "harmless" does not alleviate this problem. The rule provides no guidance as to when an omission would be substantially justified or harmless, and the determination apparently would be made without any inquiry into the underlying merits of the claim.

09-BK-148. Bass and Associates, P.C. With respect to credit card claims, without making certain assumptions, the itemized statement required by Rule 3001(c)(2)(A) most likely is not within the capabilities of the major processing systems in use by most creditors. That is because of the unique operation of credit card accounts and the methods for applications of payments. The penalties provided by subdivision (c)(2)(D) far exceed what is required to ensure compliance with the proposed rule. Additionally, the language appears to contradict the language of the Bankruptcy Code and calls into question the significance of a debtor's listing of a debt on her schedules.

09-BK-146. American Bankers Association, Financial Services Roundtable, Mortgage Bankers Association. The organizations strongly oppose two provisions of Rule 3001 – new documentation requirements and authorization of additional sanctions for the failure to provide those documents. They suggest refinements of secondary aspects of the proposed amendments that could be addressed in a narrower proposal.

09-BK-135. Rep. Lamar Smith, ranking minority member, House Judiciary Committee. It is possible that the proposed amendments to Rule 3001 violate the Rules Enabling Act and are inconsistent with the "just, speedy, and inexpensive determination of every case and proceeding," as provided in Rule 1001.

09-BK-137. American Financial Services Association. Rule 3001(c)(2)(D) should be revised to require that a creditor be provided notice and a reasonable opportunity to cure any omissions before sanctions can be imposed. Enforcement of the requirements of Rule 3001(c) should be governed by the standards of Rule 9011. Finally, trustees should not be awarded sanctions for performing their statutory duty to examine proofs of claim and to object to claims that are improper.

09-BK-140. Housing Policy Council, Financial Services Roundtable, American Bankers Association, Mortgage Bankers Association. These organizations oppose the amendments to Rule 3001, including sanctions,

because the revisions upset the balance of burdens and responsibilities for the claims process set by Congress, in violation of the Rules Enabling Act. The proposed sanctions are unduly severe, are not supported by statutory authority, and reverse the presumption of validity that attaches to timely filed proofs of claim. If creditors are required to provide new documentation to support a proof of claim or an adjustment to a proof of claim, nationwide model forms should be adopted to increase certainty and compliance

09-BK-115. Hon. Howard R. Tallman (Bankr. D. Col.) (on behalf of a group of consumer debtor and creditor attorneys in his district). Rule 3001 does not address the inherent conflict between the timing of the confirmation hearing required by the Code and the later deadline to file a proof of claim.

09-BK-130. Prof. Bernadette Bollas Genetin (School of Law, University of Akron). As it is currently drafted, the proposed rule is somewhat ambiguous, and, on some readings, would be subject to challenge as violating the Bankruptcy Rules Enabling Act. The sanction provision in Rule 3001(c)(2)(D) conflicts with the Bankruptcy Code and abridges, enlarges, or modifies a substantive right. The Committee might instead formulate specific procedures for a party in interest to request additional information upon a demonstration of need. The rule might also include some mechanisms, such as affidavits or certifications, for ensuring the good faith of requests, and provide additional sanctions for instances in which a claimant failed, upon request, promptly to produce the requested information.

09-BK-114. The Insolvency Law Committee of the Business Law Section of the State Bar of California. The proposed sanction in Rule 3001(c)(2)(D) is unnecessarily harsh and invites judicial oversight that is not required or desirable. A better approach to enforce the new disclosure requirements is found in § 502(d) of the Bankruptcy Code, which disallows a claim until an avoidable transfer that the creditor has received is returned to the estate. In a similar manner, the creditor's claim should only be temporarily disallowed for failing to make the necessary disclosures, giving the creditor an opportunity to cure the deficiency before the claim is barred.

09-BK-004. Hon. Marvin Isgur (Bankr. S.D. Tex.). Although I agree with Rule 3001(c)(2)(B), I urge the Committee to require a full loan history. The proposed rule may lead to results that are inconsistent with the only court of appeals authority on the issue. See *Campbell v. Countrywide Home*

Loans, Inc., 545 F.3d 348 (5th Cir. 2008). The required escrow report should be tailored to meet the requirements of a bankruptcy case.

09-BK-041. National Association of Chapter 13 Trustees. The trustee members of the NACTT are deeply concerned over the increasing deterioration of the quality of information provided in proofs of claim and thus are generally supportive of the proposed amendments. The language in subdivision (c)(2)(C) – "consistent with applicable nonbankruptcy law" – may lead to the calculation of ongoing mortgage payments in a manner inconsistent with § 1322(b)(5) of the Bankruptcy Code, which permits prepetition escrow arrearages to be cured. A loan history does not need to be attached to the proof of claim. Adequate tools exist for trustees to obtain such information either under nonbankruptcy law or bankruptcy discovery rules.

09-BK-129. National Association of Consumer Bankruptcy Attorneys. NACBA strongly supports the Rule 3001 amendment. It will help to combat abuses by mortgage servicers who fail to adequately disclose and itemize charges that have been added to the principal and interest due on debtors' mortgages, as well as the filing of proofs of claim by purported mortgage holders who cannot document their interests. Such proofs of claim are regularly filed by attorneys who have never reviewed the underlying documentation or history of charges.

09-BK-157. National Association of Chapter Thirteen Trustees' Mortgage Liaison Committee. The Committee supports Rule 3001, but is concerned about requiring an escrow analysis as of the date of the bankruptcy filing. It advocates adopting a national form on which the breakout of information regarding the mortgage would be provided as an attachment to the proof of claim.

09-BK-151. Debra L. Miller. I support Rule 3001 and suggest adopting a standard form for a mortgage proof of claim attachment.

09-BK-159. Rep. John Conyers, Jr., chair, House Committee on the Judiciary, and Rep. Steve Cohen, chair, Subcommittee on Commercial and Administrative Law. The filing and documentation requirements exponentially increased for consumer debtors as a result of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act. The United States Trustee Program has enforced these requirements with particular exuberance. With respect to policing creditor abuses in consumer bankruptcy cases, however, there is a need for more enforcement tools. This need has been expressed in congressional hearings and by some courts,

and a recent academic study found substantial discrepancies between mortgage debt scheduled by debtors and creditors' proofs of claim.

09-BK-016 (testimony). **National Association of Consumer Bankruptcy Attorneys (David B. Shaev).** NACBA supports Rule 3001, including sanctions and requirements for additional documentation and itemization of claims. The amendment should be strengthened to require that the entity filing a proof of claim provide proof that it is the owner of the claim and that it disclose whether the statute of limitations has run. It should also require attachment of all contracts on which the claim is based.

09-BK-029. James J. Haller. Rule 3001 should be strengthened to require that the entity filing the proof of claim provide proof that it is the owner of the claim.

09-BK-043, O. Max Gardner, III. All bankruptcy courts should be directed to immediately approve these rules in the form of emergency administrative orders.

09-BK-054. Nancy B. Clark. Creditors should be required to reimburse debtors who successfully object to a claim.

09-BK-064. James Hong. Mortgage holders on the debtor's home should be required to supply proof of the identity of the current holder of the mortgage.

09-BK-070. John F. Cannizzaro. Rule 3001(c)(2)(A) should require the "itemized statement" to specify to whom each payment was made and for what purpose.

09-BK-069. Charles J. Roedersheimer. In the past two years, local rules in the S.D. Ohio, Dayton, have required documentation of claims as proposed by Rule 3001, and the number of objections filed to these claims has been reduced substantially. Discovery from creditors is no longer required to have them break out the arrearage costs in their claims in order to determine if the claims include improper attorney's fees, unallowed sheriff sale costs on foreclosure that are refunded because of stay by bankruptcy filing, and other administrative fees that would be regarded as unreasonable or excessive.

09-BK-091. G. Craig Hubble. Determination of what mortgage lenders are making claims for is an ongoing problem. They add on miscellaneous, unspecified charges. In many cases, they fail to give the debtor credit for

payments made, so they start off with an incorrect beginning balance. The new rules would greatly simplify the process.

09-BK-099. Gerald McNally, Jr. It is impossible for a debtor to propose a chapter 13 plan when he or she cannot get a finite number from a lender stating the amount owed. A proof of claim with a single sheet summary does not enable me to determine the accuracy of the claimed amount. This prevents me from representing my debtors intelligently or honestly. These flaws in the bankruptcy system should be corrected.

09-BK-102. Kenneth E. Lenz. Mortgage servicers, by providing no information as to arrearages or escrows, have required debtors' attorneys to spend countless hours contacting servicers to obtain this basic information, and to delay confirmation of chapter 13 plans until such information is provided.

09-BK-136. Annabelle Patterson. I strongly support Rule 3001 as being essential to curbing systematic abuse by mortgage servicers. Some mortgage proofs of claim include double-dipping escrow payments, foreclosure fees and costs that are never itemized or documented in any way, and overcharges for fees and costs.

09-BK-040. Prof. Katherine Porter (Visiting Associate Professor at University of California-Berkeley Law School). I support the proposed amendments to Rule 3001. In my article Misbehavior and Mistake in Bankruptcy Mortgage Claims, 87 TEX. L. REV. 121 (2008), I reported the results of my analysis of more than 1700 proofs of claims filed by mortgage creditors. The major findings were:

- More than half (52.8%) of claims were not supported by the documentation required by current Rule 3001(c) or Rule 3001(d), or an itemization required by Form 10's instructions.
- Debtors and creditors disagreed on the amount of mortgage debt for 95.6% of loans, reflected by discrepancies between debtors' schedules and creditors' proofs of claim.
- Itemizations were missing from 16.1% of the claim. Many of the attached "itemizations" did not contain any breakdown of principal, interest, fees, and other charges, and frequently put large sums in categories such as "other."

The need for the additional information provided for in the proposed Rule 3001(c) is acute for both unsecured and secured claims. The Committee should reject arguments that the lack of objections to claims is any meaningful evidence of the accuracy of the claims being filed and paid

under the current rule. The infrequency of objections under the current system may, in fact, be evidence of the problems with the current claims process. In many jurisdictions, a debtor must provide a specific basis for an objection to a claim. Yet, without some minimal documentation to identify the claimant and to understand the asserted basis of what is owed, the debtor is deprived by the creditor of the necessary knowledge to determine whether an objection is warranted.

Official Forms should be developed to accompany the proposed rules. They would increase the efficiency of the claims process, reducing costs for creditors and facilitating the review of claims by courts, trustees, debtors, and all creditors.

Comments by other members of the consumer bankruptcy bar, supporting the amendments to Rule 3001(c):

09-BK-027. David Commons
09-BK-030. Barbara Stief
09-BK-032. William J. Neild
09-BK-033. Ronald Ryan
09-BK-039. Frank Cahill
09-BK-042. Brett Weiss
09-BK-045. John R. Cantrell, Jr.
09-BK-047. David Rao
09-BK-048. Pernell McGuire
09-BK-049. Paul Gandy
09-BK-050. Ken Keeling
09-BK-051. Bernd G. Stittleburg
09-BK-052. David H. Abrams
09-BK-056. Richard C. Foote
09-BK-057. Pamela Simmons-Beasley
09-BK-059. Ann N. Nguyen
09-BK-060. Christopher Smith
09-BK-061. Seth D. McCloskey
09-BK-062. Glenda J. Gray
09-BK-063. D. Justin Harelik
09-BK-065. Edgar P. Petti
09-BK-066. Patricia Johnson
09-BK-067. Cristina Rodriguez
09-BK-068. Robert R. Cloar
09-BK-071. Fred Martens
09-BK-073. Ruben F. Arizmendi

09-BK-075. Charles Farrell
09-BK-078. Ken Rannick
09-BK-079. Barbara L. Franklin
09-BK-081. Howard Iken
09-BK-082. Stephen Manning
09-BK-083. Brad Eaby
09-BK-087. Jim Green
09-BK-089. Bill Turner
09-BK-092. John M. Caraway, Jr.
09-BK-093. Bob Haeger
09-BK-095. Steve Rodriguez
09-BK-096. Robert Pullis
09-BK-097. Brett Weiss
09-BK-101. Charles E. Stalnaker
09-BK-103. Aaron C. Amore
09-BK-105. Larry Regan
09-BK-107. Sonja Ann Becker
09-BK-108. Deanna Tubandt
09-BK-109. Richard K. Gustafson, II
09-BK-110. Bruce H. Williams
09-BK-112. Troy R. Jensen
09-BK-113. Richard Bushman
09-BK-117. Lex A. Rogerson, Jr.
09-BK-118. John Francis Murphy
09-BK-119. Melvin N. Eichelbaum
09-BK-122. Stan Lockhart
09-BK-123. Maria D. McIntyre for the Financial Protection Law Center
09-BK-125. Debra Voltz-Miller
09-BK-138. Rosemary Williams
09-BK-154. Joseph M. Romano
09-BK-156. William L. Fava
09-BK-158. Erin B. Shank

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) NOTICE OF PAYMENT CHANGES. 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.

(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 (i) that were incurred in connection with the claim after the bankruptcy case was filed, and (ii) 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.

(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).

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of the debtor or trustee 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.

(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 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.

(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 claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. 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.

(i) FAILURE TO NOTIFY. 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:

(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

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a) specifies that this rule applies only in a chapter 13 case to claims secured by a security interest in the debtor's principal residence.

Subdivision (b) requires the holder of a claim to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount at least 21 days before the new payment amount is due.

Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable from the debtor or against the debtor's principal residence. This might include, for example, inspection fees, late charges, or attorney's fees.

Subdivision (d) provides the method of giving the notice under subdivisions (b) and (c). In both instances, the holder of the claim must give notice of the change as prescribed by the appropriate Official Form. In addition to serving the debtor, debtor's counsel, and the trustee, the holder of the claim must also file the notice on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to any notice given under subdivision (b) or (c), and therefore the notice will not constitute prima facie evidence of the validity and amount of the payment change or of the fee, expense, or charge.

Subdivision (e) permits the debtor or trustee, within a year after service of a notice under subdivision (c), to seek a determination by the court as to whether the fees, expenses, or charges set forth in the notice are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (f) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice must (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been paid, and (2) direct the holder to comply with subdivision (g). If the trustee fails to file this notice within the required time, this subdivision also permits the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (g) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (f). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made or that the debtor is not current on other payments required by § 1322(b)(5), the response must itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (h) provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the statement under (g), the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

Subdivision (i) specifies sanctions that may be imposed if the holder of a claim fails to provide any of the information as required by subdivisions (b), (c), or (g).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).

Changes Made After Publication

Subdivision (a). As part of organizational changes intended to make the rule shorter and clearer, a new subdivision (a) was inserted that specifies the applicability of the rule. Other subdivision designations were changed accordingly.

Subdivision (b). The timing of the notice of payment change, addressed in subdivision (a) of the published rule, was changed from 30 to 21 days before payment must be made in the new amount.

Subdivision (d). The provisions of the published rule prescribing the procedure for providing notice of payment changes and of fees, expenses, and charges were moved to subdivision (d).

Subdivision (e). As part of the organizational revision of the rule, the provision governing the resolution of disputes over claimed fees, expenses, or charges was moved to this subdivision.

Subdivision (f). The triggering event for the filing of the notice of final cure payment was changed to the debtor's completion of all payments required under the plan. A sentence was added requiring the notice to

inform the holder of the mortgage claim of its obligation to file and serve a response under subdivision (g).

Subdivision (h). The caption of this subdivision (which was subdivision (f) as published), was changed to describe its content more precisely.

Subdivision (i). The clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. A sentence was added to the first paragraph to clarify that the rule applies regardless of whether ongoing mortgage payments are made directly by the debtor or disbursed through the chapter 13 trustee. Other changes were made to the Committee Note to reflect the changes made to the rule.

Other changes. Stylistic changes were made throughout the rule and Committee Note.

Summary of Public Comment

09-BK-135. Lamar Smith (ranking minority member, House Judiciary Committee). Proposed new Rule 3002.1 will impose unnecessary burdens on creditors in chapter 13 cases that hold claims secured by home mortgages, and the rule contains the same objectionable sanction provision as Rule 3001(c).

09-BK-022 (testimony). **American Bankers Association (Philip S. Corwin).** Notices of changes in payment amount due to interest rate or escrow account adjustments should be entitled to a presumption of validity absent evidence to the contrary. Providing itemized notice of fees, expenses, or charges within 180 days after they were incurred may not be feasible. A longer time period should be set. Many creditors will be unable to serve a statement on the debtor's counsel and other parties within 21 days of receipt of a cure notice. This period should be lengthened to at least 90 days. A model form should be promulgated for the provision of such notice by a trustee or debtor.

09-BK-140. Housing Policy Council, Financial Services Roundtable, American Bankers Association, Mortgage Bankers Association. The organizations oppose proposed Rule 3002.1, including sanctions. The

revisions upset the balance of burdens and responsibilities for the claims process set by Congress in violation of the Rules Enabling Act. If creditors are required to provide new documentation to support an adjustment to a proof of claim, nationwide model forms should be adopted to increase certainty and compliance. The timing of deadlines in the new 3002.1 notification scheme must be modified to create more realistic deadlines for mortgage servicers. In 3002.1(a), change the 30 days to file a Notice of Payment Changes to "at least 25, but no more than 120 calendar days, prior to the due date of the new payment amount" to follow the Truth in Lending Act adjustable interest rate change notice. In 3002.1(c), change the 180-day period to file a Notice of Fees, Expenses, and Charges to a year, and change the one year for the debtor or trustee to respond to the notice to 21 days. In 3002.1(e), change the 21-day deadline for responding to a Notice of Final Cure to a 90-day deadline.

09-BK-115. Hon. Howard R. Tallman (Bankr. D. Col.) (on behalf of a group of consumer debtor and creditor attorneys in his district). Proposed Rule 3002.1 fails to take into account home equity lines of credit. Depending upon rate fluctuations, payments could change monthly, making it difficult, if not impossible, to comply with the rule. Increased fees and burdens are caused to creditors by requiring them to examine loans secured by the debtor's primary residence every 180 days or risk waiving fees, expenses and charges recoverable from the debtor under the terms of the loan documents. This increased participation by the secured creditor may result in significant additional costs to debtors since the terms of most promissory notes provide that debtors can be charged reasonable legal fees and costs associated with legal actions. As drafted, the rule may result in at least yearly litigation if the debtor or trustee objects to the recoverability of fees, expenses, or charges. Given the high percentage of cases that never reach discharge, the frequent supplementation of claims, and the resulting additional costs of the supplementation, may ultimately prove unnecessary in most cases.

Rule 3002.1(e) requires a holder to file a Response to the Notice of Final Cure, rather than treating silence as consent. Failure to file a response could subject the holder to possible sanctions, including an award of attorneys' fees and expenses. Many consumer attorneys structure their fees so that confirmation of the plan is the end of their representation. Monitoring the supplemental claims, reviewing the Notice of Final Cure and Response, and filing a Motion to Determine Cure will require counsel to either remain active in each chapter 13 case filed for the life of the plan or withdraw from the case.

09-BK-124. Glen K. Palman for the Bankruptcy Court Administration Division at the Administrative Office of the U.S. Courts. 43 of the 58 clerks responding to a survey prefer that mortgage creditors' notices of payment change be filed on the case docket. 7 of the 43 clerks favoring the case docket suggested that CM/ECF spread the filing from the case docket to the claims docket.

09-BK-035. Hon. Thomas L. Perkins (Bankr. C.D. Ill.). By failing to limit its applicability to cases where the trustee pays the postpetition mortgage payments, this new filing and notice requirement incorrectly assumes a uniformity among bankruptcy courts that does not exist. The scope of paragraph (c) encompasses all postpetition fees, expenses, and charges, even when no payment change results and collection is not sought. This provision exceeds the scope of what may be permissibly addressed by the new rule. Issues relating to the prepetition arrearage to be "cured" and the postpetition payments to be "maintained" (at least to the extent paid by the trustee), are proper issues for the bankruptcy court. Other issues that may arise between the mortgagor and the mortgage holder are not. Paragraph (d) deals with whether the prepetition arrearage has been fully cured. Paragraph (e), which contemplates a "response" to the notice required by paragraph (d), should be limited to the same issue. In subdivision (f), the final phrase, "and paid all required postpetition amounts in full," should be deleted.

09-BK-114. The Insolvency Law Committee of the Business Law Section of the State Bar of California. Proposed Rule 3002.1 creates new and extensive information requirements for a claim secured by a mortgage on a chapter 13 debtor's home. The sanctions for failing to comply are unnecessarily harsh and invite judicial oversight that is not required or desirable.

09-BK-023. Hon. Michael E. Romero (Bankr. D. Col.) for Bankruptcy Judges Advisory Group. BJAG supports Rule 3002.1 as written, including filing payment change notices on the claims docket.

09-BK-151. Debra L. Miller. I support Rule 3002.1. The timing of the "notice of final cure payment" needs to be clarified, and standard forms for the notices required under the rule should be adopted. Mortgage servicers (and their attorneys) should be allowed to file the notices

09-BK-159. Rep. John Conyers, Jr., chair, House Committee on the Judiciary, and Rep. Steve Cohen, chair, Subcommittee on Commercial and Administrative Law. We sponsored legislation in the last Congress

and in the present Congress that, in pertinent part, would require greater disclosure and court review of claims secured by a chapter 13 debtor's principal residence.

09-BK-016 (testimony). **National Association of Consumer Bankruptcy Attorneys (David B. Shaev).** NACBA supports proposed new Rule 3002.1. It is absolutely necessary to prevent Chapter 13 mortgage arrearage cures from becoming ineffectual due to abusive mortgagee practices.

09-BK-037. Marie-Ann Greenberg. As drafted, the rule works best in jurisdictions where conduit payments are made by the Standing Trustee. The notice of cure should be filed at the end of the case.

09-BK-044. Mohammad Ahmed Faruqui. The rule should provide for review of the veracity of creditors' claims for more fees.

09-BK-053. Shmuel Klein. The cure notice for mortgage claims must also include how the amount was calculated and include the documentary basis for each charge claimed.

09-BK-128. Mitchell P. Goldstein. Creditors who hold a security interest in property that the debtor has stated an intention to retain (whether in a Statement of Intention or by paying directly in a chapter 13 plan) must send regular monthly statements to the debtor so that the debtor can track payments and ensure the right to retain the property. These statements should not be considered violations of the automatic stay. Mortgage companies should be required to account for postpetition payments separately from prepetition arrearage payments. The trustee payments should be applied to all amounts owed prepetition based on the proof of claim filed and allowed. The debtor payments made directly should be applied to post-petition obligations only (and not to added fees unless they comply with the new rule).

09-BK-129. National Association of Consumer Bankruptcy Attorneys. Proposed Rule 3002.1 is absolutely necessary to prevent chapter 13 mortgage cures from becoming totally ineffectual due to abusive mortgage servicing practices. It should provide that fees that are not disclosed as required are waived. Although there is some dispute about whether Rule 2016 currently requires an application before such fees can be recovered, an amendment to the new rule can make it clear that it is required. The rule should provide that creditors may not charge attorney's fees for the required notices of fees and payment changes which they already had a pre-existing obligation to disclose under nonbankruptcy law. Outside of bankruptcy,

such notices are routinely sent by mortgage servicers without attorney involvement or additional attorney's fees.

09-BK-004. Hon. Marvin Isgur (Bankr. S.D. Tex.). Rule 3002.1(c) should be clarified as to whether the expense notice is applicable only in trustee-pay cases or in all cases in which there is a home mortgage. The procedure in Rule 3002.1(d) should be changed to a motion to determine that the debtor is current on all ongoing mortgage payments and has cured all arrearages. The court's order in response should have res judicata effect in any subsequent state or federal litigation.

09-BK-041. National Association of Chapter 13 Trustees. NACTT concurs with Judge Isgur's suggestion that, in order to obtain the res judicata effect of an order, the notice of final cure payment under Rule 3002.1(d) should be permitted by motion rather than notice. Because the difficulties experienced by trustees with mortgages relate mostly to postpetition, ongoing payments, resulting from the fees, charges, advances, escrow adjustments, interest rate adjustments, and other modifications made during the pendency of the case, the critical question is not whether the prepetition arrearage has been cured, but whether the payments made during the plan, either by the trustee or the debtor, are current at the time of the request. Thus, timing the motion or notice of cure to 30 days after the pre-petition arrearage has been cured will not satisfy the difficulty that may be encountered if the chapter 13 plan lasts another year or two after the pre-petition arrearages are cured.

09-BK-157. National Association of Chapter Thirteen Trustees' Mortgage Liaison Committee. Proposed Bankruptcy Rules 3001 and 3002.1 are consistent with the spirit of the Best Practices developed by the NACTT Mortgage Liaison Committee, and the Committee advocates the adoption of these Rules. These Rules will allow consistency on a national basis. While many of the large servicers have the technology and ability to run an escrow analysis on a date certain (as of the date of the filing of the bankruptcy), some smaller servicers do not have this ability. HELOC and DSI loans seem to be problematic with the rule as proposed. Some loan payments adjust every 30 days, and in the case of a DSI loan may have interest rate changes on a daily basis.

09-BK-040. Prof. Katherine Porter (Visiting Associate Professor at University of California-Berkeley Law School). I support proposed Rule 3002.1. The frustration of consumer debtors' attorneys, creditors' attorneys, trustees, and judges about the administration of mortgage claims in chapter 13 cases is manifest. Creditors, just as much as debtors, would be

well-served by the uniformity that proposed Rule 3002.1 would bring to case administration. Official Forms should be developed to accompany the proposed rules.

09-BK-054. Nancy B. Clark. I have had clients call after a successful chapter 13 to inform me that the mortgage company has scheduled a sale of their home. This is caused mostly by the mortgage servicers' accounting systems. Chapter 13 bankruptcy has been around for a long enough period for servicers to set up systems that will account for payments correctly, but they have not changed those systems because it is more profitable for them to collect unwarranted fees after a bankruptcy than it is to play by the rules.

09-BK-055. J. Thomas Black. In one case I was reviewing yesterday, the homeowner just completed her chapter 13 payments (no discharge yet), and her mortgage servicer changed. The new servicer has already added over $700 in "junk fees" that were not authorized by the bankruptcy court. With our local rule, I will be able to challenge the imposition of those fees with clear authority to do so; without it, it would be an uphill battle to get them removed, if possible at all. In another case, the debtor completed his plan, and under local procedures the trustee filed a Motion to Deem Mortgage Current, which was granted. Again, the servicer changed (this time after discharge), and the new servicer insisted that the debtor owed one more payment than he should have. The payments are $5665 each. With the Order Deeming Mortgage Current, we were able to prevail upon the new servicer to give credit for the payment. Without the order, we would have had to bring litigation in the bankruptcy court, and the outcome would have been uncertain, but costly for everyone to sort out.

09-BK-060. Christopher Smith. We often encounter difficulty in crafting a plan to deal with the home mortgage claim because it is a challenge to ascertain the source of the charges, or even more alarming, it is difficult to determine how the lender calculated the monthly payment. Often these numbers do not comport with what the debtor was paying prepetition. We need to give debtors some assurance when they emerge from a plan that they will be current, since this is usually the primary purpose of the chapter 13 filing.

09-BK-078. Ken Rannick. It is sometimes necessary to have a debtor re-enter a chapter 13 or file a subsequent case to clean up a discrepancy in the previous case. The proposed rule will establish a mechanism for the court to determine at the end of the case whether the mortgage has been cured, and precludes a creditor from introducing evidence of any fees or charges

for which notice was not provided under the rule. This exit accounting is great.

09-BK-085. Richard Croak. Several years ago I had a client who had very limited means but scrupulously made his chapter 13 payments and mortgage payments. He had a small default on his mortgage payments when he filed, but remained current thereafter. He died unexpectedly and the following month the mortgage holder moved to modify the stay and foreclose since the case was no longer feasible. The client's executor asked that I keep the case open temporarily, as she had a pending sale for the debtor's house. When the mortgage holder's payoff letter arrived in the closing attorney's office, he called me to say the amount was $15,000 higher than expected. We closed on the house on the bankruptcy court's order and escrowed the disputed amount. It took months of litigation before the court finally found that the bank had nothing to support its additional charges. It had been simply adding charges for property taxes that they had not paid, for inspections never made, and defaults that had not occurred. Had the debtor lived, he would have been confronted by these at the end of his case. His untimely death exposed the bank's erroneous charges.

09-BK-100. Mark Cornell. I am constantly dealing with issues related to mystery charges and fees from the mortgage lender. Often these fees are related to attorneys fees never disclosed to the court or to the debtor during the course of the case. The common response when questioned about these fees is, "We are the lender; we can do what we want." The procedures in proposed Rule 3002.1 would avoid future litigation and are not a burden on creditors.

09-BK-103. Aaron C. Amore. All too often I see all sorts of illegal fees included in a proof of claim, including attorneys fees, property preservation fees, proof of claim fees, processing fees, and a wide range of other miscellaneous fees that are not considered principal and/or interest. Mortgage servicers will often apply post-filing payments to the earliest debt and not consider them as pass-through payments on the current obligation. This results in an inappropriate motion for relief from the stay, even though the debtor is current on his monthly payments to the trustee in a mortgage pass-through case. Debtors then need to respond, the trustee often files a response, and the court has to take the matter up in due course. These motions cause confusion and delay.

09-BK-106. Jeanne Hovenden. Mortgage lenders do not want to provide detailed payment histories on the loans, and they do not want the debtors or the courts to see the amount of added, unnecessary costs being charged for

broker price opinions, drive-by "appraisals," property maintenance drive-by's, etc, during chapter 13 cases. Many of these "services" are obtained every month. When multiplied by the number of homes in chapter 13 nationwide, it becomes a wonderful profit center for the lenders. Forcing them to disclose the fees will at least partially level the playing field so that debtors can challenge the necessity of these costs during the bankruptcy case. Right now, there is no mechanism in the bankruptcy code short of a full blown adversary proceeding to get these disclosed. That leaves the debtor, who is required by the Code and the courts to devote all available excess income to their chapter 13 payment, in the position of being unable to afford to pay counsel to bring the adversary proceeding. The debtor then hopes that the court will award attorney's fees to cover the cost of ferreting out information that the debtor should be receiving as the case unfolds. It is also critical for the court to have a way of determining at the end of a chapter 13 case that the mortgage loan has been brought current. I have had to file subsequent chapter 13 cases because of the fees that were assessed without contemporaneous disclosure to the debtor during the first case.

The proposed 180-day time for providing information concerning fees, expenses, and charges is too long. The requirement should be shortened to 90 days. The mortgage company can provide the reports to the court, the debtor, and counsel at the same time it pays the vender for the service, which likely happens within 90 days of the service being provided.

09-BK-111. G. Bruce Kuehne. It is unfortunately true that there is no way we can know (except by making a RESPA request in every case, which is a hardship on both us and the lender) whether a mortgage debt has been cured in a chapter 13 case. We also have no efficient way to know whether the lender is adding on late charges each month during the plan. It is a huge shock to debtors when they complete their plan, assuming they are in good standing, only to learn that they still owe thousands of dollars in fees to the mortgage lender.

09-BK-117. Lex A. Rogerson, Jr. One of the most common ways in which a debtor may be frustrated in the attempt to bring a home mortgage current is by the mortgage holder's assessment of fees and charges during the pendency of the bankruptcy. The debtor may have made all plan payments and may believe he has made all postpetition mortgage payments, but upon discharge he learns that the mortgage holder contends he still owes charges that accrued during the case. The holder typically has not notified the debtor of these charges, usually contending the automatic stay prohibits such notice. The propriety of such charges should be determined in bankruptcy court while the case is pending, not in state court thereafter.

Bankruptcy judges understand how chapter 13 requires mortgage holders to apply payments; state court judges do not. State courts are likewise ill-equipped to determine whether it was necessary for the mortgagee's attorney to take a given step in a bankruptcy case or whether the associated fees are reasonable.

09-BK-136. Annabelle Patterson. I strongly support proposed Rule 3002.1 as essential to curbing systematic abuse by mortgage servicers. Common abuses include holding trustee payments in suspense accounts for long periods of time and failing to apply trustee payments to principal and interest payments due; using ongoing trustee payments to pay fees and costs ahead of principal and interest payments; using ongoing trustee payments to pay fees and costs that were never disclosed to the court; and manipulating escrow accounts and diverting escrow payments to pay fees and costs. The failure of servicers to notify the parties of changes in the ongoing monthly payments due to escrow changes or interest rate adjustments is particularly problematic.

09-BK-158. Erin B. Shank. I strongly support the proposed amendments that would require mortgage companies to notify borrowers in bankruptcy before adding fees and charges to their loans. This requirement is very much needed. I have numerous clients who exit bankruptcy after making all of their payments only to learn that their mortgage company has added numerous fees to their loan that they never knew of during their bankruptcy case. They exit bankruptcy with a big bill on their mortgage, instead of with a fresh start and a current mortgage.

Comments of other members of the consumer bankruptcy bar expressing support for proposed Rule 3002.1

09-BK-030. Barbara Stief
09-BK-031. Loraine Troyer
09-BK-032. William J. Neild
09-BK-038. Lucien A. Morin
09-BK-039. Frank Cahill
09-BK-042. Brett Weiss
09-BK-045. John R. Cantrell, Jr.
09-BK-046. Jonathan Leventhal
09-BK-047. David Rao
09-BK-048. Pernell McGuire
09-BK-049. Paul Gandy
09-BK-050. Ken Keeling
09-BK-051. Bernd G. Stittleburg

09-BK-052. David H. Abrams
09-BK-056. Richard C. Foote
09-BK-057. Pamela Simmons-Beasley
09-BK-058. Scott Logan
09-BK-059. Ann N. Nguyen
09-BK-061. Seth D. McCloskey
09-BK-062. Glenda J. Gray
09-BK-065. Edgar P. Petti
09-BK-066. Patricia Johnson
09-BK-067. Cristina Rodriguez
09-BK-068. Robert R. Cloar
09-BK-071. Fred Martens
09-BK-073. Ruben F. Arizmendi
09-BK-074. Sharon L. Smith
09-BK-075. Charles Farrell
09-BK-076. Edward Shaw
09-BK-077. Heidi McLeod
09-BK-079. Barbara L. Franklin
09-BK-081. Howard Iken
09-BK-082. Stephen Manning
09-BK-083. Brad Eaby
09-BK-084. Richard Nemeth
09-BK-087. Jim Green
09-BK-088. Penny Souhrada
09-BK-089. Bill Turner
09-BK-091. G. Craig Hubble
09-BK-092. John M. Caraway, Jr.
09-BK-093. Bob Haeger
09-BK-095. Steve Rodriguez
09-BK-096. Robert Pullis
09-BK-097. Brett Weiss
09-BK-098. Alan Ramos
09-BK-099. Gerald McNally, Jr.
09-BK-101. Charles E. Stalnaker
09-BK-102. Kenneth E. Lenz
09-BK-105. Larry Regan
09-BK-107. Sonja Ann Becker
09-BK-108. Deanna Tubandt
09-BK-109. Richard K. Gustafson, II
09-BK-110. Bruce H. Williams
09-BK-112. Troy R. Jensen
09-BK-113. Richard Bushman
09-BK-118. John Francis Murphy

09-BK-119. Melvin N. Eichelbaum
09-BK-121. Stephen M. Goldberg
09-BK-122. Stan Lockhart
09-BK-125. Debra Voltz-Miller
09-BK-126. Jonathan C. Becker
09-BK-138. Rosemary Williams
09-BK-154. Joseph M. Romano
09-BK-155. Richard D. Shepard
09-BK-156. William L. Fava

Rule 4004. Grant or Denial of Discharge

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(b) EXTENSION OF TIME.

(1) On motion of any party in interest, after notice and hearing ~~on notice~~, the court may for cause extend the time to ~~file a complaint~~ objecting to discharge. Except as provided in subdivision (b)(2), ~~T~~the motion shall be filed before the time has expired.

(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and 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.

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COMMITTEE NOTE

Subdivision (b) is amended to allow a party, under certain specified circumstances, to seek an extension of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. Furthermore, during that period the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In those situations, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

Changes Made After Publication

Following publication minor stylistic changes were made to the language of the rule, and a sentence was added to the Committee Note to clarify that the rule applies whenever the debtor commits an act during the gap period that provides a basis for both denial and revocation of the discharge.

Summary of Public Comment

09-BK-001. Hon. Wesley Steen (Bankr. S.D. Tex.). The statute allows denial of discharge if the act occurs after the deadline for objecting to discharge, provided that the discharge has not yet been entered. I believe that the rule (even with the proposed change) is more restrictive than the statute and denies relief that the statute authorizes. Therefore, unless the rule is amended even further, it is my view that the rule is invalid.

09-BK-004. Hon. Marvin Isgur (Bankr. S.D. Tex.). This is an excellent change to this rule to address the current "gap period" discharge problem. I will note that my colleague, Wesley Steen, recently confronted a related problem that could also be addressed by this rule. See *In re Shankman*,

2009 WL 2855731 (Bankr. S.D. Tex. 2009). For the reasons set forth by Judge Steen, I suggest that the language be broadened to address the concerns raised in *Shankman*.

09-BK-114. The Insolvency Law Committee of the Business Law Section of the State Bar of California. The proposed changes to this rule would enhance the ability of creditors to extend the time to file a complaint objecting to a debtor's discharge. The ILC has confirmed that the proposed amendment of Rule 4004 was drafted to address grounds for revocation of discharge beyond Bankruptcy Code § 727(d)(1) – that the discharge was obtained through the fraud of the debtor and the requesting party did not know of such fraud until after the granting of such discharge. The proposed Committee Note, however, seems to refer only to section 727(d)(1). The ILC respectfully submits that the comment should be amended to explain the full scope of the provision.

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

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, ~~grant relief~~ issue an order granting ~~regarding~~ the following:

(a) an application under Rule 2014;

(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; ~~and~~ or

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

COMMITTEE NOTE

The rule is amended to clarify that it limits the timing of the entry of certain orders, but does not prevent the court from providing an effective date for such an order that may relate back to the time of the filing of the application or motion, or to some other date. For example, while the rule prohibits, absent immediate and irreparable harm, the court from authorizing the employment of counsel during the first 21 days of a case, it does not prevent the court from providing in an order entered after expiration of the 21-day period that the relief requested in the motion or application is effective as of a date earlier than the issuance of the order. Nor does it prohibit the filing of an application or motion for relief prior to expiration of the 21-day period. Nothing in the rule prevents a professional from representing the trustee or a debtor in possession pending the approval of an application for the approval of the employment under Rule 2014.

The amendment also clarifies that the scope of the rule is limited to granting the specifically identified relief set out in the subdivisions of the rule. Deleting "regarding" from the rule clarifies that the rule does not prohibit the court from entering orders in the first 21 days of the case that may relate to the motions and applications set out in (a), (b), and (c); it is only prohibited from granting the relief requested by those motions or applications. For example, in the first 21 days of the case, the court could grant the relief requested in a motion to establish bidding procedures for the sale of property of the estate, but it could not, absent immediate and irreparable harm, grant a motion to approve the sale of property.

Changes Made After Publication

Minor stylistic changes were made to the Committee Note following publication.

Summary of Public Comment

No comments were submitted on proposed Rule 6003 after its publication.

Official Forms 22A, 22B, 22C

Official Forms 22A, 22B, and 22C, with the amendments highlighted, are included in the pages that follow.

Changes Made After Publication

No changes were made to the forms after publication

Summary of Public Comment

09-BK-032. William J. Neild. I have no objection to clarifying the "family size" issue, but I suggest another change to Form 22A that the Committee should consider. Individuals who are not self-employed should be allowed to deduct certain expenses incurred in the production of income.

Official Forms 20A and 20B

Official Forms 20A and 20B, with the amendments highlighted, are included in subsequent pages. Because the changes are made to conform to existing statutory and rule provisions, final approval is sought without publication.

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____ _____	Case No. _____ Chapter _____

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date) , you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also mail a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date) , (year) , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____ Signature: _____
Name:
Address

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor	)	Case No. _____
Address _____ _____	)	Chapter _____
Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____	)	
Employer's Tax Identification (EIN) No(s).(if any): _____ _____	)	

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also mail a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on (date), (year), at ___ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name:
Address

COMMITTEE NOTE

The form is amended to require that the title of the case include all names used by the debtor within the last eight years. This change conforms to the 2005 amendment of § 727(a)(8), which extended from six years to eight years the period during which a debtor is barred from receiving successive discharges. In conformity with Rule 9037, the filer is directed to provide only the last four digits of any individual debtor's taxpayer-identification number.

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**Disabled Veterans.** If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).
1B	**Non-consumer Debtors.** If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**Reservists and National Guard Members; active duty or homeland defense activity.** Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 days and ☐ I remain on active duty /or/ ☐ I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed; OR b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.** b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.** c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.** d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$
9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act Debtor $ _____ Spouse $ _____	$	$

10	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. **Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance.** Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.		$

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero. a. $ b. $ c. $ Total and enter on Line 17.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19A	**National Standards: food, clothing and other items.** Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
19B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.	$

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

20A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
20B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.**	$

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

21	**Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below: _____ _____ _____	$

22A	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. ☐ 0 ☐ 1 ☐ 2 or more. If you checked 0, enter on Line 22A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
22B	**Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
23	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**	$
24	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 23. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**	$
25	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
26	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly payroll deductions that are required for your employment, such as retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
27	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 44.**	$

a.	IRS Transportation Standards, Ownership Costs	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

a.	IRS Transportation Standards, Ownership Costs	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 34		$
	If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below: $ _____		
35	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.		$
36	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.		$
37	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**		$
38	**Education expenses for dependent children less than 18.** Enter the total average monthly expenses that you actually incur, not to exceed $137.50 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**		$
39	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary.**		$

40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40	$

Subpart C: Deductions for Debt Payment

42 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b and c	

$

43 **Other payments on secured claims.** If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44 **Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 28.** $

45 **Chapter 13 administrative expenses.** If you are eligible to file a case under chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a.	Projected average monthly chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of chapter 13 case	Total: Multiply Lines a and b

$

46	**Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45.	$

Subpart D: Total Deductions from Income

47	**Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 33, 41, and 46.	$

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$
52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $6,575** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $10,950.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $6,575, but not more than $10,950.** Complete the remainder of Part VI (Lines 53 through 55).	
53	**Enter the amount of your total non-priority unsecured debt**	$
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result.	$
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	

Part VII: ADDITIONAL EXPENSE CLAIMS

56 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

Part VIII: VERIFICATION

57 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____ (Debtor)

Date: _____ Signature: _____ (Joint Debtor, if any)

Official Form 22B (Chapter 11) (12/10)
In re _____
Debtor(s)

Case Number: _____
(If known)

CHAPTER 11 STATEMENT OF CURRENT MONTHLY INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 11 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married, not filing jointly. **Complete only Column A ("Debtor's Income") for Lines 2-10.** c. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Net income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do not enter a number less than zero. a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Net rental and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include contributions from the debtor's spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act Debtor $ _____ Spouse $ _____	$	$
9	**Income from all other sources.** If necessary, list additional sources on a separate page. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. a. $ b. $ Total and enter on Line 9	$	$
10	**Subtotal of current monthly income.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$

11	**Total current monthly income.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$

Part II: VERIFICATION

12	I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)* Date: _____ Signature: _____ (Debtor) Date: _____ Signature: _____ (Joint Debtor, if any)

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.**		
	a. Gross receipts	$	
	b. Ordinary and necessary business expenses	$	
	c. Business income	Subtract Line b from Line a	$ $
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.**		
	a. Gross receipts	$	
	b. Ordinary and necessary operating expenses	$	
	c. Rent and other real property income	Subtract Line b from Line a	$ $
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$

8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ _____ — Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance. Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	$
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 13.	$
14	**Subtract Line 13 from Line 12 and enter the result.**	$
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.	$

Persons under 65 years of age			Persons 65 years of age or older		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$

25B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**	
	a. IRS Housing and Utilities Standards; mortgage/rent expense — $	
	b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47 — $	
	c. Net mortgage/rental expense — Subtract Line b from Line a.	$
26	**Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below: _____ _____ _____	$
27A	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more. If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
27B	**Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
28	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**	
	a. IRS Transportation Standards, Ownership Costs — $	
	b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47 — $	
	c. Net ownership/lease expense for Vehicle 1 — Subtract Line b from Line a.	$

<table>
<tr><td>29</td><td>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 28.
Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Transportation Standards, Ownership Costs</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net ownership/lease expense for Vehicle 2</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
<tr><td>30</td><td>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. Do not include real estate or sales taxes.</td><td>$</td></tr>
<tr><td>31</td><td>Other Necessary Expenses: involuntary deductions for employment. Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as voluntary 401(k) contributions.</td><td>$</td></tr>
<tr><td>32</td><td>Other Necessary Expenses: life insurance. Enter total average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.</td><td>$</td></tr>
<tr><td>33</td><td>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations included in Line 49.</td><td>$</td></tr>
<tr><td>34</td><td>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</td><td>$</td></tr>
<tr><td>35</td><td>Other Necessary Expenses: childcare. Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.</td><td>$</td></tr>
<tr><td>36</td><td>Other Necessary Expenses: health care. Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. Do not include payments for health insurance or health savings accounts listed in Line 39.</td><td>$</td></tr>
<tr><td>37</td><td>Other Necessary Expenses: telecommunication services. Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. Do not include any amount previously deducted.</td><td>$</td></tr>
<tr><td>38</td><td>Total Expenses Allowed under IRS Standards. Enter the total of Lines 24 through 37.</td><td>$</td></tr>
<tr><td colspan="3">Subpart B: Additional Living Expense Deductions
Note: Do not include any expenses that you have listed in Lines 24-37</td></tr>
</table>

39 **Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents.

a.	Health Insurance	$
b.	Disability Insurance	$
c.	Health Savings Account	$

Total and enter on Line 39 $

If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below:
$ _____

40 **Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.** $

41 **Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court. $

42 **Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.** $

43 **Education expenses for dependent children under 18.** Enter the total average monthly expenses that you actually incur, not to exceed $137.50 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.** $

44 **Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary.** $

45 **Charitable contributions.** Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.** $

46 **Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45. $

Subpart C: Deductions for Debt Payment

47 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b, and c	

$

48 **Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c $

49 **Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 33.** $

50 **Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.

a.	Projected average monthly chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of chapter 13 case	Total: Multiply Lines a and b $

51 **Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50. $

Subpart D: Total Deductions from Income

52 **Total of all deductions from income.** Enter the total of Lines 38, 46, and 51. $

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53 **Total current monthly income.** Enter the amount from Line 20. $

54 **Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child. $

55 **Qualified retirement deductions.** Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19). $

56 **Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52. $

Deduction for special circumstances. If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. **You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.**

57

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
		Total: Add Lines a, b, and c

$

58 **Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result. $

59 **Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result. $

Part VI: ADDITIONAL EXPENSE CLAIMS

Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

60

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

Part VII: VERIFICATION

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

61

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

2010 COMMITTEE NOTE

Form 22A, lines 19A, 19B, 20A, and 20B, and Form 22C, lines 24A, 24B, 25A, and 25B, are amended to delete the terms "household" and "household size" and to replace them with "number of persons" or "family size." Under § 707(b)(2)(A)(ii)(I) means test deductions for food, clothing, and other items and for health care are permitted to be taken in the amounts specified in the IRS National Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself generally determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

In order for Forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to "household" and "household size" are deleted, and the substituted terms – "number of persons" and "family size" – are defined in terms of exemptions on the debtor's federal income tax return and other dependents.

Form 22A, line 8, Form 22B, line 7, and Form 22C, line 7, are amended to add an instruction that only one joint filer should report regular payments by another person for household expenses. Reporting of the figure by both spouses results in an erroneous double-counting of this source of income.

The introductory instruction to Part I of Form 22A is amended to direct debtors in joint cases to file separate forms if only one of the debtors is entitled to an exemption under Part I and the debtors believe that the filing of separate forms is required by § 707(b)(2)(C) of the Code. The language of § 707(b) is ambiguous about how the exclusions from means testing authorized by § 707(b)(1) (for debtors whose debts are not primarily consumer debts) and (b)(2)(D) (for certain disabled veterans, National Guard members, and Armed Forces reservists) are to be applied in joint cases. The form does not impose a particular interpretation of these provisions. It leaves up to joint debtors the initial determination of whether the exclusion of one spouse from means testing relieves the other spouse from the obligation to complete the form, and allows any dispute over this matter to be resolved by the courts.

TAB

10B

Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 3001. Proof of Claim**

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* Except for a claim governed by paragraph (3) of this subdivision, w~~W~~hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate 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.

* * * * *

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement, a statement shall be filed with the proof of claim including, as applicable, the following

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

** Incorporates amendments that are due to take effect on December 1, 2011, if approved by the Judicial Conference and the Supreme Court, and if Congress takes no action otherwise.

information:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder;

(iii) the date of the last transaction on the account by an account holder;

(iv) the date of the last payment on the account;

(v) the date on which the account was charged to profit and loss.

(B) On written request, the holder of a claim based on an open-end or revolving consumer credit agreement shall provide a party in interest the documentation specified in paragraph (1) of this subdivision.

COMMITTEE NOTE

Subdivision (c) is amended to add paragraph (3), which specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a

basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit.

To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim.

Rule 7054. Judgments; Costs

* * * * *

(b) COSTS. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on ~~one day's~~ 14 days' notice; on motion served within ~~five~~ seven days thereafter, the action of the clerk may be reviewed by the court.

COMMITTEE NOTE

Subdivision (b) is amended to provide more time for a party to respond to the prevailing party's bill of costs. The former rule's provision of one day's notice was unrealistically short. The change to 14 days conforms to the change made to Civil Rule 54(d). Extension from five to seven days of the time for serving a motion for court review of the clerk's action implements changes in connection with the December 1, 2009, amendment to Rule 9006(a) and the manner by which time is computed under the rules. Throughout the rules, deadlines have been amended in the

following manner:

- 5-day periods became 7-day periods
- 10-day periods became 14-day periods
- 15-day periods became 14-day periods
- 20-day periods became 21-day periods
- 25-day periods became 28-day periods

Rule 7056. Summary Judgment

Rule 56 F. R. Civ. P. applies in adversary proceedings~~.~~, except that, unless a different time is set by local rule or the court orders otherwise, any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought.

COMMITTEE NOTE

The only exception to complete adoption of Rule 56 F.R. Civ. P. involves the default deadline for filing a summary judgment motion. Rule 56(c)(1)(A) makes the default deadline 30 days after the close of all discovery. Because in bankruptcy cases hearings can occur shortly after the close of discovery, a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

B 10 (Official Form 10) (12/11) **(08/10 publication draft)**

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor:	Case Number:	
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		**COURT USE ONLY**
Name and address where notices should be sent: Telephone number: email:		❒ Check this box if this claim amends a previously filed claim. **Court Claim Number:** _____ (*If known*) Filed on: _____
Name and address where payment should be sent (if different from above): Telephone number: email:		❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars. ❒ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:**	**3b. Uniform Claim Identifier (optional):**
___ ___ ___ ___	_____ (See instruction #3a)	_____ (See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒ Real Estate ❒ Motor Vehicle ❒ Other
Describe:

Value of Property: $_____

Annual Interest Rate _____ **%** ❒ Fixed or ❒ Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

$_____

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):

_____
_____
_____
Telephone number: email:

_____ (Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended in several respects. A new section – 3b – is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Check boxes for indicating whether the interest rate is fixed or variable are also added.

Section 7 of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8 – the date and signature box – is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided "is true and correct to the best of my knowledge, information and reasonable belief." That individual must also provide identifying information – name, title, company, address, and telephone number (if not already provided) – and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions.

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ **Case number:** _____

Name of creditor: _____ **Last four digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. **Principal due** $ _____

2. **Interest due**

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	+ $ _____
Total interest due as of the petition date			$ _____

Copy total here ▶ + $ _____

3. **Total principal and interest due** $ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred in connection with the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
Late charges	_____	$ _____
Non-sufficient funds (NSF) fees	_____	$ _____
Attorney's fees	_____	$ _____
Filing fees and court costs	_____	$ _____
Advertisement costs	_____	$ _____
Sheriff/auctioneer fees	_____	$ _____
Title costs	_____	$ _____
Recording fees	_____	$ _____
Appraisal/broker's price opinion fees	_____	$ _____
Property inspection fees	_____	$ _____
Tax advances (non-escrow)	_____	$ _____
Insurance advances (non-escrow)	_____	$ _____
Escrow shortage or deficiency (not included in payments due)	_____	$ _____
Property preservation expenses. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____
Other. Specify: _____	_____	+ $ _____

Total prepetition fees, expenses, and charges. Add all of the amounts listed above. $ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

☐ No

☐ Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

---

1. **Installment payments due**	Date last payment received by creditor	__/__/____		
	Number of installment payments due	_____		
2. **Amount of installment payments due**	_____installments @	$ _____		
	_____installments @	$ _____		
	_____installments @	+ $ _____		
	Total installment payments due as of the petition date	$ _____	Copy total here ▶	$ _____
	Add total prepetition fees, expenses, and charges		Copy total from Part 2 here ▶	+ $ _____
	Subtract total of unapplied funds (funds received but not credited to account)			- $ _____
	Total amount necessary to cure default as of the petition date			$ _____

Copy total onto Item 4 of Proof of Claim form

COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

B 10 (Supplement 1) (12/11) **(08/10 publication draft)**

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no.** (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/____

New total payment:
Principal, interest, and escrow, if any $_____

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- ☐ No
- ☐ Yes. Attach a copy of the escrow account statement, prepared according to applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $_____ **New escrow payment:** $_____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- ☐ No
- ☐ Yes. Attach a copy of the rate change notice, prepared according to applicable nonbankruptcy law. Describe the basis for the change. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $_____ **New principal and interest payment:** $_____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- ☐ No
- ☐ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $_____ **New mortgage payment:** $_____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ___/___/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____–_____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence – or the holder's agent – to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of FRBP 9011(b) are satisfied.

B 10 (Supplement 2) (12/11) **(08/10 publication draft)**

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no.** (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ☐ No
- ☐ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
Late charges	_____	$ _____
Non-sufficient funds (NSF) fees	_____	$ _____
Attorney fees	_____	$ _____
Filing fees and court costs	_____	$ _____
Bankruptcy/Proof of claim fees	_____	$ _____
Appraisal/Broker's price opinion fees	_____	$ _____
Property inspection fees	_____	$ _____
Tax advances (non-escrow)	_____	$ _____
Insurance advances (non-escrow)	_____	$ _____
Property preservation expenses. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____
Other. Specify: _____	_____	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ___/___/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____–_____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence – or the holder's agent – to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of FRBP 9011(b) are satisfied.

B25A Official Form 25A (12/11) **(08/10 publication draft)**

United States Bankruptcy Court

_____ District of _____

In re _____, Case No. _____
Debtor

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

* * * * *

ARTICLE VIII
GENERAL PROVISIONS

* * * * *

8.02 Effective Date of Plan. The effective date of this Plan is the ~~eleventh~~ first business day following the date that is fourteen days after~~of~~ the entry of the order of confirmation. ~~But i~~If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the~~at~~ date on which ~~no~~the stay of the confirmation order expires or is otherwise terminated ~~is in effect, provided that the confirmation order has not been vacated~~.

COMMITTEE NOTE

Provision 8.02 of Article VIII of the form, which specifies the plan's effective date, is amended to reflect the change in the time periods of Rules 3020(e) and 8002(a) for a stay of the confirmation order and the filing of a notice of appeal. As of December 1, 2009, both time periods were increased from ten to fourteen days. The effective date of the plan will generally be the first business day after those time periods expire. Accordingly, the effective date of the plan is extended to the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order remains in effect on the specified effective date, the plan will instead go into effect on the first business day after the stay expires or is terminated, so long as the order of confirmation has not been vacated.

TAB

10C

Minutes of the Bankruptcy Rules Committee Meeting on April 29-30, 2010, will be sent in a supplemental mailing.

TAB

11A-B

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: May 28, 2010

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 8 and 9, 2010, in Asheville, North Carolina. The Committee gave final approval to proposed amendments to Appellate Rules 4 and 40,[1] removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 4 and 40, accompanied by a proposed legislative amendment to 28 U.S.C. § 2107. Part III covers other matters.

The Committee has scheduled its next meeting for October 7 and 8, 2010, in Boston.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[2] and in the Committee's study agenda, both of which are attached to this report.

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[1] The wording of the proposed amendments was finalized and approved after the meeting by an email vote in May 2010.

[2] These minutes have not yet been approved by the Committee.

II. Action Item

The Committee is seeking final approval of proposed amendments to Rules 4 and 40. The Committee also proposes seeking a legislative amendment to 28 U.S.C. § 2107. The proposed amendments would clarify the treatment of the time to appeal or to seek rehearing in cases to which a United States officer or employee is a party.

The Rule 4 and Rule 40 proposals were published for comment in 2007. However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment addresses the scope of the 60-day appeal period in Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, concerns were raised that amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. The Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) withdrew its proposal to amend Rule 4(a)(1)(B). As a result, the Committee initially decided to pursue the Rule 40(a)(1) amendment without the Rule 4(a)(1) amendment.

The proposed Rule 40(a)(1) amendment was placed before the Standing Committee for discussion rather than action at its January 2009 meeting. Shortly thereafter, the Supreme Court granted certiorari in *United States* ex rel. *Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that concerned the applicability of Rule 4's and Section 2107's 60-day appeal periods in qui tam actions under the False Claims Act. At its June 2009 meeting, the Standing Committee remanded the Rule 40 proposal to the Appellate Rules Committee for further consideration in the light of the *Eisenstein* decision.

After further discussion, the Committee decided to pursue both the Rule 4 and the Rule 40 amendments, along with a proposed legislative amendment to Section 2107. Amending all three of these provisions will render uniform their treatment of cases in which a United States officer or employee is a party. It will bring clarity to these provisions and allow the United States (and other parties) to rely upon the longer appeal and rehearing periods in many cases where uncertainty (concerning the applicable time period) may currently exist.

There was unanimous support among the Committee members for the general goal of the proposed amendments. There was some division among the Committee members concerning one aspect of the proposals. As discussed below, the proposals set a general principle – namely, that the longer periods apply in cases where a current or former 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. For the reasons discussed in Part II.A.2 below, the Committee decided to specify certain safe harbors that ensure the application of the longer time periods. All members

supported the inclusion of two safe harbors – one that applies when the United States represents the officer or employee at the time of the entry of the relevant judgment, and another that applies when the United States files the appeal for the officer or employee. The Department of Justice also supported including a third safe harbor, which would apply if the United States had paid for private representation for the officer or employee. However, the Committee voted 7-2 in favor of adopting the proposed amendments without that third safe harbor. The two members voting in the minority indicated that even if the third safe harbor were excluded they would support the proposed amendments.

A. Rule 4

The proposed amendment to Rule 4 will clarify the applicability of Rule 4(a)(1)(B)'s 60-day appeal deadline. A corresponding proposed amendment to 28 U.S.C. § 2107 is discussed in Part II.C of this report.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule's appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person." During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred

in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

B. Rule 40

The proposed amendment to Rule 40 will clarify the applicability of Rule 40(a)(1)'s 45-day period for seeking rehearing.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 40 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

The two changes to the Rule 40(a) proposal correspond to those discussed in Part II.A.2 of this report with respect to the Rule 4(a)(1) proposal. First, the Committee inserted the words "current or former" before "United States officer or employee." Second, the Committee added, at the end of new Rule 40(a)(1)(D), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person."

C. 28 U.S.C. § 2107

As noted above, to ensure achievement of the goals of the proposed amendment to Rule 4, it is desirable to request a corresponding statutory amendment to 28 U.S.C. § 2107.

1. Text of Proposed Amendment

The Committee recommends that the Standing Committee approve the goal of seeking legislative amendment of 28 U.S.C. § 2107 as set out in the enclosure to this report.

2. Tentative Draft of Proposed Bill

A tentative draft bill that would accomplish the proposed amendment to Section 2107 is set out in the enclosure to this report.

III. Information Items

The Committee is considering a proposal to amend Appellate Rules 13 and 14 to address interlocutory appeals from the Tax Court. Prior to the Committee's spring 2010 meeting, the Committee informally solicited the views of the Tax Court, the American Bar Association's Tax Section, and the Department of Justice concerning whether such amendments would be useful and, if so, how they should be drafted. Chief Judge Colvin and Judge Thornton of the Tax Court support the idea of amending Rules 13 and 14. In addition, they propose amending Appellate Rule 24 because Rule 24(b) currently groups the Tax Court with administrative agencies (a grouping that they view as inconsistent with the Tax Court's status as a judicial body that is independent of the political branches). The Committee is studying alternative ways of amending Rule 24(b) to respond to this concern.

The Committee is continuing to research issues relating to a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Under Rule 29(a), the federal and state governments can file amicus briefs as a matter of course, but tribal amici must seek party consent or court leave. Because this issue also arises with respect to Supreme Court Rule 37.4, the Committee resolved to consult the Supreme Court for its views. The Committee will also consult the Chief Judges of the Eighth, Ninth, and Tenth Circuits, because the Federal Judicial Center's study of tribal amicus filings in the courts of appeals revealed that most such filings occur in those three circuits.

The Committee has begun to consider possible rulemaking responses to the Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine. The Committee will consider possible ways to provide for immediate appellate review of attorney-client privilege rulings, as well as possible mechanisms to control such appeals (such as certification requirements or expedited procedures). Some members have also suggested a broader review of the collateral order doctrine, encompassing such topics as appeals from qualified immunity rulings. The Committee will coordinate its efforts with the Civil and Criminal Rules Committees.

The Committee has embarked on a review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Caselaw in this area addresses a range of different fact patterns, and the Committee plans to consider from a policy perspective whether the

Rule and the caselaw appropriately treat the common situations in which questions of prematurity tend to arise.

The Committee is considering whether to modify Rule 28(a)(6)'s requirement that briefs contain a separate "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The Committee will informally consult knowledgeable groups of appellate practitioners for their views.

The Committee removed from its agenda one item, relating to reply brief word limits. The item arose from the suggestion that the Committee consider whether the Supreme Court's recent change to its own limits on reply brief length should prompt a review of the Appellate Rules' limits. After discussion, members concluded that no change is warranted.

A couple of other projects will entail coordination with other advisory committees. The Committee looks forward to working with the Bankruptcy Rules Committee on the latter's project to revise Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals). And the Committee expects that a future project will bring together the advisory committees to consider the implications, for the Rules, of the transition to electronic filing.

The Committee discussed the possible usefulness of monitoring circuit splits that relate to the Appellate Rules. Though members noted that not all such splits may necessarily warrant a rulemaking response, it seems useful to analyze the splits and consider whether they are amenable to solution through rulemaking. The Committee also continues to monitor the developing caselaw concerning the implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for appeal-related deadlines.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

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 ~~is entered~~.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(i) the United States;

(ii) a United States agency;

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

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

(iv) 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 judgment or order is entered or files the appeal for that person.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints 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." The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule's appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person." During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal

periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests."

Rule 40. Petition for Panel Rehearing

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

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment 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.

* * * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

To promote clarity of application, the amendment to Rule 40(a)(1) includes safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 40(a)(1)(D), a case automatically qualifies for the 45-day period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the court of appeals' judgment that is the subject of the petition or (2) a legal officer of the United States appears on the petition as counsel, in an official capacity, for the current or former officer or employee.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the

text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees.

Second, the Committee added, at the end of Rule 40(a)(1)(D), the following new language: "– 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." During the public comment period, concerns were raised that a party might rely on the longer period for filing the petition, only to risk the petition being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer period applies in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the petition on the officer or employee's behalf.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

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to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

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PROPOSED AMENDMENT TO
28 U.S.C. § 2107

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding ~~in which the United States or an officer or agency thereof is a party~~, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;

(2) a United States agency;

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

(4) 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 judgment, order, or decree is entered or files the appeal for that person.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal,

extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

* * *

A BILL

To clarify appeal time limits in civil cases to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America
in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Appeal Time Clarification Act of 2011.'

SEC. 2. AMENDMENT RELATED TO TITLE 28, UNITED STATES CODE.

Section 2107(b) is amended by striking its current contents and substituting the following: 'In any such action, suit or proceeding, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;
(2) a United States agency;
(3) a United States officer or employee sued in an official capacity; or
(4) 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 judgment, order, or decree is entered or files the appeal for that person.

SEC. 3. EFFECTIVE DATE

The amendment made by this Act shall take effect on December 1, 2011, and shall govern appeals from judgments, orders, or decrees entered on or after November 1, 2011.

DRAFT

Minutes of Spring 2010 Meeting of
Advisory Committee on Appellate Rules
April 8 and 9, 2010
Asheville, North Carolina

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 8, 2010, at 8:30 a.m. at the Inn on Biltmore in Asheville, North Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Peter T. Fay, Mr. James F. Bennett,[1] Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and noted his regret that Judge Rosenthal, Justice Holland, and Professor Coquillette were unable to be present. He introduced the Committee's two new members, Judge Fay and Mr. Taranto. Judge Sutton observed that Judge Fay had served previously on the Appellate Rules Committee, and that the Committee would benefit from his expertise. Judge Sutton recalled that he had worked with Mr. Taranto before Judge Sutton was appointed to the bench and noted that he would be an excellent addition to the Committee.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting, and he thanked Ms. Leary and the FJC for their skilled research support.

II. Approval of Minutes of November 2009 Meeting

A motion was made and seconded to approve the minutes of the Committee's November 2009 meeting. The motion passed by voice vote without dissent.

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[1] Mr. Bennett missed a portion of the meeting due to a court obligation.

III. Report on January 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee's discussions at its January 2010 meeting. He noted that he had described to the Standing Committee aspects of the Appellate Rules Committee's ongoing work. In particular, he had discussed the pending proposal to amend Appellate Rules 4 and 40 and to consider proposing legislation to amend 28 U.S.C. § 2107, and he had described the proposal to amend Appellate Rules 13 and 14 to account for permissive interlocutory appeals from the Tax Court.

Judge Sutton noted that the Standing Committee had spent part of the meeting discussing the implications of the Supreme Court's decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for pleading standards. Mr. Rabiej observed that bills are pending in both Houses of Congress that would respond to *Twombly* and *Iqbal*, though the two bills would take different approaches. The House bill would reinstate the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41 (1957), whereas a draft bill under consideration in the Senate apparently would turn the clock back to the state of pleading jurisprudence as it existed on the day before the Supreme Court decided *Twombly*. Mr. Rabiej noted that both bills would retain the possibility that the pleading standard adopted in the legislation could subsequently be altered through the rulemaking process. Mr. Rabiej reported that statistics gathered by the AO thus far do not indicate that *Iqbal* and *Twombly* have produced a large change in pleading practice, but these data are limited and the AO has asked the FJC to study the question further. Mr. Rabiej observed that the upcoming 2010 Civil Litigation Conference organized by the Civil Rules Committee – which will take place in May at Duke University Law School – will shed light on relevant issues, such as the possibility that some types of lawsuits involve asymmetric information. The 2010 Conference will include the presentation of empirical data; for example, one project focuses on obtaining litigation defense cost information from some 10 to 20 major companies.

Judge Sutton reported that the Standing Committee had also heard presentations from a panel of law school deans concerning the future of legal education.

IV. Other Information Items

The Reporter noted that several amendments to the Appellate Rules had taken effect on December 1, 2009, including the time-computation amendments and new Appellate Rule 12.1 concerning indicative rulings. She observed that several more Appellate Rules amendments are currently on track to take effect on December 1, 2010, if the Supreme Court approves them and Congress takes no contrary action; these pending amendments would affect Appellate Rule 1(b) (by defining the term "state" for purposes of the Appellate Rules), Appellate Rule 4 (by making a technical amendment to conform to the restyled Civil Rules), Appellate Rule 29 (to impose the new authorship and funding disclosure requirement) and Appellate Form 4 (to conform to privacy requirements).

V. Action Items

A. For final approval

1. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Sutton invited Mr. Letter to introduce this item, which originally stemmed from a proposal by the DOJ. Mr. Letter explained that the proposal arises from the need to clarify the operation of Appellate Rules 4(a)(1)(B) and 40(a)(1). Those rules provide all parties with extra time in cases where the parties include the United States, a federal agency, or a federal officer. The amendments are designed to make clear that the extra time applies in cases where the only federal party is a federal employee, and also in cases where the only federal party is a federal officer or employee sued in his or her individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rules, because the application of the longer time periods in such cases is not entirely clear, the DOJ attorneys follow the practice of complying with the shorter time periods – with the result that the federal government is not receiving the benefit of the longer periods in those cases. Mr. Letter observed that the number of affected cases is relatively small, because in many cases one of the parties fits clearly within the existing terms ("United States or its officer or agency"); nonetheless, the issue is an important one in the cases where it arises. The proposals to amend Rules 4 and 40 were first developed prior to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). After *Bowles*, participants in the Rule 4 discussions came to believe that the best way to clarify the Appellate Rule 4 period would be to do so in tandem with a proposed legislative change to 28 U.S.C. § 2107. Mr. Letter reported that he has received authorization from the DOJ to pursue such a legislative amendment.

Turning to the details of the Rule 4 and 40 language as originally published for comment, Mr. Letter reported that the DOJ feels that the language should be altered so as to refer explicitly to "current or former" United States officers or employees. Mr. Letter and his colleagues within the DOJ considered possible alternatives to the proposed reference to "an act or omission occurring in connection with duties performed on the United States' behalf," but they concluded that this language – which tracks the language in Civil Rules 4(i)(3) and 12(a)(3) – is preferable. Mr. Letter consulted a DOJ colleague who handles cases involving federal officers and employees and who reports that he has not encountered difficulties with the interpretation of those Civil Rules.

A judge member inquired whether there are any statutes that might supply relevant language. Mr. Letter noted 28 U.S.C. § 2679, which provides for certifications by the Attorney General "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." He pointed out, though, that such certifications do not occur in *Bivens* cases. An attorney member noted the difference in procedural posture between the situations in which Civil Rules 4(i)(3) and 12(a)(3) may be applied and the situations in which Appellate Rules 4 and 40 may be applied: these Appellate Rules will often become operative at a

point in the litigation when there has already been a court finding regarding whether the relevant conduct was "in connection with" the defendant's federal duties. Mr. Letter noted that it would not be a good idea to make the applicability of the longer periods in Rules 4 and 40 depend on what the plaintiff has alleged in the complaint. The attorney member responded that another alternative might be to use the term "allegedly."

Another attorney member observed that the purpose of the longer periods is to ensure that the United States has sufficient time for deliberation concerning litigation strategy – in particular, sufficient time for the Solicitor General to decide whether to take an appeal or to seek rehearing. This member suggested that it would make sense to tie the availability of the longer periods to whether the United States has actually decided to provide representation. That might be accomplished, he suggested, by language such as "... current or former United States officer or employee for whom the United States files the notice of appeal or is providing representation at the time of the entry of such judgment, order, or decree." A judge asked how the other parties to the litigation would know whether such a standard was met in cases where the government was paying for private counsel rather than providing the representation directly.

Mr. Letter expressed a desire to consult his colleagues at the DOJ concerning these suggested alternative formulations. A judge member asked whether the two formulations – something like the formulation in the published proposal, plus something that would refer to the United States' provision of representation – could be combined as alternative parts of the test. The Reporter noted that such a combined test might be somewhat similar to the test currently followed in the Ninth Circuit. Another member suggested, however, that he understood the provision-of-representation proposal as designed to exclude situations where the United States is paying for private counsel. By consensus, the Committee decided to return to this drafting question the following morning.

The next morning, the Committee took up the drafting question once again. Judge Sutton noted that members had raised good points about possible ambiguity in the proposal as published for comment. Mr. Letter suggested that the DOJ could be comfortable with a proposal that tied the availability of the longer period to the United States' decision to provide representation. Judge Sutton observed that it might be less than optimal for the Appellate Rules' language to diverge from the Civil Rules' language, but that the Committee Notes to Appellate Rules 4 and 40 could explain the reasons for the difference. By consensus, the Committee determined to continue its discussions of the proposed language by email circulation. Members also discussed whether the proposed changes in wording would require re-publication – a matter that was deferred to await a more definite decision on wording choice. Mr. Rabiej noted the need to coordinate the effective date of the proposed Rule 4 and 40 changes with the effective date of the proposed legislative amendment to Section 2107.

B. For publication

1. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns permissive interlocutory appeals from the Tax Court. Ms. Mahoney noted that Committee members had concluded that it would be worthwhile to amend Appellate Rules 13 and 14 to take account of permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). She observed that the agenda materials contained an initial drafting proposal by the Reporter and an alternative proposal provided by Chief Judge Colvin and Judge Thornton of the Tax Court. The latter proposal also includes a proposed amendment to Appellate Rule 24 concerning applications to proceed in forma pauperis. Judge Sutton noted that in addition to obtaining input from the Tax Court and from the DOJ, he had spoken with the chair of the Tax Section of the American Bar Association, but that the latter had not yet been able to provide a sense of the views of Tax Section members.

Ms. Mahoney reviewed Chief Judge Colvin's two proposed alternatives for amending Appellate Rule 24. Those proposals stem from the observation that the current wording of Rule 24(b) treats the Tax Court in the same sentence as "an administrative agency, board, commission, or officer." Chief Judge Colvin explains that the Tax Court is a court of law that exercises judicial powers and is independent of the political branches, and he argues that Rule 24(b) should not group the Tax Court with executive agencies, boards, and the like. Chief Judge Colvin's preferred alternative would be to delete from Rule 24(b) any reference to the Tax Court; when taken together with the proposed global definition of "district court" and "district clerk" as including the Tax Court and its clerk, this change would lead those seeking to appeal in forma pauperis from the Tax Court to proceed under Rule 24(a) by first making their i.f.p. applications to the Tax Court. Chief Judge Colvin has indicated that the Tax Court is willing to serve as the first-line decision-maker on such i.f.p. applications. Chief Judge Colvin's second proposed alternative would be to retain the treatment of the Tax Court under Rule 24(b) but to re-style that Rule so that it is clear that the Tax Court is not lumped in with administrative agencies.

An attorney member expressed support for the second proposed Rule 24 alternative; he suggested that it seems appropriate for Rule 24(b) to address i.f.p. applications both for appeals covered in Title III (addressing appeals from the Tax Court) and for review petitions covered in Title IV (review of agency orders). A judge member asked whether it would be possible to approve the proposed changes to Rules 13 and 14 for publication while deferring consideration of the Rule 24 proposal. The attorney member noted, however, that adopting the proposed Rule 13 and 14 amendments – with a global definition of "district court" and "district clerk" to include the Tax Court and its clerk – might introduce ambiguity into Rule 24 by suggesting that i.f.p. applications by those seeking to appeal from the Tax Court were covered under both Rule 24(a) and Rule 24(b).

In the light of these considerations, the Committee determined by consensus to hold this item for further review of the Rule 24 question and to return to the matter at the fall meeting.

VI. Discussion Items

A. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)

Judge Sutton invited the Reporter to introduce this item, which concerns the possible implications, for the Appellate Rules, of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The principal developments relating to this topic – since the Committee's last meeting – came in cases that did not involve the Appellate Rules: *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 130 S. Ct. 584 (2009), and *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). Both decisions concerned statutory requirements unrelated to appeal deadlines, and both held that the requirement in question was non-jurisdictional. One can thus place both of these decisions within the line of cases, typified by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), that have held various statutory requirements not to be jurisdictional. In this sense, both decisions highlight the questions discussed by the Committee at the fall 2009 meeting concerning possible tensions between *Arbaugh* and *Bowles*.

The Reporter noted that the Court's two most recent decisions might be read as offering competing visions of the way in which to address the respective applicability of *Arbaugh* and *Bowles* when confronted with the contention that a statutory requirement is jurisdictional. In *Union Pacific*, Justice Ginsburg, writing for a unanimous Court, followed *Arbaugh* and distinguished *Bowles* on the ground that the latter "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." In *Reed Elsevier*, Justice Thomas, writing for the majority, distinguished *Bowles* on a somewhat different ground – namely, "that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Justice Ginsburg, joined by two other Justices, wrote separately in *Reed Elsevier* to contest this mode of reconciling *Bowles* with *Arbaugh*; in Justice Ginsburg's view, a key factor that distinguished *Reed Elsevier* from *Bowles* was that the Supreme Court had never held the statutory provision at issue in *Reed Elsevier* to be jurisdictional. Justice Ginsburg, in other words, takes the view that *Arbaugh*'s clear-statement rule applies *unless* (as in *Bowles*) existing Supreme Court precedent requires otherwise.

Justice Ginsburg's approach is more rule-like, while the *Reed Elsevier* majority's multi-factor balancing test is more like a standard. However, in cases concerning statutory appeal deadlines, the two approaches are likely to yield the same results. These two most recent cases do not seem likely to change the trajectory of the caselaw on statutory appeal deadlines; it seems likely that courts will continue to hold that most (if not all) such deadlines are jurisdictional under *Bowles*.

Mr. Letter noted that the Third Circuit has before it a set of appeals that raise the question whether the deadlines for filing post-judgment motions (of the types that can toll the time to appeal under Appellate Rule 4(a)(4)) are jurisdictional or merely claim-processing rules. This question is already the subject of a circuit split.

A participant observed that the Supreme Court currently has before it a petition for certiorari raising the question whether *Bowles* renders jurisdictional the deadline set by 38 U.S.C. § 7266 for filing in the Court of Appeals for Veterans Claims a notice of appeal from a decision of the Board of Veterans' Appeals. The Federal Circuit, sitting en banc, held that Section 7266's deadline is jurisdictional and therefore not subject to equitable tolling.

B. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Dean McAllister to present this item, which arises out of Daniel Rey-Bear's suggestion concerning the treatment of federally recognized Native American tribes in connection with Appellate Rule 29 and some other Appellate Rules. Mr. Rey-Bear, commenting on proposed Rule 1(b), suggested that federally recognized Indian tribes be included within the Rule's definition of "state." At the Committee's fall 2009 meeting, participants decided that it would be useful to focus on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. As a point of comparison, participants discussed the U.S. Supreme Court's amicus rule, and Dean McAllister undertook to research the history of that rule, with a view to determining why it does not treat Native American tribes the same as states.

Dean McAllister reported that the Supreme Court's amicus-filing rule can be traced back to a rule adopted in 1939. The substance of the rule has not changed materially since 1939, but its numbering has changed and so has its language. Since 1939, the Supreme Court's rule has always permitted amicus filings, without Court leave or party consent, by federal, state, and local governments. Neither Native American tribes nor foreign governments have been included in that provision, and Dean McAllister was not able to find any evidence that the question of treating tribes the same as federal, state, or local governments has been raised in connection with the Supreme Court's rule. Native American tribes and foreign governments do sometimes file amicus briefs in the Supreme Court, and Dean McAllister has not come across evidence of any such briefs being rejected except on timeliness grounds.

Dean McAllister provided an enlightening historical overview of amicus practice before the Supreme Court. Amicus filings were relatively rare during the nineteenth century, but the United States did participate as an amicus in a number of nineteenth-century cases. States evidently appeared as amici in some cases during and after the Civil War. And Dean McAllister found an 1890 case involving the City of Oakland's participation as an amicus. Thus, Dean McAllister observed, by 1939 the Supreme Court had some familiarity with federal, state and local government amicus filings. By contrast, the first Supreme Court amicus filing that Dean McAllister could find by a Native American tribe was in 1938. Dean McAllister suggested that this evidence supports the view that the omission of Native American tribes from the Supreme Court's 1939 amicus rule may have been an accident of history that has been carried forward, since then, in the later iterations of the rule. Recounting the evolution of the Supreme Court's rule, Dean McAllister noted Justice Black's observation, in 1954, that the Court was too restrictive in its approach to amicus briefs. And

Dean McAllister observed that Appellate Rule 29(a) is even less inclusive than Supreme Court Rule 37.4: the latter, but not the former, allows filings without party consent or court leave by municipalities.

Judge Sutton thanked Dean McAllister for his presentation and invited Ms. Leary to describe the results of her research on tribal amicus filings in the federal district courts and courts of appeals. The Committee had asked Ms. Leary to assess whether and how often Native American tribes seek leave to file amicus briefs and how often such requests are denied. To investigate this question, Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals. The courts of appeals only began to go "live" with their CM/ECF systems recently: the earliest circuit went "live" in 2006, ten circuits had gone "live" by 2009, and all but the Federal Circuit had gone "live" as of March 2010. This limited the length of time for which court of appeals records could be searched; Ms. Leary's search excluded the Second and Eleventh Circuits (which went live in January 2010) as well as the Federal Circuit, and the average length of time since the other circuits went "live" is only two and a half years.

Ms. Leary reported that relatively few Native American amicus briefs are filed with the consent of the parties; most such filings occur by court leave rather than party consent. Ms. Leary found 180 motions filed by Native American tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 11 were denied, and 12 were not ruled on. A table compiled by Ms. Leary showed that this pattern – a relatively high percentage of motions granted and a relatively small percentage of motions denied – was consistent within each circuit as well as across the ten circuits. Most of the activity occurred in the Eighth, Ninth, and Tenth Circuits (which encompass the reservations of a large number of tribes). Of the eleven motions that were denied, two were denied as untimely, one was denied as moot, and one was denied because the filer was the plaintiff in another case scheduled for argument before the same panel on the same day; no reasons were stated for the denial of the other seven motions.

In addition to searching the records of the courts of appeals, the Committee also asked Ms. Leary to search the records of four federal district courts: the Eastern District of California, the District of Minnesota, the Eastern District of Oklahoma, and the Eastern District of Wisconsin. Ms. Leary's search of those districts found no relevant motions in the latter three districts. In the Eastern District of California, Ms. Leary found five motions – three that were granted and two that were not ruled on. She then expanded her search to encompass all districts within the Ninth Circuit. That expanded search yielded 49 motions by Native American tribes seeking permission to file an amicus brief, of which 42 were granted, four were denied, and three were not ruled on.

Judge Sutton thanked Ms. Leary for her careful and helpful research. The Reporter recounted the results of her search for tribal-court amicus-filing provisions. At the fall 2009 meeting, it was suggested that it might be useful to investigate whether tribal court systems have rules concerning amicus filings and, if so, how those rules treat amicus filings by government litigants. The Reporter sought to focus this inquiry on tribes with relatively large court systems. As a very rough proxy for

this, the Reporter compiled a list of the 20 largest federally recognized tribes (measuring size by reservation and trust land population according to the census data), and also included three additional tribes in the courts of which a 2002 survey by the Bureau of Justice Statistics reported at least 3,000 civil cases or 3,000 criminal cases filed during a calendar year. A research assistant then searched the Internet for relevant provisions in the law of these 23 tribes. She found only six relevant tribal-law provisions: two rules that require court permission for amicus filings, two rules that require either court permission or party consent, and two rules that address amicus filings but do not make clear the standards for such filings. She did not find any rules that address whether governments other than the tribe in question are exempt from the general amicus-filing requirements. The Reporter suggested that the absence of such findings is not surprising: In the light of the U.S. Supreme Court's decisions narrowing the reach of tribal-court subject matter jurisdiction, tribal courts are less likely to hear cases that directly implicate the interests of another government than are either federal courts or state courts.

As a point of comparison, the Reporter also looked at state-court amicus-filing provisions. She found that many state-court rules require court permission for amicus filings. Some state-court rules require either court permission or party consent. A handful of state-court rules appear to permit amicus filings without either court permission or party consent. Sixteen states have a court rule that exempts certain types of government entities from applicable amicus-filing requirements; of those exemptions, sixteen treat the relevant state specially, six treat municipalities specially, four treat the United States specially, and two or three treat other states specially. Though only a small number of state provisions explicitly authorize special treatment for filings by the federal government in state courts, it is possible that such filings are already separately authorized by 28 U.S.C. § 517. That statute provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Though this statute has rarely been cited by state courts, it could be argued to authorize amicus filings by the federal government in state court proceedings.

Focusing on the eight instances in which the Ninth Circuit had denied a Native American tribe leave to file an amicus brief, Mr. Letter asked whether it was possible that those denials occurred because the motions for leave to file were untimely. Ms. Leary stated that that was possible. An attorney member wondered whether the scope of Supreme Court Rule 37.4 matters a great deal, given that it is very rare, nowadays, for the Supreme Court to deny leave to file an amicus brief.

Another attorney member suggested that it would be useful to solicit the views of the Eighth, Ninth, and Tenth Circuits. Given the concentration of tribal amicus activity in those circuits, an appellate judge member wondered whether any concerns about such filings could be accommodated by means of local circuit rules. Another appellate judge member stated that he did not recall ever turning down a Native American tribe's request to file an amicus brief; this judge agreed with the suggestion that it might be better to address the issue by local circuit rule.

Mr. Letter reported that colleagues within the DOJ believe that the tribal-amicus question merits government-to-government consultation with the federally recognized Native American tribes. A November 5, 2009 Presidential Memorandum for the heads of executive departments and agencies noted the federal government's special relationship with Indian tribal governments, and directed federal agencies – pursuant to Executive Order 13175 of November 6, 2000 – to "engag[e] in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." The DOJ would be glad to facilitate a government-to-government consultation process with the tribes concerning the amicus-filing issue. Some Committee members questioned, though, whether the executive branch policy of consultation could practicably be transposed to the context of the rulemaking process.

Returning to the merits of the issue, an appellate judge member suggested that Ms. Leary's findings could be argued to cut in more than one direction. Another member responded that the fact that the courts of appeals usually grant motions by tribes to file amicus briefs should not be dispositive; in this member's view, the question is one of according the tribes the same dignity accorded to states. This member also observed that there are many more municipalities than Native American tribes in the United States; given that Supreme Court Rule 37.4 permits municipal amici to file without party consent or court leave, he suggested, adopting a similar approach to tribal amici would not overburden the courts. He argued that if Native American tribes do not need a rule permitting them to file amicus briefs without party consent or court leave, neither do states, cities or the federal government. An attorney member agreed that according tribes equal dignity provides the best argument in favor of amending Rule 29; but this member suggested that the Appellate Rules Committee might wish to follow the Supreme Court's lead on this issue. Mr. Letter responded that the Supreme Court would, of course, have an opportunity to consider the merits of any proposed amendment to Rule 29(a) during the approval process.

An attorney member suggested that if Rule 29(a) is expanded to encompass Native American tribes, the revised rule should also encompass foreign and municipal government amici. Mr. Letter stated that the DOJ does not have a position concerning whether municipal governments should be added to the list in Rule 29(a), and he noted that court of appeals judges might have different preferences on that point than the Supreme Court does. With respect to foreign governments, Mr. Letter noted that there is a question of reciprocity. Foreign countries vary in their approaches to requests by the United States to appear as an amicus in their courts; some permit such amicus appearances, some require intervention, and some instead provide for a filing by the host government on the United States' behalf. Having a provision in the Appellate Rules permitting amicus filings by foreign governments without party consent or court leave, Mr. Letter suggested, could sometimes be helpful in persuading foreign courts to permit filings by the United States.

It was noted that with the upcoming adoption of new Appellate Rule 29(c)(5) – which is on track to take effect December 1, 2010, assuming approval by the Supreme Court and no contrary action by Congress – Rule 29 will impose a new authorship and funding disclosure requirement but will exempt from that new requirement the entities that are entitled under Rule 29(a) to file their

amicus brief without court leave or party consent. An attorney member noted the likelihood that the disclosure requirement may actually be useful to some entities that might be amicus filers; an entity that is being pressured by a party to make an amicus filing can respond that the amicus would have to pay for the filing itself or disclose that someone else paid for it. This member suggested that – with respect to the disclosure question – it might make sense to wait and see how new Rule 29(c)(5) works when it takes effect. Another member, though, responded that failing to include tribes within the categories listed in Rule 29(a) will subject tribes to a new requirement once new Rule 29(c)(5) becomes effective. He questioned why the disclosure requirement should apply to tribes when it does not apply to states; states, he observed, have sometimes received help from others in writing amicus briefs, and they have not been (and will not be) required to disclose such help in connection with their amicus filings.

An appellate judge member asked whether any treaties with Native American tribes might bear on the amicus-filing question. The Reporter stated that she is not aware of any treaty provisions specifically addressing the issue. Because treaty-making between the United States and Native American tribes ended in 1871, at a time when tribes were not in the habit of making amicus filings in the courts, it would have been unlikely that any treaty would speak to this particular issue. However, there may be more general provisions that might bear on the question, as might the federal government's general trust responsibility to the tribes.

An appellate judge suggested that some judges on the courts of appeals have expressed skepticism about the value of amicus briefs; such judges might prefer to have more control over amicus filings. It is important, this member stressed, to find out what the judges would prefer. Supreme Court Rule 37.4, the member suggested, is more puzzling than Appellate Rule 29(a), because the former includes towns but not Native American tribes; Mr. Letter agreed with this point.

An appellate judge member suggested that the Committee should consult with the Supreme Court, with a view to following the Supreme Court's lead on this issue; another appellate judge member agreed with this suggestion. By consensus, it was decided that the Committee should consult further with the Supreme Court. In addition, Judge Sutton undertook to write to the Chief Judges of the Eighth, Ninth and Tenth Circuits; he will share with them Ms. Leary's research, and ask for their views on the question of whether a provision on this topic should be adopted either in the Appellate Rules or in local circuit rules. A member noted that the issue extends beyond those three circuits; there are tribes that are located within other circuits, and the question of amicus filings by foreign nations applies to all the circuits. An appellate judge member responded that the Eighth, Ninth and Tenth Circuits are the ones that seem likely to be most affected by a rule treating amicus filings by Native American tribes. Another appellate judge member agreed, stating that the Committee should focus on tribal amicus filings rather than amicus filings by foreign governments. Mr. Letter reiterated that before the Committee takes any final action on this item, the DOJ would strongly prefer that consultation occur with the Native American tribes.

VII. Additional Old Business and New Business

A. Item No. 09-AP-D (implications of *Mohawk Industries, Inc. v. Carpenter*)

Judge Sutton invited the Reporter to introduce this item, which arises from John Kester's suggestion that the Committee consider the implications of *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In *Mohawk Industries*, the Court held that a district court's order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine.

The collateral order doctrine, instituted by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), treats a non-final order as a final judgment – for purposes of taking an appeal under 28 U.S.C. § 1291 – if three requirements are met: the order must be conclusive, must resolve important questions completely separate from the merits, and must render such important questions effectively unreviewable on appeal from the ultimate final judgment. In *Mohawk Industries*, the Court held that the attempted appeal from the attorney-client privilege ruling failed to meet the third of these requirements. The Court expressed doubt as to the benefits of permitting such rulings to come within the collateral order doctrine, and expressed concern as to the burdens such a course would impose on the courts of appeals. The Court also noted the difficulty of line-drawing in this area, observing that it would be hard to distinguish rulings on attorney-client privilege disputes from rulings concerning other sorts of sensitive information. In the opinion's concluding section – which was joined by all members of the Court – Justice Sotomayor stressed that any further consideration of the petitioner's arguments for expanded appellate review of attorney-client privilege rulings should take place within the rulemaking process.

In considering possible rulemaking responses to *Mohawk Industries*, the Committee confronts a range of options, from an approach that focuses on attorney-client privilege rulings to one that attempts a broader rationalization of the areas currently covered (or not covered) by the collateral order doctrine.

A rulemaking response that focuses on attorney-client privilege would raise a number of questions: Does the unavailability of collateral-order immediate review for privilege rulings affect the incentives for attorney-client communications? Even if that is not the case, does the unavailability of such review afford undue settlement leverage to a party who obtains a ruling that the opposing side's information is non-privileged and discoverable? If immediate review of such rulings were made generally available, how many appeals would be taken? Would wealthy litigants take such appeals in order to impose cost and delay on their opponents? Would such appeals interfere with the trial judge's management of the case? Would they unduly increase the appellate courts' workload?

An approach that focuses on attorney-client privilege rulings would raise boundary issues – how and why should one distinguish attorney-client privilege rulings from other types of privilege

rulings? From other discovery-related rulings? Should one, instead, attempt a broader review of the collateral order doctrine – one that could encompass, for example, an attempt to rationalize interlocutory review of qualified-immunity rulings?

An appellate judge member suggested that the rulemaking process might provide a very useful venue for looking into questions of this nature. Mr. Letter wondered whether the *Mohawk Industries* Court's reference to the rulemaking process was intended as a signal that the Committee should consider changes in this area. An attorney member observed that the rulemaking process affords opportunities that are unavailable to the Court when deciding cases. For example, the rulemakers, if they were to decide to permit immediate appeals from privilege rulings, could calibrate the mechanism by requiring permission from either the district court, the court of appeals, or both; 28 U.S.C. § 1292(b) and Civil Rule 23(f) provide possible models in this regard. This member noted the importance of the question, observing that if privileged material is mistakenly disclosed, that disclosure can have a huge monetary impact on the disclosing party. Another attorney member later added that a rulemaking discussion could include the possibility of procedures for expediting any immediate appeal from a privilege ruling. This member also noted that it would be worthwhile to consider and address the possibility that creating an avenue for immediate appeals from privilege rulings could open the way for an argument that a party that fails to take such an immediate appeal has waived its rights to contest the ruling later.

Another attorney member suggested that in some instances the availability (or not) of immediate appellate review for privilege rulings might actually affect a client's privilege-related decision-making. In this member's experience with parallel civil litigation and administrative proceedings, he carefully advises the client concerning the decision whether to waive the privilege and the scope of that waiver. The unavailability of immediate appellate review, he said, could affect the advice he would given in such situations concerning the optimal scope of any waiver. This member stated that the question is worth the Committee's consideration, both because the Supreme Court noted the possibility of rulemaking and because of the question's importance to lawyers and clients.

An appellate judge stated that he reads the *Mohawk Industries* opinion as suggesting that the Court is not happy with the current state of the collateral order doctrine. There are thorny issues, under current law, with respect to collateral-order appeals from qualified-immunity rulings. The judge stated that immediate review may be justified in some instances but that such review can be quite burdensome for the courts of appeals, and he questioned whether it is worthwhile to afford immediate appellate review of all such rulings, including those concerning the immunity of police officers and lower-level government officials. He suggested that a provision requiring the court of appeals' permission for such immediate appeals – akin to Civil Rule 23(f) – could work well. Another member agreed with the observation that the law concerning qualified immunity is messy. An attorney member wondered how often immediate appeals from qualified immunity rulings succeed.

Mr. Letter suggested that the Committee should focus its attention, as an initial matter, on the question of privilege rulings. With respect to such rulings, it is important to account for the differing circumstances in which they may arise. In criminal cases, for instance, there is a need for speed and it would not necessarily be appropriate to permit an immediate appeal in that context.

An appellate judge member said that he believes that immediate appellate review can be important in order to protect attorney-client privilege. Another appellate judge observed that there is varying caselaw on whether the collateral order doctrine encompasses appeals from remands to administrative agencies.

Mr. Rabiej noted that at the time that Congress enacted 28 U.S.C. § 2072(c), which authorizes the rulemakers to define a decision as final for purposes of appeal, and 28 U.S.C. § 1292(e), which authorizes the rulemakers to provide for interlocutory appeals, it had been assumed that suggestions for such rulemaking would originate in the Civil Rules Committee or the Criminal Rules Committee. An attorney member observed that the Civil and Criminal Rules Committees are likely to be interested in the question of appellate review of privilege rulings. Judge Sutton noted that the Civil / Appellate Subcommittee might look into the matter.

The discussion of the varied caselaw concerning the collateral order doctrine led the Committee to consider the more general question of the Committee's process for identifying areas of study. Judge Sutton suggested that it might be useful for the Committee to adopt a process for identifying, and periodically reviewing, rule-based circuit splits. Mr. Rabiej noted that the Committees have not employed such a practice in the past. He suggested that circuit splits may concern controversial issues. Mr. McCabe stated that there has been a presumption against altering the rules. An attorney member asked whether the United States Sentencing Commission employs a similar procedure. Another attorney member observed that the Supreme Court can resolve a circuit split more quickly than the rulemaking process can. One member noted that U.S. Law Week lists various circuit splits, and another member observed that one could monitor petitions for certiorari that refer to the Appellate Rules.

B. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

Judge Sutton invited the Reporter to update the Committee on the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules. Part VIII contains the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel. These rules were originally modeled on the Appellate Rules, but they have not always been updated to reflect changes to the Appellate Rules over time. The current review is designed to consider amendments that clarify the Part VIII rules and make certain other improvements, while also taking account of new developments such as the prevalence of electronic filing.

The Bankruptcy Rules Committee committed this review, in the first instance, to its Subcommittee on Privacy, Public Access, and Appeals. The Subcommittee held an open meeting in Boston on September 30, 2009, and is continuing its deliberations by conference call this spring. The resulting proposals will be published for comment, at the earliest, in summer 2011. It appears likely that the Committee will be asked to comment on the draft during fall 2010 and/or spring 2011. A number of the project's features -- such as its treatment of electronic filing – are of interest to the Appellate Rules Committee. Moreover, close coordination between the two committees is important with respect to instances where the Bankruptcy and Appellate Rules interlock – in particular, with respect to the rules governing direct permissive appeals under 28 U.S.C. § 158(d)(2).

Judge Sutton noted that members should let him know if they are particularly interested in working on issues relating to electronic filing. This topic led to a more general discussion of electronic filing. An appellate judge member noted that he reads briefs on his Kindle. Mr. McCabe observed that electronic filing issues implicate all the rules committees, and that all the advisory committees should coordinate their efforts in this area.

C. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton invited the Reporter to introduce this issue, which concerns the treatment of premature notices of appeal in civil cases. Shortly after the Committee's fall 2009 meeting, the Supreme Court denied certiorari in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009), which presented a question concerning the treatment under Appellate Rule 4(a)(2) of a notice of appeal filed from an order disposing of fewer than all the claims in the case.

The caselaw concerning premature notices of appeal is complicated by at least two features. First, there is the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, there is the Supreme Court's decision in *FirsTier*, which then-Judge Roberts characterized as "leav[ing] a vast middle ground of uncertainty" concerning the circumstances under which relation forward is proper under Rule 4(a)(2).

The pre-1979 cumulative finality doctrine is exemplified by the Fifth Circuit's decision in *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). In *Jetco*, one defendant's motion to dismiss was granted, after which the plaintiff filed a notice of appeal. Months later, the rest of the case was disposed of. The court of appeals refused to dismiss the appeal, holding that the two orders, viewed together, ended the litigation. The courts of appeals are divided on the question of whether Rule 4(a)(2), as interpreted in *FirsTier*, displaces the older cumulative finality doctrine; the Fifth Circuit says yes, but the Third Circuit disagrees.

The pathmarking case interpreting Rule 4(a)(2) is the Court's 1991 *FirsTier* decision. In *FirsTier*, the notice of appeal was filed after the court's announcement from the bench that it would grant summary judgment, but before the parties had submitted the proposed findings and conclusions requested by the court. The Court did not decide whether the bench ruling was final. Rather, it held that the notice of appeal related forward under Rule 4(a)(2). The rule's purpose, the Court stated, is to protect a litigant who files a notice of appeal from a decision that he reasonably believes to be a final judgment. But the rule is not designed to protect one who files a notice of appeal from a clearly interlocutory decision – for example, a discovery ruling or a Rule 11 sanction – because it would not be reasonable to believe that such a decision constituted a final judgment.

Questions of Rule 4(a)(2)'s application cover a spectrum of scenarios. At one end of the spectrum are instances where the notice of appeal is filed after the court has announced its decision but before proposed findings have been submitted. This was the pattern at issue in *FirsTier*, and the Court held that the notice related forward.

Moving along the spectrum, one finds instances where the notice of appeal was filed after the announcement of a decision that was contingent on a future event, but before the occurrence of that event. An example is a decision dismissing a complaint but granting leave to re-plead within a certain time period. Various circuits have found that the notice of appeal related forward under such circumstances, and this conclusion is supported by cases that were cited with approval in the 1979 Committee Note to Rule 4(a)(2). However, in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), the Seventh Circuit found that the notice of appeal did not relate forward for two reasons: first, because dismissal of the complaint was conditional (the district court had granted the plaintiffs a time period within which to re-file the complaint and serve certain defendants), and second, because the district court had told the appellants that their notice of appeal was a "nullity."

At a further point along the spectrum, one finds instances where the notice of appeal was filed prior to the district court's provision of a certification of the relevant order for immediate appeal under Civil Rule 54(b). Some seven circuits have found relation forward in such circumstances, but the Eleventh Circuit has disagreed.

A still further point on the spectrum concerns instances where the court disposes of fewer than all claims or parties, after which a notice of appeal is filed, after which the court disposes of the remaining claims and parties. This was the pattern presented by the *CHF Industries* case. Some nine circuits have found relation forward under these circumstances. But one of those circuits – the Seventh Circuit – has disparate caselaw on the question. And the Eighth Circuit has adopted the opposite view.

The caselaw varies somewhat subtly on questions that concern instances where the notice of appeal is filed after an order that determines liability but leaves the amount of damages or interest undetermined. Another pattern arises when a party files a notice of appeal from a magistrate judge's findings and conclusions before those findings and conclusions have been reviewed by the district

court; the Fifth and Ninth Circuits have found no relation forward in such cases, while the Second Circuit has disagreed. But the Second Circuit case appears to have been driven by its particular facts: the appellant was pro se and the magistrate judge's disposition was misleadingly entered as a "judgment." Moving still further along the spectrum, most cases are in accord that relation forward does not occur when a notice of appeal is filed after entry of a clearly interlocutory order that would not qualify for certification under Civil Rule 54(b); but there is one Tenth Circuit decision to the contrary.

In assessing the state of the doctrine, the Reporter suggested, it might be useful to consider several factors. Is the doctrine in tension with the final judgment rule? Does it offend the doctrine stated in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), that only one court – trial or appellate – should have control of a case at a given time? Does the doctrine avoid setting traps for unsophisticated litigants? Is the doctrine fair to the appellee?

An appellate judge member asked how well the doctrine accords with the text of Appellate Rule 4(a)(2). The *FirsTier* decision, he suggested, is easier to understand than the Rule. An attorney member asked whether the doctrine leads to confusion for the appellate clerks' offices. An appellate judge member noted that if a clerk is in doubt about a question of relation forward, the clerk would consult a judge. An attorney member observed that it is important for the rules concerning notices of appeal to be clear.

Judge Sutton agreed that ambiguity is undesirable in a rule that concerns appeal timing. He noted that this item ties in with other projects that the Committee is currently considering, such as the manufactured-finality doctrine. He suggested that at the fall 2010 meeting the Committee should further consider possible amendments to Rule 4(a)(2). An attorney member asked what policy preferences such a proposed amendment should seek to further; this member noted that the Committee will need to make judgments concerning whether the various fact patterns warrant relation forward. One participant suggested, for example, that it might be reasonable to permit relation forward when a notice of appeal is filed from a Rule 11 sanctions order. Another attorney member wondered whether one way to amend Rule 4(a)(2) would be to insert "appealable if entered" – so that Rule 4(a)(2) would read: "A notice of appeal filed after the court announces a decision or order that would be appealable if entered – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." The Reporter noted that this wording would change current practice in a number of circuits.

D. Item No. 10-AP-B (statement of the case)

Judge Sutton introduced this item, which concerns the provisions in Appellate Rule 28 that direct the appellant to provide separate statements of the case and of the facts. As a point of comparison, Supreme Court Rule 24 does not require such separate statements; rather, Supreme Court Rule 24(g) requires "[a] concise statement of the case, setting out the facts material to the

consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12." Judge Sutton observed that the Supreme Court's approach makes more sense: It seems intuitively more sensible to permit the appellant to weave the two statements together and present the relevant events in chronological order.

Mr. Letter suggested that it would make sense to change Rule 28 unless judges really do want separate statements of the case and the facts. An attorney member agreed, noting that it is difficult to tell, under the current rule, where one should describe the decisions below. Attorneys end up adding parts not called for by the rules. This member suggested that the approach to this question should be nationally uniform. Another member agreed that he has always found the separate requirements awkward; he has assumed that judges want the statement of the case to set forth the basic procedural posture of the appeal – for instance, that the appeal is from the grant of summary judgment.

Another attorney member, however, offered a different view. He has not found the separate requirements problematic. In the statement of the case he denotes the basic orders that the appellate court is being asked to review – for example, in a patent case on appeal to the Federal Circuit, one might state that the appeal concerns a verdict of invalidity and a verdict of non-infringement. Clarity on these points can be useful, he suggested, and it is not necessarily provided by the information that advocates include in the jurisdictional statement. He argued that it is useful to know what ruling the appellant is challenging before one starts reading the facts; and requiring the statement of the case before the statement of the facts may help discipline counsel's presentation of the facts. He concluded by noting that the key question is what judges would prefer.

An appellate judge member said that he looks to the statement of the case for basic information on what the case is about – such as a statement that the appeal is from the grant of summary judgment dismissing a wrongful termination claim. Another appellate judge member stated that he prefers the statement of the case to be one simple paragraph. Judge Sutton noted that the problem arises because Rule 28(a)(6) requires not merely statements of the nature of the case and the disposition below but also a description of "the course of proceedings" below. Mr. Letter agreed that this aspect of Rule 28(a)(6) prompts inexperienced lawyers to include too much detail.

An appellate judge member noted that he finds the statement of the issues presented for review (required by Rule 28(a)(5)) to be very helpful. Mr. Letter said that it would be useful for that statement of issues to include a few sentences setting forth what the case is about. He suggested that it might be worthwhile to re-write Rules 28(a)(5), (6) and (7). Judge Sutton observed that it makes sense to have a paragraph that sets out the ruling that is being challenged; but he noted that no participant had defended current Rule 28(a)(6)'s reference to the "course of proceedings."

Judge Sutton suggested that a two to three page introduction can be a useful way to frame the brief. Mr. Letter noted that some U.S. Attorney's offices take this approach, but that practices vary by district. An attorney member observed that inviting too much in the way of an introduction

might tempt those commenting on a draft brief to advocate the inclusion of too many issues "up front." An advocate might worry, he suggested, that omitting any issue from such an introduction downplays that issue. Judge Sutton observed that there is no need for the Rules to require an introduction.

An appellate judge member stated that the briefs his court receives are generally well-written and helpful, and that the summary of argument helps the judges to focus their reading. It was observed that with respect to the contents of the brief, as with the question of double-sided printing of briefs, judges will have many different views. A member suggested deleting "course of proceedings" from Rule 28(a)(6).

Judge Sutton suggested that it would be useful to consult the American Bar Association's Council of Appellate Lawyers on these questions. An attorney member suggested that the Committee also consult the American Academy of Appellate Lawyers. Judge Sutton stated that he would write to these two groups to solicit their views.

E. Item No. 10-AP-C (reply brief word limits)

Judge Sutton invited the Reporter to introduce this item, which arises from the Supreme Court's decision, effective February 2010, to revise Supreme Court Rule 33 to lower the word limit for reply briefs on the merits from 7,500 words to 6,000 words. A question was raised whether that change provides a reason to alter Appellate Rule 32's length limits. Ever since their adoption, the Appellate Rules have followed a pattern of setting the permitted length of reply briefs at half the permitted length of principal briefs. From 1980 to 2007, the Supreme Court's rules set the ratio of the page limits for reply and principal briefs at 40 %. In 2007, the Court published for comment a proposal to switch from page limits to word limits. Some who commented on that proposal complained that the reply brief limits were too tight. Ultimately, the Court decided in 2007 to increase the ratio to 50 %, so that reply briefs were limited to 7,500 words. The Supreme Court's February 2010 change merely restores the prior 40 % ratio. That change does not, the Reporter suggested, necessarily warrant a change in the Appellate Rules' length limits. The real question is whether lawyers and judges desire to change those limits.

An attorney member stated that there are reasons for the difference between Supreme Court Rule 33's 40 % ratio and Appellate Rule 32's 50 % ratio. In appeals to the court of appeals, this member argued, an appellee is more likely to present alternative grounds for affirmance which may require a lengthier reply brief. An appellate judge member stated that shorter reply briefs are better but that he is not complaining about the current rule. Another appellate judge member noted that a litigant can move for leave to exceed Rule 32's length limits. The attorney member responded that it is best to design the rule to accommodate the general run of cases, because motion practice is not a good way to mitigate the effects of an overly stringent length limit. Another attorney member pointed out that the timetable for reply briefs is short, which would make it difficult to move for

leave to file an over-length reply brief. Mr. Letter, by contrast, noted that most reply briefs seem too long to him – though he conceded that sometimes the extra length is necessitated by the appellee's decision to raise alternative grounds for affirmance. He questioned why the appellant should be allowed 50 % more words than the appellee.

The latter observation led an attorney member to note the undesirable results that can occur when an insubstantial cross-appeal permits the cross-appellant extra brief length. Mr. Letter noted that the Committee had considered this critique of Appellate Rule 28.1. The Committee had considered imposing separate word limits for the briefs' discussions of the appeal and the cross-appeal, but had rejected the idea as impracticable – a view with which the appellate clerks had agreed. It had been noted, as well, that a judge who is bothered by the use of the extra length to brief issues unrelated to the cross-appeal can take the advocate to task over this at oral argument. An attorney member observed that such a prospect can help to deter the misuse of the extra length.

A motion was made to remove Item No. 10-AP-C from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

VIII. Schedule Date and Location of Fall 2010 Meeting

The Committee's fall 2010 meeting will be held on October 7 and 8, 2010, in Boston, Massachusetts.

IX. Adjournment

The Committee adjourned at 10:00 a.m. on April 9, 2010.

Respectfully submitted,

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Catherine T. Struve
Reporter

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2010

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08 Revised draft approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10

FRAP Item	Proposal	Source	Current Status
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Awaiting initial discussion
10-AP-E	Consider effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case	Howard J. Bashman, Esq.	Awaiting initial discussion

TAB

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JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

June 1, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: Draft Strategic Plan for the Federal Judiciary

The Ad Hoc Advisory Committee on Judiciary Planning has requested the Committee on Rules of Practice and Procedure (and all other Judicial Conference committees) to review and provide feedback on its *Draft Strategic Plan for the Federal Judiciary*. Attached are copies of a memorandum from Judge Charles R. Breyer, Chair of the Ad Hoc Advisory Committee on Judiciary Planning, and of the *Draft Strategic Plan for the Federal Judiciary*. Also attached is a two-page document prepared by the Ad Hoc Advisory Committee on Judiciary Planning, entitled *Strategies and Goals That May Relate to the Work of the Committee on Rules of Practice and Procedure*, that distills from the *Draft Strategic Plan* those particular elements that most closely concern the work of the rules committees.

Judge Breyer asks that the committee provide him with any comments about the draft plan or the proposed planning approach by June 22, 2010. The Executive Committee of the Judicial Conference will consider the matter at its August 2010 session. Judge Breyer states, "Assuming the Executive Committee endorses the plan, it is likely to be presented for Conference consideration in September 2010."

Jeffrey N. Barr

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

April 25, 2010

MEMORANDUM

To: Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure

From: Charles R. Breyer
Chair, Ad Hoc Advisory Committee on Judiciary Planning

RE: JUDICIARY PLANNING STATUS AND IMPLEMENTATION APPROACH
(ACTION REQUESTED)

PLEASE RESPOND BY JUNE 22, 2010

I would like to update you and your committee on judiciary planning efforts and on the status of the *Strategic Plan for the Federal Judiciary* (Attachment 1). I am very grateful for the contributions of Judicial Conference committees in shaping this draft and making suggestions about its implementation. This summer, the Ad Hoc Advisory Committee on Judiciary Planning will submit the *Strategic Plan* to the Executive Committee, along with recommendations about an ongoing approach to planning. Please provide me with any additional comments about the draft plan or the proposed planning approach by June 22, 2010.

While the *Strategic Plan* is still in draft form, I would also like you to consider the potential implications of its strategies and goals on your committee's work. Additionally, I would appreciate your suggestions about strategies or goals in the draft plan that may require special coordination efforts, or that the judiciary should consider to be a high priority over the next two years. This input is not as time-sensitive as your suggestions about the text of the *Plan* or the planning approach, so you may wish to take additional time to respond.

STATUS OF THE JUDICIARY PLANNING INITIATIVE

Since September 2008, the Ad Hoc Advisory Committee has worked to develop an approach to strategic planning that is national in scope, sustainable, and compatible with the judiciary's organizational culture and systems of governance and administration. Under this approach, Judicial Conference committees are critical participants in judiciary-wide strategic planning. Specific actions to implement judiciary strategic plans would be identified, considered, and taken at the committee level, with facilitation and coordination by the Executive Committee and, on its behalf, by the judge serving as its long-range planning coordinator.

The draft *Strategic Plan for the Federal Judiciary* seeks to address judiciary-wide issues and challenges in a manner consistent with the judiciary's values. Challenges addressed in the draft include:

- Meeting the demands for justice, given changes in the work of the federal courts, and in the expectations of people who come before them;
- Securing adequate resources, and managing them efficiently and effectively to ensure that workload demands are met;
- Supporting a lifetime of service for federal judges;
- Attracting and developing the next generation of judiciary employees;
- Harnessing technology to support judges and meet the needs of court users;
- Enhancing the understandability, accessibility and affordability of federal courts;
- Developing and maintaining effective relationships with Congress and the executive branch; and
- Enhancing the public's understanding, trust and confidence in the federal courts.

As you know, Judicial Conference committees have contributed to the draft *Strategic Plan* during the past two meeting cycles, suggesting changes to proposed strategic issues a year ago, and reviewing a draft plan during December and January meetings. The Ad Hoc Advisory Committee has now asked circuit judicial councils and chief district and bankruptcy judges to review the current draft *Strategic Plan* (which is essentially the same as the version shared with you last month), and will consider their ideas and suggestions over the next few months. After addressing this feedback in a new draft, it is anticipated that the Ad Hoc Advisory Committee will recommend that the Executive Committee seek Judicial Conference approval of the *Strategic Plan*. Assuming the Executive Committee endorses the plan, it is likely to be presented for Conference consideration in September 2010.

APPROACH TO IMPLEMENTATION

As noted, the Ad Hoc Advisory Committee strongly believes that the work of Judicial Conference committees is critical to the successful implementation of the *Strategic Plan.* Committees have the knowledge and expertise to address judiciary issues in a specific and tangible manner. Committees also have mechanisms and procedures that allow for the deliberate study of issues and the thoughtful consideration of changes to judiciary policy. Under the Ad Hoc Advisory Committee's proposed implementation approach, most of the actions necessary to implement the judiciary strategic plan would be identified and considered at the committee level. As appropriate, these actions may include:

- incorporating the *Strategic Plan's* strategies and goals into committee planning discussions and processes;
- coordinating efforts with other Judicial Conference committees and entities that participate in judiciary governance and administration;
- conducting assessments and studies;

- developing recommendations for Judicial Conference consideration;
- considering the budget impact of proposed actions;
- developing mechanisms to assess progress in achieving the *Strategic Plan's* goals; and
- providing guidance to those conducting initiatives and pilot programs linked to the *Strategic Plan's* goals.

The Executive Committee's facilitation and coordination of judiciary planning might include communication with Judicial Conference committees about sections of the *Strategic Plan* that relate to their work. In that context, certain committees might be asked to take the lead in implementing selected strategies included in the plan, in cooperation and coordination with other committees as needed. The Executive Committee would also review reports about the status of implementation, and consider revisions and updates to the *Strategic Plan*.

ACTION REQUESTED: By June 22, please let me know if you or your committee has any comments or suggestions about the approach to implementation described above.

STRATEGIES AND GOALS RELATING TO THE WORK OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The draft *Strategic Plan* was prepared from a judiciary-wide perspective, and its strategies and goals relate to the work of multiple Judicial Conference committees. Committee roles in the implementation of the strategic plan will vary depending upon whether the particular strategy or goal directly relates to the committee's work and jurisdiction, or is of indirect, "stakeholder" interest to the committee.

I would like to call your attention to Attachment 2, which is a list of strategies and goals in the draft *Strategic Plan* that appear to relate to the work of the Committee on Rules of Practice and Procedure. Some of these strategies and goals are directly related to the Committee's work and jurisdiction. For other strategies and goals, the Committee may have some responsibility for the successful implementation of the strategy or goal, often in conjunction with other committees. For still others, the Committee is more of a stakeholder. Similar and overlapping lists are being provided to each Judicial Conference committee.

ACTION REQUESTED: Please let me know whether the list of strategies and goals associated with the Committee on Rules of Practice and Procedure appears to be accurate and complete.

PRIORITIES

Even though the draft *Strategic Plan*'s scope is limited, it still includes 7 issues, 13 strategies and 37 goals to pursue over the next four to six years. I am interested in the ideas of your Committee about whether any of the plan's issues, strategies or goals should receive particular attention over the next two years. I am also interested in whether the implementation of any of the plan's strategies or goals might, in your committee's view, require special coordination efforts. Such efforts would likely involve the Executive Committee's long-range planning coordinator.

ACTION REQUESTED: Please let me know which of the draft *Strategic Plan's* issues, strategies, or goals should receive priority attention over the next two years.

CONCLUSION

I look forward to reviewing your comments about the implementation of the *Strategic Plan.* As always, I deeply appreciate the time and consideration that you have devoted to the development of the draft *Strategic Plan* and the planning approach. I think it is important work, and I know the effort it requires.

Attachments

cc: Committee Staff

AD HOC ADVISORY COMMITTEE ON JUDICIARY PLANNING

Draft Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

- ***Rule of Law***: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law
- ***Equal Justice***: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect
- ***Judicial Independence***: the ability to render justice without fear that decisions may threaten tenure, compensation or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management
- ***Accountability***: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources
- ***Excellence***: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources
- ***Service***: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner

The Plan in Brief

This plan continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, the plan recognizes that the future may provide tremendous opportunities for improving the delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency, attracts to judicial service the nation's finest legal talent, is an employer of choice for highly qualified executives and support staff, works effectively with the other branches of government, and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, the plan focuses attention on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in the plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes the delivery of justice, the effective and efficient management of resources, the workforce of the future, technology's potential, access to the judicial process, relations with the other branches of government, and the public's level of understanding, trust and confidence in federal courts.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues—fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Delivering Justice
Issue 2: The Effective and Efficient Management of Public Resources
Issue 3: The Judiciary Workforce of the Future
Issue 4: Harnessing Technology's Potential
Issue 5: Enhancing Access to the Judicial Process
Issue 6: The Judiciary's Relationships with the Other Branches of Government
Issue 7: Enhancing Public Understanding, Trust and Confidence

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Delivering Justice

How can the judiciary deliver justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality staff, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in law challenge the federal judiciary's effective delivery of justice. To address this issue, this plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the effective administration of justice:

- Pursue improvements in the delivery of justice on a nationwide basis. (Strategy 1.1)

- Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations. (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)

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of case management, and has a number of mechanisms to identify and assist congested courts. Despite ongoing efforts, pockets of delay persist in the courts. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. This plan calls for a concerted and collaborative effort among Judicial Conference committees, circuit judicial councils and others to make measurable progress in reducing the number of cases that are unduly delayed, and the number of courts with unwarranted, persistent and significant backlogs.

The delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 5. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to reduce unnecessary costs as well as delay.

Other efforts to improve the delivery of justice should continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development of next-generation case management systems. Also, improvements in the supervision of offenders and defendants include the use of techniques that are supported by research. This evidence-based approach has been enhanced through the use of a Decision Support System that integrates data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

This strategy also includes a goal to ensure that persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions.

Goal 1.1a: Reduce delay through the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Reduce unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.

Strategy 1.2. Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel and jurors to use the same corridors, entrances and exits as prisoners, criminal defendants, and others in custody. Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, and assisting judges in taking steps to protect themselves while away from court facilities. Efforts include "Project 365," a joint judiciary-Marshals Service initiative to increase the awareness of potential security risks away from court facilities for judges, their families, and court staff.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.3 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 4.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.2a: Improve the protection of judges and their families in all court facilities, at home, and in other off-site locations.

Goal 1.2b: Improve the security of court facilities, including perimeter security at primary court facilities.

Goal 1.2c: Work with the U.S. Marshals Service to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. Funding levels in recent years have allowed staffing in most clerks' offices, probation and pretrial services offices and defender organizations to keep pace with the judiciary's workload. However, critical resource needs in other areas remain. Judges' pay has failed to keep pace with inflation for many years, placing at risk the judiciary's ability to attract and retain highly competent judges from a broad spectrum of backgrounds and career paths. In addition, many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Beyond the needs of judges, resources are needed for jurors. Compensation for jurors is still $40 per day, reaching $50 only after the tenth day of jury service. Inadequate compensation creates a financial hardship for many jurors. And, while the judiciary has made progress over the past two decades in securing additional space, some court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking separate, secure corridors separate from inmates appearing in court.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must work with these agencies to ensure that the judiciary's resource needs are met.

Strategies and goals in other sections of this plan are closely related to this strategy of securing adequate resources. For example, Strategy 3.2 and its associated goals focus on the importance of attracting, recruiting, developing and retaining the staff that are required for the effective performance of the judiciary's mission, and will be critical to supporting tomorrow's judges and meeting future workload. Also, a

goal under Strategy 4.1 urges the judiciary to continue to build and maintain a robust technology infrastructure.

Goal 1.3a: Restore judicial compensation to attract and retain the best-qualified persons from varied backgrounds as judges and eliminate disincentives to long judicial service.

Goal 1.3b: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.3c: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient and properly equipped.

Goal 1.3d: Secure adequate compensation for jurors.

Issue 2. The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing its resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The workload of the federal courts can vary greatly from year to year, and it is an ongoing challenge to ensure that adequate resources are available in each court to meet workload demands. Consequently, whether cases are handled in a timely manner can sometimes be a function of location. The judiciary relies upon effective decision-making processes governing the allocation and use of judges, staff, facilities, and funds to ensure the best use of limited resources. Developing, evaluating, publicizing and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices should be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide. This plan includes a single strategy to address this issue:

- Allocate and manage resources more efficiently and effectively. (Strategy 2.1)

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Background and Commentary. The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of

judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth are under consideration. Other initiatives identify better and more efficient practices, such as the methods analysis program, which analyzes discrete clerks' office functions and identifies techniques that save staff time and improve service. Efforts to ensure the effective use of resources are also underway.

This strategy includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and staff to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Advances in technology have increased the ability to perform many tasks, such as handling certain proceedings in civil cases, without the need for travel. A third goal speaks to the critical need to maintain effective court operations when disaster strikes.

Goal 2.1a: Make more effective use of visiting and senior judges, and judges who are recalled to service, to relieve overburdened and congested courts.

Goal 2.1b: Facilitate the sharing of administrative staff and services within courts and, where appropriate, across organizational boundaries.

Goal 2.1c: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue 3. The Judiciary Workforce for the Future

How can the judiciary continue to attract, develop and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations?

Issue Description. The judiciary can only meet future workload demands if it can continue to attract, develop and retain highly skilled and competent judges and staff. Chief Justice Roberts has noted that judicial appointment should be the "capstone of a distinguished career" and not "a stepping stone to a lucrative position in private practice." Attracting and retaining highly capable judges and staff will require fair and competitive compensation and benefit packages. The judiciary must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Two strategies to address this issue follow:

- Support a lifetime of service for federal judges. (Strategy 3.1)

- Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements. (Strategy 3.2)

Strategy 3.1. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges. In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Technology training, for example, is moving away from a focus on software applications toward an emphasis on the tasks and functions that judges perform. Training and education programs, and other services that enhance the well being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 3.1a: Strengthen policies that encourage senior judges and judges who are recalled to service to continue handling cases as long as they are willing and able to do so.

Goal 3.1b: Seek the views of judges on practices that support their development, retention and morale.

Goal 3.1c: Evolve and adapt education, training and orientation programs to meet the needs of judges.

Strategy 3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.

Background and Commentary. The judiciary continues to be an attractive employer, and staff turnover is relatively low. Employees are committed to the judiciary's mission, and the judicial branch provides staff with many resources and services, including training and education programs. Nonetheless, ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career expectations, and changes in how staff communicate and interact.

The judiciary also must develop the next generation of executives. More than half of the existing senior executive leadership in the federal courts is currently eligible to retire or will become eligible to retire within the next five years. The

management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The most qualified candidates often come from within the system since the judiciary's management model is not currently replicated in other government systems. To ensure a sufficient internal supply of qualified candidates, the judiciary should initiate a meaningful leadership development training program along with the creation of executive relocation programs to widen the pool of qualified internal applicants.

The following goals are intended to foster diversity, strengthen leadership, and provide rewarding careers for staff.

Goal 3.2a: Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.

Goal 3.2b: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead staff.

Goal 3.2c: Strengthen the judiciary's commitment to workforce diversity through expansion of diversity program recruitment, education and training.

Goal 3.2d: Attract, recruit, develop and retain the next generation of judiciary executives and senior leaders.

Issue 4. Harnessing Technology's Potential

How can the judiciary develop national technology systems while fostering the development of creative approaches and solutions at the local level?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, staff and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build and maintain effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

The development, operation and management of IT systems is quite decentralized in the judiciary, allowing flexibility but also presenting challenges for coordination, prioritization and leadership. A key challenge will be to balance the economies of scale that may be achieved through certain judiciary-wide approaches with the creative solutions that may result from allowing and fostering the development of local applications. The judiciary's strategy for addressing this issue is as follows:

- Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts. (Strategy 4.1)

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

Background and Commentary. The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. The functional requirements of next-generation case management systems are being defined, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology.

The effective use of advanced and intelligent applications and systems (calendaring systems that suggest optimal hearing dates, for example) will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective to the development of certain systems. Another goal in this section focuses on the security of electronic court records.

The effective use of technology is critical to furthering other strategies in this plan. Success in pursuing Strategy 2.1, concerning the effective and efficient management of resources, is closely linked to the use of technology. An effective technology program also supports training and remote access to courts (Strategies 3.1 and 3.2), and programs to improve the accessibility of the judiciary (Strategy 5.1).

Likewise, an effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, is it critical that the judiciary

succeed in recruiting, developing and retaining highly competent staff (Strategy 3.2). And, investments in technology also require adequate funding (Strategy 1.3).

Goal 4.1a: Continue to build and maintain a robust and flexible technology infrastructure that fully meets and anticipates the judiciary's requirements for communications, record-keeping, electronic case filing, and effective case management.

Goal 4.1b: Exercise effective leadership to coordinate and integrate national IT systems and applications.

Goal 4.1c: Develop systemwide approaches to the utilization of technology to achieve enhanced performance and cost savings while at the same time encouraging the development of local initiatives that can improve services.

Goal 4.1d: Refine and update security practices to ensure the confidentiality, integrity and availability of court records and information.

Issue 5. Enhancing Access to the Judicial Process

How can courts remain comprehensible, accessible and affordable for people who participate in the judicial process while responding to demographic and socioeconomic changes?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. Given the profound changes occurring in American society, the federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. This plan includes two strategies that focus on identifying unnecessary barriers to court access, and taking steps to eliminate them:

- Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 5.1)

- Ensure that the federal judiciary is open and accessible to those who participate in the judicial process. (Strategy 5.2)

The views of participants — including parties, lawyers and jurors — should be solicited as a first step in implementing these strategies.

Strategy 5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.

Background and Commentary. The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood

To improve access, civil, criminal, appellate and evidence rules of practice and procedure were rewritten to simplify and clarify them, and make them more uniform. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.

To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:

Goal 5.1a: Ensure that court rules, processes and procedures are published or posted in an accessible manner.

Goal 5.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Goal 5.1c: Adopt measures to handle promptly claims that cannot be properly addressed or resolved in the federal judicial system.

Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, witnesses, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with

information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. And, the Judicial Conference will continue to work to reduce the burden of jury service, improve juror utilization, and improve citizen participation in juries.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants. Continued efforts are needed, and this strategy sets forth three goals to make courts more accessible for jurors, litigants, witnesses, and others.

Goal 5.2a: Provide jurors, litigants, witnesses, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 5.2b: Reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petit jurors.

Goal 5.2c: Develop best practices for providing appropriate assistance to pro se litigants in civil and bankruptcy cases.

Issue 6. The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. Increasingly, the judicial branch's ability to deliver justice in a manner consistent with its core values is dependent upon its relationships with the other two branches of the federal government. An effective relationship with Congress is critical to success in securing adequate resources. In addition, the judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review. The judiciary's relationships with the executive branch are also critical,

particularly in areas where the executive branch has primary administrative or program responsibility, such as judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

- Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress. (Strategy 6.1)

- Strengthen the judiciary's relations with the executive branch. (Strategy 6.2)

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

Background and Commentary. This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may bring dividends.

Goal 6.1a: Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Goal 6.1b: Implement effective approaches, including partnerships with the legal, academic and private sector organizations, to achieve the judiciary's legislative goals.

Strategy 6.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and

procedures that affect the administration of justice. This strategy focuses on enhancing the ability of the judiciary to provide input to the Department of Justice and others regarding proposed actions and policies that affect the administration of justice.

Goal 6.2a: Develop ongoing communications with the executive branch about policies and solutions to address issues affecting the judiciary.

Issue 7: Enhancing Public Understanding, Trust and Confidence

How should the judiciary promote public trust and confidence in the federal courts, in a manner consistent with its role?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the system. In large part, the judiciary earns that trust and confidence through faithful performance of its duties, including effective internal oversight and review and governance responsibilities. However, public perceptions of the judiciary are also often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate.

Advances in communications technology and the attendant transformation of journalism and public information will continue to play a key part in how the judiciary is portrayed to, and seen by, members of the public. Although these changes provide the judicial branch and others in society an opportunity to communicate broadly with greater ease and at far less cost than previously possible, they also present the challenge of ensuring that the information now more readily available to all is both complete and accurate. For the judiciary, this challenge is an especially difficult one because judges are constrained in their ability to participate in public discourse. This plan includes two strategies to enhance public understanding, trust and confidence in the judiciary:

- Assure high standards of conduct and integrity for judges and staff. (Strategy 7.1)

- Improve the accessibility of information about the judiciary in an appropriate manner that preserves the rights of participants in judicial proceedings. (Strategy 7.2)

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

Background and Commentary. This strategy emphasizes the performance of critical internal controls, audit, investigation and discipline functions. Keeping

policies current, and providing guidance is a key aspect of this strategy. An emerging issue with implications for the protection of private information and other conduct-related issues is the conveyance of inappropriate information via electronic social networking. Ongoing activities include providing up-to-date and relevant guidance on judiciary policies to judges and staff. A comprehensive redesign of the *Guide to Judiciary Policy*, and regular *Guide* updates, will help judges and employees to access current, relevant information about judiciary policies.

Goal 7.1a: Ensure the integrity of funds, information, operations and programs through strengthened internal controls and audit programs.

Goal 7.1b: Perform investigative, disciplinary and other critical self-governance responsibilities to achieve appropriate accountability.

Strategy 7.2. Improve the accessibility of information about the judiciary in an appropriate manner that preserves the rights of participants in judicial proceedings.

Background and Commentary. Changes in the media landscape will continue to have a significant impact on how the judiciary is portrayed, and ultimately viewed by the public. More writers without a traditional journalism background will write about the judiciary in stories and opinion pieces, many of which will gain a wide audience. New forms of communication may also provide opportunities for the judiciary to interact more directly with the public. A communications strategy that takes into account the changes in journalism is needed.

Over the past several years, the judiciary has participated in many initiatives to improve the level of understanding about the federal courts, and retired Justices Sandra Day O'Connor and David Souter are among those who have championed civic education efforts. Partnerships with organizations outside the judicial branch may help the judiciary to participate in efforts such as these in a cost effective manner. While civic education is critical, the vast majority of the work involved in improving public understanding is borne by individual judges and court officials in the course of their official duties or through individual outreach efforts.

Goal 7.2a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications.

Goal 7.2b: Develop partnerships with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

STRATEGIES AND GOALS THAT MAY RELATE TO THE WORK OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Committee roles in the implementation of the strategic plan will vary depending upon whether the particular strategy or goal directly relates to the committee's work and jurisdiction, or is of indirect, "stakeholder" interest to the committee.

Issue 1. Delivering Justice	
Strategy 1.1:	Pursue improvements in the delivery of justice on a nationwide basis.
Goal 1.1b:	Reduce unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.
Issue 5. Enhancing Access to the Judicial Process	
Strategy 5.1.	Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process
Goal 5.1a:	Ensure that court rules, processes and procedures are published or posted in an accessible manner.
Goal 5.1b:	Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.
Goal 5.1c:	Adopt measures to handle promptly claims that cannot be properly addressed or resolved in the federal judicial system.
Strategy 5.2:	Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.
Goal 5.2a:	Provide jurors, litigants, witnesses, and observers with comprehensive, readily accessible information about court cases and the work of the courts.
Goal 5.2c:	Develop best practices for providing appropriate assistance to pro se litigants in civil and bankruptcy cases.

Issue 6. The Judiciary's Relationships with the Other Branches of Government	
Strategy 6.1:	Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.
Goal 6.1a:	Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Please let Judge Breyer, the Executive Committee's long-range planning coordinator, know whether the list of strategies and goals associated with the Committee on Rules of Practice and Procedure appears to be accurate and complete.

December 2010						
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January 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1 New Year's Day
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16	17 Martin Luther King Jr. Day	18	19	20	21	22
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30	31					U.S. Federal Holidays are in Red.